Sealed Nonpublic Meeting Minutes Review Procedure

Under RSA 91-A:3, III, minutes of non-public sessions "may be withheld" (commonly called "sealed") "until, in the opinion of a majority of members, the [reason for withholding the minutes] no longer apply." This provision raises the question: what is the obligation of a public body to evaluate whether the reason for withholding the minutes continues to exist?

Until recently, the practical reality was that sealed minutes would either be reevaluated upon the receipt of a records request from someone or sealed for a certain amount of time (subject, presumably, to a reevaluation upon the time coming to a close). Instead, NHMA has long recommended that public bodies take proactive steps to ensure that minutes are withheld for only as long as the circumstances leading to their withholding still apply.

Recently adopted HB 321 addresses this question. It adds new paragraph IV to RSA 91-A:3, III, requiring public bodies to either develop their own process to review minutes or to follow a statutorily created process. Either way, public bodies are required to review all nonpublic minutes that were previously sealed and determine whether the circumstances that justified keeping meeting minutes from the public under RSA 91-A:3, III no longer apply. That review process must take place within 10 years of the effective date of HB 321, October 3, 2023. ***Meeting minutes that were kept from the public that are not reviewed by the public body or agency on or before October 3, 2033 shall be subject to public disclosure without further action of the public body.***

In developing their own process, public bodies have wide discretion in deciding how to structure their review of sealed minutes. Some may choose to assign one board member the task of reviewing the minutes and making a recommendation, others may designate a subcommittee, still others may choose to review all sealed minutes as a whole committee. Similarly, boards may choose to review all sealed minutes or only some each year. Thus, a board may stagger the review process so that it does not interfere with other board business.

In the absence of adopting its own process, a public body must follow the statutorily created process. That statutory process requires a review of sealed minutes "no more than 10 years from the last time the public body voted to prevent the minutes from being subject to public disclosure." The statutory process also includes a 10-year review period. In other words, if your board has minutes that were sealed more than 10 years ago and your board hasn't reviewed them since, you have 10 years after the law goes into effect to review those minutes and decide whether to keep them sealed or not.

Public bodies ought to take advantage of the 10-year review period and start evaluating what, if any, review process they would like to develop. Once that determination has been made, it is important for boards to follow those processes and teach new board members about the legal requirement to review sealed minutes and the locally adopted process designed to comply with that requirement.

While, in most cases, there is no penalty for disclosure of information that could be withheld from public disclosure as our law begins by assuming that any information held by the government is subject to disclosure, there are a handful of circumstances where disclosure is not in the best interests of anyone. Private information, such as social security numbers, statutorily protected information, such as whether someone is receiving municipal welfare, and information that, if disclosed, could result in harm to persons or property, such as information about access points to public water systems, ought to continue to be carefully protected from disclosure. The best way to do that is to ensure that future boards need not rush through a review process to protect that type of information from becoming public. Instead, starting now can ensure that the citizens of the state of New Hampshire can "know what the government is up to" while also ensuring that information that was rightfully protected from public disclosure and ought to continue to be protected from public disclosure remains protected.

Summary: HB 321 imposes a statutory obligation to review all previously sealed nonpublic meeting minutes and complete that review process within 10 years of October 3, 2023. This new law does not require the release of sealed nonpublic meeting minutes if divulgence would still cause harm to reputation, or render the proposed action discussed ineffective, or pertain to thwarting a terrorist attack. However, failure to review previously sealed minutes during the review period will automatically result in the public release of those minutes, regardless of the potential harm resulting from that release.

Practice Pointer: Municipalities may wish to craft a multi-year 'action plan' to help boards review sealed minutes dating from the past few decades over the course of the next several years to minimize the burden on any one year.

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