



# Filling Vacancies Requires Attention to Public Governance Statutes

BY BRANDON H. MOSS



The process of hiring an employee—either replacing a departing employee or filling a new position—can be complicated and daunting. Finding the ideal candidate from the pool involves wading through the waters of statutory compliance along the way, in addition to applicable local requirements. During the hiring process, municipal employers will need to adhere to such requirements, or else run the risk that the search process could be susceptible to challenge, or a restart.

## Procurement Considerations

Many municipal employers will engage the services of a search consultant. Services routinely performed by such consultants

include developing a candidate profile, identifying and locating candidates, screening and reviewing applications and resumes, and assisting (as applicable) the preliminary screening committee and its parent public body with interviews, finalist selection and contract negotiations.

Search consultants do come at a price, however. And, ironically, a search process must take place just to select the search consultant. The Uniform Procurement Act, or Chapter 30B, generally governs the procurement of services, such as retaining a search consultant. “Services” are defined as “the furnishing of labor, time, or effort by a contractor” (M.G.L. Ch. 30B, Sec. 2).

If the estimated contract is under \$10,000, then the municipality can use “sound business practices,” which means “ensuring the receipt of favorable prices by periodically soliciting price lists or quotes,” to obtain a search consultant (Ch. 30B, Secs. 2, 4(c)).

If the estimated contract amount for a search consultant is between \$10,000 and \$50,000, the municipality shall solicit written quotations (Ch. 30B, Sec. 4(a)). In doing so, a municipality will need to devise a written purchase description for the services reasonably expected to be performed. The written purchase description must be sent to a minimum of three persons that customarily provide the

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desired search consultant services—although there is no requirement that three written quotations are received. Any contract must be awarded to the responsible person that provides the lowest quotation “at the needed quality” of the service (Ch. 30B, Sec. 4(b)). As an alternative, a municipality may use competitive sealed bids, selecting the lowest responsible and responsive bidder (Ch. 30B, Sec. 4(a)).

The contract with a search consultant should be carefully prepared. Among other provisions, the municipality may consider: a schedule for the performance of search tasks, to ensure timely and orderly performance; a description of the scope of recruitment efforts; identification of the responsibility for costs and approval of the same; a requirement of compliance with all applicable employment laws; and a provision allowing the municipality to terminate the contract in the event of default and for convenience.

## Preliminary Screening

Under the open meeting law (Ch. 30A, Secs. 18-25), “preliminary screening” is “[t]he initial stage of screening applicants conducted by a committee or subcommittee of a public body solely for the purpose of providing to the public body a list of those applicants qualified for further consideration or interview.” Many parent public bodies will establish a committee to perform the preliminary screening, for purposes of efficiency and to obtain input from a diverse group of stakeholders.

A preliminary screening committee is a “public body” if it is performing screening for a parent public body that will make the hiring decision, such as a board of selectmen or school committee. Unlike a parent public body, a preliminary screening committee has the ability to perform certain duties in private, which preserves confidentiality in an early stage of the process and avoids deterring qualified candidates who may wish to preserve the privacy of their candidacy (because, for example, they are currently employed elsewhere). [See *Gerstein v. Superinten-*

*dent Search Screening Committee*, 405 Mass. 465, 470 (1989).] Specifically, a preliminary screening committee can use Purpose 8 for an executive session: “To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening” (Ch. 30A, Sec. 21(a)(8)).

The preliminary screening committee cannot contain a quorum (usually a majority) of the parent public body. [See *OML 2013-155 (Conway Town Administrator Search Committee)*.] Additionally, a preliminary screening

*Committee*.)] Purpose 8 is unavailable, however, once applicants have passed preliminary screening.

The preliminary screening committee is not required to interview every candidate; instead, preliminary screening can include multiple steps, may or may not involve candidate interviews, and ultimately results in the recommendation of candidates to the parent public body. [See *Gerstein*, 405 Mass. at 471-72.] Re-interviewing candidates is not permitted during preliminary screening. [See *Commonwealth v. Board of Selectmen of Westborough*, No. 062167C, 21 Mass. L. Rptr. 545, 2006 WL 3292678 (Mass. Super. Ct. Oct. 30, 2006) (Locke, J.).]

Recent guidance from the Division of Open Government of the Attorney General’s Office further defines the permissible actions under open and executive sessions. In *OML 2016-105*, the Division of Open

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committee is subject to the same requirements as other public bodies under the open meeting law, such as posting proper agendas, following requirements for open and executive sessions, and taking separate minutes.

Preliminary search committees cannot use Purpose 8 as a blanket reason for executive session. Rather, a preliminary screening committee can review resumes and application materials and can interview candidates in executive session, even if the reviews occur at multiple executive sessions, when open session discussion would have a detrimental effect on obtaining qualified candidates. [See *OML 2016-105 (Weymouth School*

*Government* held that preparing interview questions must occur in open session. As a result, there is a potential for candidates to have an insight into possible interview questions.

The preliminary screening cannot result in the recommendation of a single candidate. [See *OML 2016-105*.] Instead, there must be at least two candidates that pass the screening and are passed on to the parent public body for further consideration. It is immaterial whether the decision is unanimous, or whether the single candidate is the best, or only, qualified candidate, because there is a public right-to-know about the hiring process and the parent public body should

not be a rubber stamp to the preliminary screening committee recommendation.

An alternative hiring approach was upheld in *Three Registered Voters v. Board of Selectmen of Lynnfield* [90 Mass. App. Ct. 15 (2015)], a case in which the search consultant screened the candidate pool down to seven candidates, and then forwarded the names and information about these candidates to the board of selectmen. The individual members of the board of selectmen conducted separate interviews of each candidate; two of the selectmen ranked the candidates and forwarded the rankings to the then-town administrator, who kept the rankings to himself, while the third did not provide rankings. No discussion of the rankings occurred outside of a public meeting. The individual interviews were permissible because there was no secret deliberation “between or among a quorum of a public body,” and instead the interviews allowed the selectmen to prepare for future deliberation at an open meeting.

## Next Steps

Once preliminary screening has occurred, the next steps must be conducted by either the preliminary screening committee or the parent public body in open session. [See *OML 2012-111 (Weymouth School Committee)*.] Specifically, the open meeting law generally requires interviews, discussions of professional competence, and hiring decisions to occur in open session. [See *OML 2011-34 (University of Massachusetts Board of Trustees)*.] Executive session is only permissible for a proper purpose under the open meeting law, such as discussion of concerns about “reputation and character” (Purpose 1, subject to certain safeguards) or contract negotiations with a selected candidate (Purpose 2).

In conducting the next phase(s) of a hiring process, there should be an agenda posting sufficient for advising the public of the action to be taken, such as conducting candidate interviews, discussion of the hiring, and/or a vote for hiring.

[See 940 CMR 29.03(1)(b).] The posted agenda should list the topics—including those relating to the hiring process—that the chair of the public body reasonably anticipates will be discussed, with sufficient specificity so that the public will know what is to be discussed. [See M.G.L. Ch. 30A, Sec. 20(b); 940 CMR 29.03(1)(b).] The Division of Open Government has advised that providing additional details about the hiring process on the agenda, such as candidate names, is the type of information that could be helpful to the public in reviewing an agenda. [See *OML 2014-60 (Sterling Board of Selectmen)*.]

## The Aftermath

Compliance issues do not end with the hiring of a candidate. While the preliminary screening committee may view its function as terminating after the preliminary screening is completed, either the preliminary screening committee or the parent public body still must approve minutes of meetings of the preliminary screening committee. [See *OML 2017-34*.] Minutes must be approved in a “timely manner,” an undefined phrase that depends on the frequency with which the public body meets. [See *OML 2017-34*.] If possible, a public body should approve minutes at its next meeting; as an example, a public body that meets weekly or bimonthly cannot wait two or three months to approve minutes, as this is seen as untimely. [See *OML 2016-118 (Fall River City Council)*.]

Minutes also must contain sufficient detail to allow a member of the public to have a clear awareness of what transpired. [See M.G.L. Ch. 30A, Sec. 22(a); *OML 2013-64 (Concord Natural Resources Commission)*.] Such details should include a description of the questions posed to candidates and the answers provided by the candidates. [See *OML 2016-105*.]

Minutes and documents used during open session are generally considered non-exempt, regardless of any public records law exemption that could otherwise apply (Ch. 30A, Sec. 22(e)). Materials used to deliberate hiring decisions, however,

such as applications and supporting materials, are considered exempt from public disclosure, while resumes are considered non-exempt.

Executive session minutes and the materials used in executive session may be kept secret until the lawful purposes for secrecy no longer exist (Ch. 30A, Sec. 22(f)). The purposes of secrecy may still exist even after the forwarding of candidates to the parent public body and dissolution of the preliminary screening committee, if the search process remains incomplete. [See *OML 2012-11*.] Once the search process has been completed and a finalist has accepted the position, the purpose for secrecy no longer exists.

When the hiring process has concluded and there is a public records request for executive session minutes and materials, a common issue involves identifying applicants who did not pass preliminary screening. Exemption (c) to the public records law, which applies to “any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy,” may allow for redacting identifying information for candidates who were discussed in executive session and did not pass preliminary screening, such as those candidates whose current positions could be jeopardized, those candidates whose future employment could be adversely affected, and those candidates whose standing in the community could be harmed. [See *Attorney General v. School Committee of Northampton*, 375 Mass. 127, 132 & n.5 (1978).]

## Conclusion

The hiring process is not confined to recruiting and hiring the ideal candidate. Instead, municipalities must adhere to applicable requirements under the Uniform Procurement Act, open meeting law, and public records law, among others, to ensure that the hiring process is properly followed and the ideal candidate, when chosen, can be selected without unnecessary scrutiny to the process that was used. 🌟