



Ethics Reform: Chapter 28 of the Acts of 2009

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The Open Meeting Law
Overview of the Amendments

- Codification of existing case law, Attorney General's guidelines, etc.
- More clarity & detail
- New provisions regarding administration
- Additional "exemptions" from the open meeting requirement
- Better guidance as to the keeping, review and disclosure of minutes
- Expanded investigation & enforcement procedures

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The Open Meeting Law, Cont'd.
Definitions

- "Deliberations" include *written* communication, including e-mail; they do not include distribution of meeting agenda, scheduling information or reports/documents to be discussed at meeting
- "Intentional violation" defined as act or omission by public body or member thereof in knowing violation of Open Meeting Law
- "Meeting" does not include on-site inspection of a project, attendance by quorum at public/private gathering or attendance by quorum at meeting of another public body, *so long as* members do not deliberate; nor does it include attendance by quorum at Town Meeting
- "Public body" includes subcommittees, the latter being any multiple-member body created to advise or make recommendations to public body

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The Open Meeting Law, Cont'd.

Administration

- Establishes "Division of Open Government" in Department of the Attorney General, under the direction of a Director of Open Government
- Requires that said Division create & distribute educational materials & provide training to public bodies to foster awareness & compliance with Open Meeting Law
- Creates "Open Meeting Law Advisory Commission," to review issues relative to Open Meeting Law & submit recommendations for modifications to regulations, trainings & educational initiatives

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The Open Meeting Law, Cont'd.

Meetings: Notice, Membership & Participation

- Posted notice must contain listing of topics that the chair of public body "reasonably anticipates" will be discussed
- Attorney General may, by regulation or ruling, authorize remote participation by members of public body not present at meeting location, provided that a quorum is present at said location
- Chair of public body must be notified of video/audio recordings being made; all attendees must be informed of same at beginning of meeting
- To address a meeting of a public body, permission of the chair is required; all persons shall be silent at request of chair or may be ordered removed
- All members of public body must certify receipt of copy of Open Meeting Law & educational materials provided by the Attorney General

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The Open Meeting Law, Cont'd.

Executive Session

- Permitted to consider or interview applicants for employment or appointment, *only* by preliminary screening committee & *only if* an open meeting will have a detrimental effect on obtaining qualified applicants
- Permitted to meet or confer with a mediator in connection with litigation or decision on public business, if decision to mediate is made in open session & no action taken without deliberation & approval in open session
- Permitted to discuss trade secrets or confidential, competitively-sensitive information associated with the public body's status as an energy supplier, municipal aggregator or governmental cooperative

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The Open Meeting Law, Cont'd.

Minutes

- Must include summary of discussions on each subject, list of exhibits used at the meeting & decisions made, including record of all votes
- All exhibits shall be part of official record, except materials used in a performance evaluation as to professional competence or in deliberations about employment or appointment
- Minutes of executive sessions must be disclosed "when the purpose for which [the]... executive session was held has been served"
- At reasonable intervals or within thirty (30) days of a request therefor, a public body shall review the minutes of executive sessions to determine if continued non-disclosure is warranted

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The Open Meeting Law, Cont'd.

Investigation & Enforcement

- With reasonable cause, the Attorney General may conduct an investigation by requesting that information be voluntarily provided or, if not provided, by taking testimony under oath & requiring that documents be produced
- At least thirty (30) days prior to submission to the Attorney General, but within thirty (30) days of the alleged violation, a complaint must be filed with the public body, providing it an opportunity to remedy the same
- Upon receipt of a complaint, the Attorney General shall determine whether a violation has occurred
- The Attorney General may: (1) compel compliance; (2) compel attendance at training session; (3) nullify action taken at the meeting; (4) require that materials be made public; (5) reinstate a dismissed employee; or (6) impose a civil penalty of up to \$1,000 for each intentional violation

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The Conflict of Interest Law

Overview of the Amendments

- Significantly increased penalties for violations
- Knowing & unknowing violations distinguished
- State Ethics Commission directed to establish exclusions to the Conflict of Interest Law
- Adjudicatory proceedings to be held by said Commission
- New acknowledgment & online training requirements for public employees

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The Conflict of Interest Law, Cont'd.

Penalties

- **Before:** Fine of not more than \$3,000-5,000 or imprisonment in state prison for not more than 2-5 years or in a jail or house of correction for not more than 2½ years, or both
- **Now:** Fine of not more than \$10,000-100,000 or imprisonment in state prison for not more than 5-10 years or in a jail or house of correction for not more than 2½ years, or both
- Violation occurs only if the unlawful activity is done knowingly

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The Conflict of Interest Law, Cont'd.

Exclusions

- Commission shall adopt regulations: (a) defining “substantial value,” presently \$50 or more; & (b) establishing exclusions for (i) ceremonial privileges & exemptions, (ii) privileges & exemptions offered only because of family or friendship & (iii) other scenarios no presenting a genuine risk of conflict or the appearance thereof
- Said regulations are in-progress, with comments on the working draft being requested

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The Conflict of Interest Law, Cont'd.

Adjudication

- “Upon a finding pursuant to an adjudicatory proceeding,” the Commission may: (a) require the violator to pay damages in the amount of the economic advantage; and (b) make restitution to an injured third party
- Absent a criminal judgment of acquittal or conviction for said offense, the Commission may also order payment of additional damages up to twice the amount of the economic advantage
- Further, said finding is grounds for avoiding, rescinding or cancelling the action of the municipal agency, upon the agency's request
- A maximum of \$25,000 may be ordered as aforesaid; damages in excess of \$25,000 must be recovered by civil action

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The Conflict of Interest Law, Cont'd.

New Requirements

- Commission required to publish summary of Conflict of Interest Law on its website; public employees shall be furnished with a copy thereof annually & sign an acknowledgment of receipt
- Commission required to prepare & update online training program(s); public employees shall complete program(s) every two (2) years & submit notice to employer
- Each municipality must designate a senior level employee as liaison to the Commission & notify the Commission of the same

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The Financial Disclosure Law

A Few Amendments...

- Added detail regarding investigation & enforcement of G.L. c. 268A & 268B by State Ethics Commission (including requirement that adjudicatory proceedings commence within six (6) years of alleged violation)
- No substantive changes to the requirement that public employees file a "statement of financial interests" with the Commission annually
- \$100 limit on gifts from executive/legislative agent to public employee or member of his/her immediate family replaced with prohibition of "any gift of any kind or nature," subject to exclusions to be determined by the Commission

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An Aside: The *Siva* Case

Fees vs. Taxes

- Municipality may "fix reasonable fees... for all licenses, permits or certificates issued pursuant to statutes or regulations," but may *not* "levy, assess or collect a tax unless the power to do so... is granted by the Legislature"
- Fees, unlike taxes:
 - Are charged in exchange for a governmental service which benefits party paying the fees in a manner not shared by others
 - Are paid by choice
 - Are collected not to raise revenues but to compensate governmental entity providing services for its expenses
- Valid fees may be: (1) user fees, based on rights of the entity as proprietor of the instrumentalities used; or (2) regulatory fees, founded on police power to regulate businesses and/or activities

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Resources

- Open Meeting Law:
 - G.L. c. 30A, §§ 18-25
 - www.mass.gov/Cago/docs/Government/oml_guidelines_final.pdf
- Conflict of Interest and Financial Disclosure Laws:
 - G.L. c. 268A
 - G.L. c. 268B
 - <http://www.mass.gov/?pageID=ethhomepage&L=1&L0=Home&sid=1eth>
- For more information on taxes vs. fees, see:
 - *Emerson College v. City of Boston*, 391 Mass. 415 (1984)
 - *Silva v. City of Attleboro*, 454 Mass. 165 (2009)

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