

Open Meeting Law Training

**Town of Sherborn
July 11, 2019**

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Overview– Sunshine Laws

- Open meeting , public records and conflict of interest laws exist in virtually every state
- Purpose of such laws is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based
- Under the Open Meeting Law (“OML”), public bodies can only conduct business through public meetings, held in accordance with the OML, unless an exemption allowing an executive session exists

Open Meeting Law

OML – Legal Requirements

- Meeting Notices/ Agendas
 - Meeting must be properly posted
 - 1) timing
 - 2) location
 - 3) detail
- Minutes
 - Accurate, timely prepared and approved
 - Verbatim transcripts not required, but significantly detailed
 - Guidance from AG on process for approving
- Attorney General's Office promulgated revisions to the Open Meeting Law regulations in 2017

OML –Meetings

Meeting includes a **deliberation** amongst a **quorum** to discuss matters within jurisdiction of body

- The term “meeting” does not include an **on-site inspection of a project or a program**, provided that members **do not** deliberate (AG interprets this requirement very strictly)
 - ✓ **Post follow-up meeting of board or committee** if members anticipate that they might want to discuss matters amongst themselves or respond to matters raised
- The term “meeting” does not include attendance by a quorum at a **public or private gathering or social event**, provided that members **do not deliberate**
 - ✓ **Avoid creating the appearance** that a body is discussing municipal business

OML –Meetings

- **The term “meeting” does not include** attendance and participation by a quorum of the body at a posted **meeting of another public body**, communicating only by open participation on matters there under discussion and not privately among themselves
 - ✓ If a member wishes to speak, should **be clear** that the member is not representing the public body, but instead speaking as an individual
 - ✓ **Post “joint” meeting** to be held at same time and place

Meetings- Deliberation

- “[A]n oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction...,” with certain express exceptions.
- Provided that no opinions of governmental body are expressed, deliberation specifically excludes distribution by a member of the public body of:
 - A meeting agenda;
 - Scheduling or procedural information;
 - Reports or documents that may be discussed at an upcoming meeting, so long as the material does not express the ideas, feelings, beliefs, opinions of a member of the body.

Deliberation–Email & Social Media

Email. Explicitly addressed in OML

- A quorum may not use e-mail to share their ideas, feelings, opinions, beliefs, whether serially or in a single e-mail, on board business, and may not use a non-member to avoid law.
 - ✓ Beware of “reply to all” on emails
 - ✓ Limit use of **e-mail to scheduling purposes**, and try to avoid using e-mail to undertake Town business
 - ✓ Assume that e-mail may be forwarded to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog
 - ✓ Don't ask for or express opinions, ideas, beliefs in an e-mail to other members

Deliberation–Email & Social Media

Social Media. Also subject to OML

- Alternative electronic communications have become more prevalent, including blogging, instant messaging, texting, social networking such as Facebook, and Twitter; also subject to OML
 - ✓ Do not direct comments to other members of body
 - ✓ If matter directly involves issue pending before body consider not engaging
 - ✓ Be thoughtful about manner in which comments are made
 - ✓ Consider using separate accounts for campaign purposes and following election

Meetings – Email & Social Media

- **Potential Violations.** Communications among a quorum would likely implicate the OML
 - An e-mail, voice mail, IM, posting, or blog originally addressed to one member of a public body subsequently forwarded to, or reviewed by a quorum of members;
 - An e-mail, voice mail, IM, posting or blog sent by a member to a quorum of members of a public body;
 - A reply to an e-mail, voice mail, IM, posting, or blog originally addressed to one member of a public body subsequently forwarded to, or reviewed by a quorum of members;
 - A web-based discussion group, chat room or social networking site where a quorum is participating, whether contemporaneously or in serial fashion.

Public Body

“[A] multiple-member board, commission, committee **or subcommittee** within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; ...and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.”

Public Body (cont.)

- Any multiple-member board, commission, committee, or sub-committee, however created or otherwise constituted, established to serve a public purpose :
 - “Within government”;
 - Empowered to act collectively; and
 - Serve a public purpose.
- The focus of the rule is on the manner in which the committee is created, either formally or informally, rather than on who created it.
- Conservative approach is to err on side of compliance with law.

Public Body - Subcommittee

- Subcommittee – any multiple-member body created to advise or make recommendations to a public body:
 - Intent to create a subcommittee is not required;
 - AG looks to three factors in determining if group constitutes subcommittee, is it “within government”, “empowered to act collectively”, and serving a “public purpose”.
- Committees or subcommittees created by sole officer who has authority to act independently are excluded, i.e., the so-called “Connelly Rule.”

Scheduling Meetings: Location

- **Accessibility**
 - √ Location of meeting must be included in notice
 - √ Location of meeting **must be accessible**; required both by the OML and the ADA
- **Practical considerations include:**
 - √ Ability to meet at privately owned location
 - √ Moving meeting to different location (e.g., unanticipated attendance)
 - √ Closing door during open session

Meeting Notices - Posting

- **When** - Posted at least 48 hours in advance of meeting, **excluding** Saturdays, Sundays and legal holidays unless an “emergency”
 - For a Monday meeting, notice must be posted on Thursday
 - If Monday is a holiday, a Tuesday meeting must also be posted on Thursday
 - Notice **must state both the date and time** that the **notice is posted**
 - If revised, must state both the date and time of the original posting and the date and time of the revised posting

Meeting Notices - Posting

- **Where** - Must be filed with Town Clerk and posted in manner conspicuously visible to the public at all hours in, on, or near the municipal building housing clerk's office.
 - *Alternatively, new regulations expressly provide that a municipality may use its official website as the official posting location. This eliminates requirement to post meeting notices in two locations.*
 - The decision must be made by the "chief executive officer".
 - Copies of posted meeting notices must also be available at Clerk's Office during business hours.
 - Still must file written notice with AG of adoption of alternative method.
 - Must post statement in several locations that website is official posting location.
 - If website becomes inaccessible within 48 hours before a meeting (not including Saturdays, Sundays), website must be restored within 6 hours from discovery or meeting must be re-posted for another date and time.

Meeting Notices - Content

- **Date, time and place**
- **“Listing of TOPICS that the chair reasonably anticipates will be discussed at the meeting.”** (emphasis supplied) G.L. c. 30A, § 20(b).
- The list of topics shall have "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." 940 CMR 29.03(1)(b).
- Interpreted by the AG to mandate that the notice include a listing of the **particular ITEMS** to be discussed, rather than general topics of discussion; must be very detailed.
- Regularly occurring items need more detail than simply using generic placeholders (i.e. old or new business).

Notice – Practical Considerations

- ✓ Do not use acronyms – write out terms that may not be familiar to the general public (i.e. replacing "HUD CPD HOME" with "Department of Housing and Urban Development Community Planning and Development HOME Investment Partnerships Program")
- ✓ Include executive sessions – cite to specific statutory reference(s), quote text of executive session purpose; provide additional detail that would not negatively impact body; more content may be necessary!
- ✓ Avoid shorthand references (i.e., “personnel”, “contract negotiations,” “real estate,” etc.)
- ✓ **If executive session is planned and would be only matter on agenda, notice must also indicate open session as an agenda item**

Notice – Practical Considerations

- ✓ **Matters not reasonably anticipated** by chair
MUST be added to agenda after posting deadline
to extent feasible
 - Updated agenda must show time and date of update, as well as change to agenda
- ✓ **Matters not reasonably anticipated** by Chair MAY be discussed and acted upon
 - **AG recommends** that unless matter requires immediate action, should be put off to later meeting and included in posting

Meeting Notice - Emergencies

- Limited instances when a public body can meet without the requisite 48 hours advance notice/posting.
- Poor planning does not equal an emergency!
- Natural disasters and public safety issues **do** qualify as emergencies.
- **Practical Recommendations:**
 - Comply with the law to the extent possible;
 - Limit deliberations to emergency matter;
 - Take minutes of meeting, and review and include with minutes of next regularly scheduled meeting;
 - When posting an emergency meeting, consider posting a regular meeting as well, to allow body to ratify the action taken at emergency meeting.

Conducting Meetings - Recording

- Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute).
- Recording by individuals:
 - Must inform the Chair;
 - Chair must make required announcement;
 - Chair may reasonably regulate recordings (placement, operation of equipment).

Conducting Meetings

- **Order of Meeting**
- **Common areas of concern**
 - Open session/public comment session
 - Executive Session
- **Practical considerations with public participation period:**
 - Allow? **NOT required by OML.** See OML 2015-12
 - Beginning or end of meeting?
 - Controls:
 - Protect individual rights;
 - Don't try to resolve issues at time; consider adding issue as agenda item at future meeting;
 - Avoid debate;
 - Limit time per person and total time.

Remote Participation

- May be allowed by Select Board for all boards and committees of town
 - Quorum must be physically present at the meeting location (Remote participants considered present and may vote).
 - Person chairing meeting must be physically present.
 - Members participating remotely and all present at meeting location must be audible to each other.
 - All votes recorded roll call votes.
 - Chair must announce use of remote technology and the member using it.
 - New regulations now provide that remote participation permitted if physical attendance would be “unreasonably difficult”.

Executive Session

Process:

- First convene in open session beforehand.
- State the purpose(s) of executive session **“stating all subjects that may be revealed without compromising the purpose for which the executive session was called.”**
- Take and record roll-call to go into executive session.
- Announce if open session will reconvene afterward.
- Maintain exhibits and documents used in reasonable proximity to minutes.
- Only discuss matters cited.
- Take all votes by roll-call.

Executive Session – Common Purposes

1. Reputation, character, physical condition or mental health, rather than professional competence, **of an individual**, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. (**48 hours NOTICE to individual required**)
2. Conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
3. Strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body *and the chair so declares* ...
6. Consider purchase, exchange, lease or value of real property *if the chair declares* that an open meeting may have a detrimental effect on the negotiating position of the public body

Executive Session – Practical Considerations

- If executive session is anticipated, it must be listed in appropriate detail on meeting notice, with such specificity as is possible without compromising purpose of the session.
- Related vote to enter executive session must also include all information possible without compromising purpose of session (i.e., name of non-union personnel or union must be identified in notice and vote if bargaining or negotiations will be conducted; case name to be discussed under litigation strategy must be listed, unless doing so would compromise Town's position); and declaration must be made, as needed.

Meeting Minutes - Content

- Date, time, place of meeting, and members present or absent;
- **Detailed** summary of discussion of each topic sufficient to allow a person not present at the meeting to understand the substance of what occurred at that meeting;
- Decisions made, actions taken, and votes recorded (no secret ballots permitted); and
- List of documents and other exhibits **used** by the body at the meeting, which will be “part of record” but not of minutes;
 1. Document is physically present at meeting; and
 2. Document is verbally identified; and
 3. Content of document is discussed by members (OML 2012-42).

Minutes - Approval

Open session minutes must be created and approved in timely manner.

- **New regulations indicate that approval must occur generally within the next 3 meetings or within 30 days, whichever is later.**
- Minutes are public records as of moment of their creation, regardless of whether they have been approved.
- Upon request, minutes must be made available within 10 days.

Minutes - Approval

Executive Session Minutes

- May be withheld until purpose of exemption has been met, **unless otherwise protected under the Public Records Law**;
- Chair is obligated to review executive session minutes periodically and bring to the body for its approval minutes for which the purpose of the executive session has expired;
- Can approve in executive session, either under purpose for which session was originally held, or, if more than one purpose, under Exemption 7, referencing law that allows the same.
- Must provide a response to a request for executive session minutes within 10 calendar days and shall not assess a fee for time spent reviewing.

Enforcement Process

- Filing Complaint = **Three steps:**
 - Complainant must file written complaint with the public body, within 30 days of the alleged violation;
 - Public body must forward complaint to AG within 14 business days of receipt and inform complainant and AG of any remedial action taken; and
 - Complainant may file a complaint with AG after 30 days from the date complaint was filed with public body.

Enforcement (cont.)

- **Public Body must consider complaint at properly posted meeting**
 - Matter must appear on meeting notice
 - Body must acknowledge receipt of complaint
 - Should deliberate concerning allegations and possible resolution
 - Vote to resolve complaint
 - If appropriate, authorize response to be prepared and sent to Attorney General and Complainant
- **Cure:**
 - “Public deliberation (at a properly posted open meeting) effectively cure the private discussion which occurred over email because it enabled the public to see the discussion that went into the creation of the policy. To cure a violation of the Open Meeting Law, a public body must make an independent deliberative action, and not merely a ceremonial acceptance or perfunctory ratification of a secret decision.” See OML 2011-14.

Enforcement (cont.)

- Upon finding a violation, the AG has a range of enforcement options from compelling compliance with OML and/or attendance at a training session and/or creation or disclosure of minutes, nullifying action taken, imposition of \$1,000 fine for intentional violation. Public body may seek judicial review in Superior Court within 21 days of receipt (this would stay the AG's order, but the public body may not implement any action taken, pending appeal)
- AG may file action in Superior Court to require compliance.
- 3 registered voters may bring action in Superior Court.

Attorney General's Revised Regulations

- AG approved numerous changes to 940 CMR 29.00. While some are mostly organizational, there are some noteworthy amendments. Effective October 6, 2017.
- Posting Notices – “In, on or near” Town Hall. Still requires all notices to be filed with Clerk’s office and posting inside Town Hall. Date/time recorded with posting.
- Website can serve as “all hours” location. Choice to use website to be made by “Chief Executive Officer.”
- Post written notice at Town Hall re: accessing website.
- Website down? If within 48 hour period, must restore within 6 hours of discovery, or rescheduling required.

AG Regulations (cont.)

- Certifications – in addition to new members receiving OML, regulations, and AG Guide, shall also receive all determinations finding a violation by that public body within last 5 years.
 - Intended to reduce repeat offenders and attempts to avoid intentional violations when body has had turnover.
 - Individuals serving on multiple boards need certification for each, and those reappointed or reelected must sign new certification.
- Filing a complaint – with chair of public body and Town Clerk. Must be on AG's complaint form, or “need not be addressed.”
 - Optional mediation between public body and individual who has filed 5 or more complaints within last 12 months; at Town's expense, but if complainant refuses, AG may decline to consider.
 - Clarify that public body is required to consider complaint and response in a meeting (could be executive session).

AG Regulations (cont.)

- If AG orders body to take action, body will have 30 days and must certify to AG that it has done so.
- Remote Participation – Regulations replaced “permissible reasons” for member to participate remotely with simply “physical attendance would be unreasonably difficult.”
 - Clarifies that a Commission on Disability may itself decide whether to use remote participation, and not required for quorum to be physically present. For other public bodies, remote participation must be authorized by vote/decision of Chief Executive Officer.
- Meeting Minutes– previously, regulations only required approval of minutes in “timely manner.” New regulations require that board approve minutes within the next three meetings or 30 days, whichever is later, to be deemed timely.
 - Good cause may need to be shown to take longer.

Recent Notable Court Decisions

- Corey Spaulding v. Town of Natick School Committee, Middlesex Superior Court (November 2018)--public comment during public meetings. Committee improperly limited comments made by members of the public which were critical of the Committee in violation of free speech rights.
 - Where a multiple member body allows “public comment,” or “open forum,” its public comment policies and practices must ensure that any restrictions on such discussions, including as to time, are specific and narrowly tailored to the public body’s interest.
- Town of Swansea v. Maura Healey, Suffolk Superior Court (October 2018)--sufficiency of meeting notices. Division acted arbitrarily by applying subjective criteria, such as available bulletin board space, to determine whether a meeting notice was sufficiently detailed.
- Boelter v. Board of Selectmen of Wayland, 479 Mass. 233 (2018) – employee evaluation process by public bodies. Circulation of employee evaluations containing opinions of Board members as to employee’s performance between a quorum of the Board violated the Open Meeting Law.
 - Updated guidance from the DOG on performance evaluations to track the Boelter decision.

Any questions?

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