

January 20, 2010

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: The New Open Meeting Law – Taking and Maintaining Minutes

The revised Open Meeting Law [G.L. c.30A, §§18-25], which takes effect on July 1, 2010, will continue to require that multi-member bodies subject to the law take minutes of all meetings, including executive sessions. There are new requirements, however, that municipal boards and their recording clerks must be prepared to follow to comply with the Law. This memorandum will address the responsibility for keeping minutes generally and highlight the major new provisions that will become law in July.

The Open Meeting Law and the Public Records Law require public bodies to prepare accurate meeting minutes to serve as a permanent record of the meeting, but do not require that a transcript, written or otherwise, be prepared. The current Open Meeting Law, G.L. c.39, §§23A-23C, applies to all “governmental bodies,” which are statutorily defined to include every multiple member municipal board, commission, committee or subcommittee, whether elected, appointed or otherwise constituted, but excludes Town Meetings. The new Law, while changing the name to “public bodies,” covers the same entities (and in fact broadens the scope of covered bodies, as discussed in our “Overview” memorandum). The current law provides that, at a minimum, minutes must set forth the date, time and place of the meeting, the identity of the members present or absent and all action taken. *In addition* to these requirements, the new Law calls for the following information to be included:

- a summary of the discussions on each subject;
- a list of documents and other exhibits used at the meeting;
- the decisions made and the actions taken at each meeting, including the record of all votes.

The minutes still need not be a verbatim transcription of everything that was said at the meeting. Rather, the minutes must reflect a summary of each discussion. When votes are taken at a meeting, however, the Public Records Law, G.L. c.66, §5A, requires that the minutes record exactly each vote taken.

The new Law also requires that “documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.” While many boards maintain copies of large plans and maps, for example, as part of a particular project file,

these documents may at some point be disposed of pursuant to the Public Records Law. Minutes, however, are permanent records that municipalities must maintain forever. If all documents used during a particular meeting or hearing must be maintained as part of the minutes, this could clearly pose a significantly greater storage problem than city and town boards already face. In addition, this potentially includes records brought and referred to by members of the public at an open meeting, presenting challenges for access to and replication of such documents. We have raised these issues with the Office of Attorney General and are hopeful that they will be addressed by regulation.

While meeting minutes in general are public records, the new Open Meeting Law adds express limitations as to the portions of minutes that are exempt from disclosure, and also adds obligations to boards to make executive session minutes available to the public as soon as practicable. The new Law provides:

- That minutes of open meetings shall not be able to be withheld under any of the exemptions to the Public Records Law, except:
 - the following materials shall be exempt from disclosure to the public as personnel information: (1) materials used in a performance evaluation of an individual bearing on his professional competence, provided they were not created by the members of the body for the purposes of the evaluation; and (2) materials used in deliberations about employment or appointment of individuals, including applications and supporting materials; provided, however, that any resume submitted by an applicant shall not be exempt.
- That executive session minutes shall be disclosed in their entirety when the purpose of the exemption has been met, provided, however, that the minutes or portion thereof may be withheld if protected by the attorney-client privilege or subject to one of the exemptions to the Public Records Law.
- That the chair of the governmental body must periodically review executive session minutes for the purpose of evaluating whether they should be released, that the chair shall make a statement concerning the same at an open meeting, and that the statement be included in the minutes of that meeting;
- That minutes from an executive session, the purpose of which has been completed, be provided in response to a request for them within 10 days unless the “review” discussed above has not been undertaken, in which case, the governmental body must undertake the same and provide the minutes if required not later than the board’s next meeting or 30 days, whichever occurs first.

This latter provision will require a regular and systematic review of outstanding executive session matters. For example, it appears that a board could be required, within 10 days of a request for executive session minutes, to turn over a copy of the minutes even if the board has not yet determined that the purpose of the executive session is completed. In addition, the previous requirement seems to give the chair of the body authority to make that determination individually, which is a broad departure from the current practice of evaluating executive session minutes *within* an executive session. Minutes from executive sessions that have not been completed will still be exempt from disclosure. The new Law is clearly aimed, however, to address concerns about boards not going back and completing the process of wrapping up executive session matters and releasing such minutes to the public in a timely manner.

As with certain other aspects of the new Open Meeting Law, we anticipate that the Attorney General will issue regulations or advisories as to how the amended minutes requirements should be implemented. All multi-member boards and their recording clerks should begin to familiarize themselves with these requirements now, however, to prepare for their implementation on July 1, 2010.

Very truly yours,

Brian W. Riley

Lauren F. Goldberg