

Frequently Asked Questions About Disclosure Requirements + Board Meetings

Part of a series of MANP documents created to enhance understanding of the rules and regulations governing Maine's nonprofit organizations.

Purpose

To provide a summary of the federal, state and local regulations pertaining to required public disclosure of information.

Note: This FAQ is provided solely for informational purposes, and no one should rely on it as legal advice. You are strongly encouraged to consult a qualified attorney for advice on any particular situation.

Introduction

MANP often fields questions about nonprofit disclosure requirements. These questions range from, "Do we have to allow the public to inspect our books?" to "Are board meetings open to the public?" In an attempt to provide a comprehensive summary of the regulations, we contracted with *Robert H. Levin, Attorney at Law* (www.roblevin.net), to draft this whitepaper.

FAQs

1. Are we required to share our minutes and other administrative records with any interested member of the public?

In general, no. Most Maine nonprofit corporations are not subject to Maine's Freedom of Access Act. The one possible exception would be an organization that is quasi-public in that it meets a combination of the following factors: (1) it performs a governmental function; (2) substantial funding comes from state and/or local governments; (3) state and local governmental entities have substantial involvement or control over the organization; and (4) the organization was created by legislative action. See *Dow v. Caribou Chamber of Commerce and Industry*, 2005 ME 113, for more information, and check with an attorney if there is any question about your organization.

While you could legally decline a request to see these documents, it might not be the best way to handle the request. As discussed above, Maine law generally doesn't require nonprofit corporations to share

their records, but that doesn't mean they cannot share them. Often, the best approach is to welcome and grant such informational requests, to show that you have nothing to hide.

2. What if a member of our organization wants to see minutes and other records?

A member of a nonprofit corporation enjoys special rights above and beyond those of the public at large. For membership corporations (this designation will be indicated in your Articles of Incorporation and Bylaws), minutes and all books and records of accounts of the organization must be made available for inspection to any voting member for all legitimate purposes. See 13-B M.R.S.A. § 715, <http://janus.state.me.us/legis/statutes/13-B/title13-Bsec715.html>, for details. For organizations with large memberships, this kind of access is tantamount to public disclosure, for it will be difficult to maintain confidential and sensitive information in such situations.

3. Which organizational documents must be public regardless of whether or not the organization is a membership corporation or a non-membership corporation?

There are indeed some hard and fast disclosure requirements that apply to all Maine nonprofit corporations, and others that apply to all federal 501(c)(3) organizations, as follows:

Organizational Documents

Certain kinds of organizational documents, such as the **Articles of Incorporation** and the **State of Maine Annual Report**, are publicly available through the State's website, <https://icrs.informe.org/nei-sos-icrs/ICRS>. Thus, while a Maine nonprofit corporation does have a duty to disclose these documents, for all intents and purposes they are readily available.

Fundraising-Related Records

Maine's Charitable Solicitations Act makes publicly available a variety of fundraising-related records that must be filed with the State. These include an **annual registration application**, an **annual fundraising activity report**, and **contracts with professional fundraisers**. See 9 M.R.S.A. § 5001 *et seq.* <http://janus.state.me.us/legis/statutes/9/title9ch385sec0.html> for details.

Federal Records

Certain federal tax records must be disclosed upon request. These include the **IRS Form 1023** (the original application for 501(c)(3) status), the **IRS's recognition letter**, and the **IRS Form 990's** for the last three years. More details on these federal disclosure requirements can be found in IRS Publication 557, pages 13-15. In general the disclosed information includes: the names and address (can be work addresses or simply the address of organization) of the organization's officers, directors, or trustees; the names and salaries of the top five employees paid more than \$50,000 annually; gross income for the year; dues received from members; expenses; the organization's balance sheet; and total contributions, including gifts, grants, and government contracts. However, for reasons of privacy, charities are not required to publicly disclose the attachment to the 990 that includes an itemized list of all contributions of over \$5,000, or any trade secrets.

Copies usually must be provided immediately in the case of in-person requests, and within 30 days in the case of written requests. The tax-exempt organization may charge a

reasonable copying fee plus actual postage, if any. The IRS must also make this same information available to the general public.

Lawsuits and Governmental Investigations

Even though, as a general matter, minutes and other records are not required to be disclosed to the public, there are certain contexts in which disclosure would be required, including to the IRS or the Maine Attorney General for investigatory reasons, and to an opposing party in a lawsuit. It is important to keep this mind when drafting minutes and other records pertaining to sensitive and confidential information. In certain situations, it might be useful to retain an attorney to obtain the benefits of attorney-client privilege.

4. Does my organization have to make the names and addresses of our board members public?

The IRS requires all 501(c) organizations with annual revenues exceeding \$25,000 (and rising to \$50,000 beginning in tax year 2010) to file Form 990 or Form 990EZ. The information on the 990 must be made open to public inspection and includes the names and addresses (can be work addresses or simply the address of organization) of the organization's officers, directors, or trustees.

5. Does my organization have to allow anyone who is interested to attend our board meetings?

In general, most Maine nonprofit corporations are not required to hold open meetings (Board, membership, or committee meetings) because they are not subject to the Maine Freedom of Access Act. At the same time, many nonprofits freely choose to allow any interested person to attend their meetings in the interests of transparency and engagement with the community. Some organizations have an express policy about this, while others make it more of an informal practice. However it is done, organizations should always make it clear that they have the right to call an Executive Session at any time, to preserve confidentiality or to have a more frank discussion.

6. What is an "Executive Session"?

Any discussion involving confidential or sensitive information (such as personnel matters, pending transactions, or potential lawsuits) may be discussed in an Executive Session, which is a confidential portion of the meeting. Confidential "Notes" of the Executive Session discussion should be recorded and maintained, but in a separate document from the minutes, clearly marked as confidential and distributed only to those involved in the discussion. Any decisions made in Executive Session (e.g., the termination of an employee) may be recorded in the regular meeting minutes, as appropriate.

7. Are meeting minutes required for our Nonprofit Corporation

Under the Maine Nonprofit Corporations Act, minutes must be maintained for every meeting of the members, the Board, and any committee that has the same authority of the Board, such as the Executive Committee. (Even if not required for other committees, minutes will be invaluable as the institutional memory of that committee.) All approved minutes should be kept in a safe place (preferably fire-proof), just like other important documents.

8. Why is it important to approve minutes?

To make sure the discussion and decisions are accurately recorded, minutes must be approved. This process gives the Board an opportunity to correct any errors or indiscretions. Furthermore, only “approved” minutes carry any legal weight.

9. What should we include in our minutes and how detailed should they be?

There is no standardized level of content and format for minutes. As a legal matter, your minutes should contain enough information to show that the Board reasonably came to reasonable decisions. As a practical matter, your minutes should be detailed enough to serve as the organization’s institutional memory. Some minutes are much too detailed, containing every person’s words are recorded verbatim. Other minutes contain only a vague description of the subject matter that was discussed. It’s best to find a happy medium between these two extremes. Proper minutes will include: the date, time and location of the meeting; board members in attendance and absent; motions made and by whom; a brief account of any debate; voting results; names of abstainers and dissenters; reports and documents introduced; future action steps (highlighted in bold or placed at the beginning of the minutes), and the signature of the Secretary. It’s also important to have the minutes reflect that a quorum was reached, as any decisions made in the absence of a quorum are vulnerable to legal challenge. Furthermore, some organizations record important decisions in the form of Resolutions and keep these in a separate binder for easy access.

10. How do we keep track of confidential information without disclosing it in our minutes?

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11. Who should record our minutes?

Although it is the legal requirement of the Clerk or Secretary to record and maintain custody of meeting minutes, the task of taking the minutes can be delegated to anyone. For staffed organizations, the office manager (or other clerical position) often will take minutes. The person taking minutes should not be central to the discussion at hand, or else he will be compromised by having to do two important tasks at once.

12. Should our minutes be reviewed by an attorney?

Legal review of minutes is not required and can be expensive. However, if a particularly thorny issue is being discussed (and it’s not proper for Executive Session), an organization might want to run its minutes by an attorney, along with sufficient background information so the attorney knows your concerns. Larger nonprofits and more conservative organizations routinely have their minutes reviewed by legal counsel.