

What's New With The Open Meeting Law?

Municipal Electric Association of
Massachusetts

January 16, 2013

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Open Meeting Law

- Review of key definitions, enforcement, notices, executive sessions, remote participation, minutes.
- Review sample of Division of Open Government [DOG] determinations in response to citizen complaints on these subjects

Definition: “Meeting”

- “[A] deliberation by a public body with respect to any matter within the body’s jurisdiction....,” with certain express exceptions.

Exceptions to Definition of “Meeting”

- A quorum at an on-site inspection so long as members don't deliberate
- Attendance by a quorum at a conference or training program or a media, social or other event so long as members don't deliberate
- Attendance by a quorum at meeting of another governmental body that has complied with the notice requirements of the OML so long as the visiting members communicate only by open participation in the meeting of those matters under discussion by host body, and do not deliberate
- A meeting of a quasi-judicial board held for the sole purpose of making a decision in an adjudicatory proceeding (State bodies only)

Definition: “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.

“Deliberation”

- Specifically includes e-mail communications
- **Provided that no opinions of governmental body are expressed, specifically excludes:**
 - Distribution of meeting agenda
 - Scheduling information
 - Distribution of other procedural meeting materials, reports or documents that may be discussed (*document may not include member opinions*)

“Deliberation” - Email

- OML 2012-93 (Stow): School Bldg Committee chair emailed Town Meeting presentation to other 11 members, expressing opinions and requesting comments or information. This was improper deliberation, even where less than a quorum responded. Emails sent to less than a quorum? Not a violation.

Definition: “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”

- Includes subcommittees, which include any multiple-member body created to advise or make recommendations to a public body
- Does not include committees or subcommittees appointed by sole officer

Certification

- Must be done within 2 weeks of qualification for office
- Form prescribed by AG
- Acknowledge receipt of:
 - OML
 - Regulations promulgated by AG (pursuant to G.L. c.30A, §25)
 - Educational materials prepared by AG's office (pursuant to G.L. c.30A, §19)

Enforcement Process - Complaint

- Filing Complaint
 - Must first file written complaint with public body, within 30 days of alleged violation
 - Public body must forward complaint to AG within 14 days of receipt and inform AG of any remedial action taken
 - Not less than 30 days after date complaint was filed with public body, complainant may file a complaint with AG

Enforcement (cont'd)

- Cure:

- Consistent with prior case law, the AG recognizes: “Public deliberation (at a properly posted open meeting) effectively cured 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. OML 2011-14 (Wakefield School Committee)

Enforcement (cont'd)

- Upon finding a violation, the AG may issue an order to:
 - Compel immediate and future compliance with OML;
 - Compel attendance at authorized training session;
 - Nullify in whole or in part any action taken at meeting;
 - Impose civil penalty upon public body of not more than \$1,000 for each intentional violation;
 - Reinstate employee without loss of compensation, seniority, tenure or other benefits;
 - Compel that minutes, records or other materials be made public; or
 - Prescribe other appropriate action

Scheduling Meetings - Notice

- Timing:
 - Requires 48 hours in advance of meeting excluding Saturdays, Sundays and legal holidays
- Manner:
 - Must be posted in manner conspicuously visible to the public at all hours in or on municipal building housing clerk's office; regulations allow posting on website

Notice (cont'd)

- Content:
 - Shall include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting”; must include particular details:
 - E.g., OML 2011-15 (Melrose) – AG concluded that School Committee violated law by failing to include in notice of meeting name of non-union personnel with whom it would be negotiating.
 - Emergencies – must be threat to public health/safety

Scheduling Meetings - Notice

- E.g., OML 2011-9 (Natick) –AG concluded that School Committee violated law by failing to include specific details of proposed vote on Town Meeting warrant articles where item simply listed “Town Meeting Update”
 - Recommended that notice should have said, “Discussion of Town Meeting Warrant Articles 1, 9, 10, 18, 32, 33 and 35. The School Committee may vote to recommend action on these articles at Town Meeting.”

Scheduling Meetings - Notice

- E.g., OML 2011-11 (Freetown) – AG concluded that notice for Soil Board hearing was deficient where it listed “Renewal of Fall Soil Permits”, as it reasonably anticipated that particular permits would be considered and “it should take the additional step of listing into the meeting notice the details of those specific permits, including the name of the applicant and the location under consideration.”

Scheduling Meetings - Notice

- E.g., OML 5-4-11 (Sturbridge) AG stated that although Board of Selectmen did not violate law by discussing matter not listed on meeting notice (matter was raised by member of public and not reasonably anticipated), body was “strongly encourag[ed] . . . not to consider topics that may be controversial or of particular interest to the public until the topic has been properly listed in a meeting notice in advance of a meeting.”

Executive Sessions

- Before going into the executive session, the chair must state the purpose for the session, “stating all subjects that may be revealed without compromising the purpose for which the executive session was called.”

Executive Session - Purpose

- “(1) To discuss the 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. ...”
- Adds right of individual to create independent record of session at own cost

Executive Session - Purposes

- “2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
- 3. To discuss 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 ...”
- Adds requirement that chair declare “detrimental effect” for certain exemptions

Executive Session - Purpose

- OML 2012-52 (Hubbardston) – Parks Comm. entered exec. session to consider “purchase of real property.” Failed to identify property at issue; since purchase price and parcel already identified in open session, executive session was improper – could not show that open session would be detrimental to Town’s negotiating position.

Executive Session – Purpose #10

- **To discuss trade secrets or confidential, competitively-sensitive or other proprietary information that has been provided under the following circumstances:**
 - a. in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to G.L. c. 164 § 1F;
 - b. in the course of activities conducted as a municipal aggregator under G.L. c. 164 § 134; or
 - c. in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to G.L. c. 164 § 136; and
 - d. when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy.

Conducting Meetings – Remote Participation

- Prior to new OML, most District Attorneys interpreted OML as prohibiting remote participation by a board member electronically
- Under new OML, remote participation okay if authorized by AG by regulation [*it has been*] or letter ruling, as long as “chair” and quorum physically present

Remote Participation

- BOS must vote to allow Town boards to use, and any BOS policy applies to all boards
- Quorum must be physically present
- Remote participants considered present and may vote
- Must be audible or visible to all in attendance
- May participate in executive sessions

Conducting Meetings - Minutes

- Must include:
 - A summary of the discussions on each subject
 - The decisions made and actions taken, including a record of all votes
 - A list of documents and other exhibits used by the body at the meeting
 - The documents and other exhibits used are part of meeting record, but not part of minutes [See OML Record Retention Manual]

Minutes -

- OML 2012-91 (Carver) – complaint of failure to create/release timely minutes. Statute says “shall be created and approved in a timely manner,” but this is not defined. DOG *recommends* that minutes be approved at the next meeting, whenever possible.

Minutes

- Open session minutes shall not be withheld under any of the exemptions to the Public Records Law, except:
 - the following materials shall be exempt as personnel information:
 - materials used in a performance evaluation of an individual bearing on his professional competence that were not created by members of the body for purposes of the evaluation; and
 - materials used in deliberations about employment or appointment of individuals, including applications and supporting materials and excluding resumes

Executive Session Minutes

- Must be disclosed when purpose of exemption has been met, unless otherwise protected
- Must be reviewed periodically by chair or public body
- Must be provided within 10 days in response to request, unless review not yet undertaken (then by board's next meeting or 30 days, whichever occurs first)

Any Last Questions?

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