



CONFIDENTIAL MEMORANDUM

Office of the Town Attorney

Steven D. Briglia
Town Attorney

TO: Town Clerk

FROM: Steven D. Briglia, Town Attorney

RE: Minutes of Town Council Meetings

ATTACHEMENTS: Summary of law and Robert's Rules of Order
Va. FOIA Council Advisory Opinion

DATE: September 22, 2016

You have inquired as to the requirement or necessity of the Town Clerk to prepare "*verbatim*" minutes of Town Council public hearings and meetings. Since the term *verbatim* minutes is not defined in the Virginia State Code, for the purposes of this Memorandum the term "*verbatim*" minutes will be deemed to be taken from the Latin term *verbatim ac literatim* and is defined by Black's Law Dictionary as "(w)ord for word and letter for letter".

The primary Town Charter, Town Code, State Code and Robert's Rules provisions relating to the keeping minutes and records of meetings by the Town Clerk are summarized and attached to this memo. A review of the law and Robert's Rules reveals the form of the minutes to be taken at public meeting depends on the nature of the action taken by the Town Council; however, neither the State Code nor the Town Charter/Code seem to require *verbatim* minutes be taken of a local public body's meetings, including public hearings. The Virginia FOIA Council has issued an advisory opinion on this issue which is very helpful and also supports this position. Finally, the Town Charter states that in the absence of a specific procedure, Robert's Rules of Order applies. Included with the summary of the law are the provisions for minutes from Robert's Rules and it does not mandate *verbatim* minutes either.

It should be stressed that in the case of a public hearing an adequate record of any public input, discussion of the issue by the public body, any motion(s) and the recorded vote be included in the minutes. Whether that is done through the use of *verbatim* minutes or an adequate summary as outlined by the Virginia FOIA act and Robert's Rules is discretionary.

Please contact me if you have any questions.

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SUMMARY OF LAW AND ROBERT'S RULES OF ORDER

Town Council Meeting Minutes

Below are the primary Town Charter, Town Code, State Code and Robert's Rules provisions relating to the keeping minutes and records of meetings by the Town Clerk. The form of the minutes depends on the nature of the action taken by the Town Council; however, the State Code nor the Town Charter/Code do not seem to require verbatim minutes be taken of a local public body's meetings.

Town Charter - Sec. 4.8. – Town clerk.

The Clerk shall be the Clerk of the Council and shall keep the journal of its proceedings and shall record all ordinances and resolutions in a book or books kept for the purpose. He shall be the custodian of the corporate seal of the Town and shall be the officer authorized to use and authenticate it. He shall perform such other duties and keep such other records as the Council or the general laws of the State require of Town Clerks. All records in his office shall be public records and open to inspection at any time during regular business hours.

(Acts of 2002, ch. 594)

Town Code - Sec. 2-4. - Duties of Town clerk.

The Town clerk shall attend the meetings of the Town Council and shall keep a correct and complete record of the proceedings of the council. He shall have charge of the records of the Town, faithfully preserve the same and perform such other services and functions as he may be directed by the council to perform.

(Code 1962, § 2-5; Code 1969, § 2-4)

Town Code - Sec. 2-11. - Use of Robert's Rules of Order.

The meetings of the Town Council, except as its own rules of procedure may otherwise provide, shall be conducted according to Robert's Rules of Order.

(Code 1962, § 2-3; Code 1969, § 2-11)

Town Code Sec. 2-28. - Town clerk.

The Town clerk shall be the clerk of the council and shall perform such duties in connection with such office as may be assigned by the mayor, council or Town Manager. The Town clerk shall attend all meetings, hearing and sessions of the council as requested.

(Code 1962, app. 3; Code 1969, § 2-28; Ord. of 9-7-1965)

Virginia Code § 2.2-3707 – Meetings to be public; notice of meetings; recordings; minutes

I. Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study

commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or school board.

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.

Minutes shall be in writing and shall include (i) the date, time, and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. In addition, for electronic communication meetings conducted in accordance with § 2.2-3708, minutes of state public bodies shall include (a) the identity of the members of the public body at each remote location identified in the notice who participated in the meeting through electronic communications means, (b) the identity of the members of the public body who were physically assembled at the primary or central meeting location, and (c) the identity of the members of the public body who were not present at the locations identified in clauses (a) and (b), but who monitored such meeting through electronic communications means. (1968, c. 479, § 2.1-343; 1973, c. 461; 1976, c. 467; 1977, c. 677; 1982, c. 333; 1989, c. 358; 1990, c. 538; 1993, c. 720; 1995, c. 562; 1999, cc. 696, 703, 726; 2000, c. 227; 2001, c. 844; 2004, cc. 730, 768; 2005, c. 352; 2007, c. 300; 2009, c. 628; 2010, c. 309; 2015, c. 131.)

Virginia Code § 2.2-3712. Closed meetings procedures; certification of proceedings.

I. Minutes may be taken during closed meetings of a public body, but shall not be required. Such minutes shall not be subject to mandatory public disclosure. (1989, c. 358, § 2.1-344.1; 1999, cc. 703, 726; 2001, c. 844; 2012, c. 428.)

Robert's Rules of Order Revised:

The Minutes. The record of the proceedings of a deliberative assembly is usually called the Minutes, or the Record, or the Journal. The essentials of the record are as follows: (a) the kind of meeting, "regular" (or stated) or "special," or "adjourned regular" or "adjourned special"; (b) name of the assembly; (c) date of meeting and place, when it is not always the same; (d) the fact of the presence of the regular chairman and secretary, or in their absence the names of their substitutes, (e) whether the minutes of the previous meeting were approved, or their reading dispensed with, the dates of the meetings being given when it is customary to occasionally transact business at other than the regular business meetings; (f) all the main motions (except such as were withdrawn) and points of order and appeals, whether sustained or lost, and all other motions that were not lost or withdrawn; (g) and usually the hours of meeting and adjournment, when the meeting is solely for business. Generally the name is recorded of the member who introduced a main motion, but not of the seconder.

In some societies the minutes are signed by the president in addition to the secretary, and when published they should always be signed by both officers. If minutes are not habitually approved

at the next meeting, then there should be written at the end of the minutes the word "Approved" and the date of the approval, which should be signed by the secretary. They should be entered in good black ink in a wellbound record-book.¹

The Form of the Minutes may be as follows:

At a regular meeting of the M. L. Society, held in their hall, on Thursday evening, March 19, 1914, the president in the chair, and Mr. N acting as secretary, the minutes of the previous meeting were read and approved. The Committee on Applications reported the names of Messrs. C and D as applicants for membership, and on motion of Mr. F they were admitted as members. The committee on reported through Mr. G a series of resolutions, which were thoroughly discussed and amended, and finally adopted, as follows:

Resolved, That.....

.....

On motion of Mr. L the society adjourned at 10 P.M.

R..... N.....

Secretary.

In keeping the minutes, much depends upon the kind of meeting, and whether the minutes are to be published. In the meetings of ordinary societies and of boards of managers and trustees, there is no object in reporting the debates; the duty of the secretary, in such cases, is mainly to record what is "done" by the assembly, and not what is said by the members. He should enter the essentials of a record, as previously stated, and when a count has been ordered or where the vote is by ballot, he should enter the number of votes on each side; and when the voting is by yeas and nays he should enter a list of the names of those voting on each side. The proceedings of the committee of the whole, or while acting as if in committee of the whole, should not be entered in the minutes, but the report of the committee should be entered. When a question is considered informally, the proceedings should be kept as usual, as the only informality is in the debate. If a report containing resolutions has been agreed to, the resolutions should be entered in full as finally adopted by the assembly, thus: "The committee on submitted a report with a series of resolutions which, after discussion and amendment, were adopted as follows:" then should be entered the resolutions as adopted. Where the proceedings are published, the method shown further on should be followed. If the report is of great importance the assembly should order it "to be entered on the minutes," in which case the secretary copies it in full upon the record.

Where the regular meetings are held weekly, monthly, or quarterly, the minutes are read at the opening of each day's meeting, and, after correction, should be approved. Where the meetings are held several days in succession with recesses during the day, the minutes are read at the opening of business each day. If the next meeting of the organization will not be held for a long period, as six months or a year, the minutes that have not been read previously should be read and approved before final adjournment. If this is impracticable, then the executive committee, or a special committee, should be authorized to correct and approve them. In this case the record should be signed as usual, and after the signatures the word "Approved," with the date and the signature of

the chairman of the committee authorized to approve them. At the next meeting, six months later, they need not be read, unless it is desired for information as it is too late to correct them intelligently. When the reading of the minutes is dispensed with they can afterwards be taken up at any time when nothing is pending. If not taken up previously, they come before the assembly at the next meeting before the reading of the later minutes. With this exception the motion to dispense with reading the minutes is practically identical with the motion to lay the minutes on the table, being undebatable and requiring only a majority vote. The minutes of a secret meeting, as for the trial of a member, should not be read at a meeting that is open to the public, if the record contains any of the details of the trial that should not be made public.

Minutes to be Published. When the minutes are to be published, in addition to the strict record of what is done, as heretofore described, they should contain a list of the speakers on each side of every question, with an abstract of all addresses, if not the addresses in full, when written copies are furnished. In this case the secretary should have an assistant. With some annual conventions it is desired to publish the proceedings in full. In such cases it is necessary to employ a stenographer as assistant to the secretary. Reports of committees should be printed exactly as submitted, the minutes showing what action was taken by the assembly in regard to them; or, they may be printed with all additions in italics and parts struck out enclosed in brackets in which case a note to that effect should precede the report or resolutions. In this way the reader can see exactly what the committee reported and also exactly what the assembly adopted or endorsed.

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

AO-05-15

June 10, 2015

Ray Gregory
Norfolk, Virginia

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your electronic mail messages dated April 9 and 16, 2015, and our telephone conversation April 15, 2015.

Dear Mr. Gregory:

You have asked whether the minutes of a meeting of the Planning Commission (the Commission) of the City of Norfolk (the City) were sufficient to satisfy the requirements of the Virginia Freedom of Information Act (FOIA). You stated that the Commission met on February 13, 2014 to discuss whether the Commission should allow a design change you requested for a house under construction. At that meeting, one commissioner made comments against allowing the design change to your house that you felt were unprofessional and prejudicial. You indicated that at the meeting you refuted what you felt were misrepresentations made by the commissioner. Afterward, you requested a transcript of the meeting. You were informed that no transcript existed, but you were given meeting minutes after they had been prepared. You stated that the minutes did not include the commissioner's comments at issue or your reply to those comments. You further stated that you complained about the incompleteness of the minutes and a City representative responded that minutes focus on the motions and votes, not the full discussion. However, you wrote that you felt the commissioner's comments and your own should have been included as they concerned the matter at hand before the Commission. You also pointed out that the other commissioners' comments were included. Further, you stated you later were told by a Deputy City Attorney that a stenographer records the meetings, but that the record "does not capture every word spoken, but rather records enough information to memorialize the actions of the board." However, you observed that the minutes contain detailed comments made by your architect, your wife, and all of the commissioners except the one commissioner's negative comments and your reply. You indicated you believe the stenographer did indeed record the commissioner's negative comments and your reply, but those comments were not included in the minutes and have since been destroyed. You further assert that because you complained to the City Council about this matter, "the City should have preserved the record of these comments as evidence. The fact that these comments have apparently been destroyed appears to me to be a cover up" and in your opinion, therefore, a violation of FOIA.

The policy of FOIA stated in subsection B of § 2.2-3700 is to ensure *free entry to meetings of public bodies wherein the business of the people is being conducted*. The definition of *public body* in § 2.2-3701 includes *planning commissions*. Therefore there is no doubt that the Commission is subject to FOIA and the meeting in question is required to comply with FOIA. You have not alleged that the meeting was not open to the public or that it was improperly noticed, so we will focus solely on the minutes requirements. Subsection I of § 2.2-3707 provides in relevant part as follows:

Minutes shall be recorded at all open meetings....

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.

Minutes shall be in writing and shall include (i) the date, time, and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken.

This office has considered the requirement to include *a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken* in a prior opinion.¹ Noting that *summary* is not defined in FOIA, we turned to the common usage in the absence of a statutory definition. Merriam-Webster Online defines a summary as *an abstract, abridgment, or compendium especially of a preceding discourse*.² The American Heritage Dictionary defines a summary as *a condensation of the substance of a larger work; abstract; abridgment*.³ Following these definitions and prior opinions of the Office of the Attorney General (OAG), we opined that any matter that was *proposed, deliberated or decided* should be addressed in the meeting minutes in summary form. The opinion elaborated that any matter that is the subject of a motion or vote is a matter that is proposed, deliberated or decided by the public body (regardless of the outcome of the motion or vote) and therefore is required to be contained in the meeting minutes. Public bodies take action by motion and by vote; any matter moved before the public body is a matter that has been *proposed* before that body, even if the motion fails for lack of a second. FOIA explicitly requires that minutes must contain *a record of any votes taken*. Similarly, if there is an agenda for a meeting, any item on that agenda would be considered one that has been *proposed*, even if consideration of that item is deferred until a later date. Therefore public bodies should always include in meeting minutes a summary of any matter that appears on the agenda for that meeting, in addition to any matters that are the subject of a motion or vote.⁴

You have correctly pointed out that the situation you presented may be distinguished from the prior opinion in that the matter in question was an agenda item and portions of the discussion were included in the meeting minutes. There is no allegation that the Commission failed to include mention of an agenda item, a motion, or a vote. The issue you present is instead a question of discretion: in writing meeting minutes, can a public body choose to include some comments about a matter in detail while excluding others? Our prior opinion addressed this question briefly in stating that FOIA does not require a verbatim transcript of every word spoken at a meeting, nor that every detail of a discussion be mentioned in meeting minutes.⁵ In the prior opinion we referred to an earlier opinion of the Attorney General that considered the minutes requirements specific to a board of supervisors under former Code § 15.1-543 which was informative, but not dispositive of the FOIA question. In light of your inquiry it may be helpful to quote that OAG opinion more fully:

"....The term 'minutes' as used in this section means a brief summary of what the Board has considered at the meeting. Of course, all resolutions and ordinances must be transcribed in full. I believe that the minutes should contain all questions of a public nature which have been discussed and considered by the Board, even though a determination of such questions may have been deferred instead of being voted upon. The word 'complete' as used in this section does not, in my opinion, mean that a stenographic record of the proceedings is required. While the Board is the judge of what it shall have included in the minutes, I do not feel that their judgment should be exercised in such manner as to exclude therefrom any question of official nature that has been considered by the Board."

In light of the above-quoted language, I conclude that the Board's minutes must include, as a minimum, a brief summary of the matters considered by the Board. Supporting documents, which are presented to the Board for background, may be included as a part of the minutes, filed with the official minutes, or excluded therefrom, at the discretion of the Board.⁶

Applying the same reasoning, it is again clear that a verbatim transcript or full stenographic record of every comment made is not required under FOIA. A public body has discretion to decide what comments to include or exclude from its minutes, so long as all matters that are proposed, deliberated, or decided, and all motions made and votes taken, are properly summarized in the minutes. The minutes you provided appear to consist of about three pages reflecting the discussion of changes to a previously approved certificate of appropriateness regarding your property. The minutes reflect the discussion of specific design issues, opinions of neighbors, and various other concerns that concluded with a motion

made and seconded to continue the application for two weeks. The comments that were included appear to be fairly detailed, but they are not quotes. It is not clear whether the only comments excluded were those of interest to you, or whether other comments were excluded as well. You indicated that the comments of all the other commissioners were included, but there is no way to tell if all of their comments were included in their entirety, or whether instead the minutes reflect a selective summary of those other commissioner's comments. As the minutes are not a transcript, it is presumable that some commentary was excluded in the process of creating the summary. In other words, it appears that discussion of the matter at issue was set forth in some detail, but that certain comments about the matter that you wished to see included were omitted. There is no doubt that the matter itself was addressed, as it appears to be the only topic of the meeting in the minutes you provided. The exact level of detail to include in summary minutes, as previously opined by both this office and the Attorney General, remains a matter of discretion left to each public body. The exclusion of some commentary does not appear to be a violation of FOIA when the minutes otherwise are a *summary of the discussion on matters proposed, deliberated or decided*.⁷

However, you made five points asserting that the exclusion of the negative comments and your reply was an improper use of discretion. The first two points will be addressed together. First, you stated that you complained in writing about the matter to the City Council and therefore "surely someone among them would have looked into the matter to determine whether there was any substance to my complaint." Second, you observed that no one on City Council responded to your complaint, and ask if the "complaint had been found to be groundless, would the City Council have remained silent?" On these two points, note that the minutes in question are the minutes of a Commission meeting, not a City Council meeting. For purposes of this opinion, the City Council's reaction to your complaint, or lack thereof, would only matter if the City Council exercised some direct authority to control the contents of the Commission's meeting minutes. That does not appear to be the case. Therefore what the City Council did or did not do in response to your complaint is not relevant to the outcome of this opinion.

We now consider your third, fourth and fifth points together. Your third point is that the comments of all the other planning commissioners appear in the minutes in detail. You ask whether it is "glaringly questionable that the comments of one commissioner would be missing?" Perhaps it is questionable, but as explained above, excluding some comments while including others appears to be within the discretion granted to a public body. FOIA does not set forth any specific limits on that discretion, other than to require that minutes include *a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken*. So long as such matters are summarized, then the minutes would appear to be sufficient. Fourth, you stated that the commissioner who made the excluded comments has acknowledged in a subsequent email that she had commented at the meeting. Again, merely because comments were made does not mean they must be included in the minutes, as the public body only has to include a summary, not a transcript. Fifth, you ask whether it is "not the case that the only proper grounds for striking the comments of a commissioner from the minutes would be if those comments were not relevant to the matter at hand?" The answer is clearly no, those would not be the only proper grounds for omitting comments. In fact, the most common reason comments are excluded in my experience is simply for the sake of brevity. As defined above, summary minutes are an abstract, an abridgement, a condensation of the substance of what happened at a meeting. A summary by definition is something shorter than a full transcript, something which includes salient points but of necessity will not include every comment - or necessarily even every relevant comment - made at a meeting. While we generally encourage public bodies to include mention of each person who spoke at a meeting and the gist of their comments as a matter of best practices, we cannot say it is outside the discretion of the public body to exclude some comments when the legal requirement is only to provide a *summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken*.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director

¹ See Freedom of Information Advisory Opinion 01 (2006).

² Definition available at <http://www.m-w.com/cgi-bin/dictionary> (last accessed February 15, 2006).

³ The American Heritage Dictionary 1218 (2d College ed. 1982).

⁴ Freedom of Information Advisory Opinion 01 (2006). Note that this prior opinion also addressed whether to include in meeting minutes the discussion of other matters that were not agenda items and not the subject of any motion or vote. As the matter at issue in the facts you present was an agenda item, that portion of the prior opinion is not relevant for purposes of today's opinion.

⁵ *Id.*

⁶ 1977-1978 Op. Atty. Gen. Va. 39 (quoting 1959-1960 Op. Atty. Gen. Va. 77) (note that at the time these opinions were issued by OAG, FOIA did not contain any requirements for the contents of meeting minutes. The current requirements for meeting minutes were enacted in 2004 (2004 Acts of Assembly, c. 730)).

⁷ Note that generally as a matter of parliamentary procedure public bodies approve their own minutes and that is the check on the accuracy and completeness of the minutes. Members usually have the opportunity to object or suggest changes if they feel the minutes are inaccurate, incomplete, or otherwise deficient. In this instance it is not clear whether the minutes provided are final approved minutes or not. However, once minutes are approved by the public body, that approval represents tacit agreement by the members that the minutes accurately summarize what happened at the meeting.