SJC Decision Guides Open Meeting Law Compliance

By Kevin D. Batt

On April 5, 2018, in an important case of first impression, the Supreme Judicial Court found that a town's board of selectmen had violated the Massachusetts open meeting law due to the procedure the board used to conduct the evaluation of the town administrator [*Boelter v. Board of Selectmen of Wayland*, 479 Mass. 233 (2018)]. In doing so, the SJC provided important guidance to municipal boards and committees for complying with the open meeting law that may go beyond the evaluation of employees and inform other issues as well.

The Facts and the Decision

In advance of a meeting scheduled for the town administrator's evaluation, the chair of the Wayland Board of Selectmen circulated to all board members both the written evaluations from individual board members and a composite written evaluation of the town administrator's performance. The board made public all written evaluations only after its meeting.

This procedure adhered to the guidance from the Attorney General's Office at the time. The board followed what is sometimes referred to as the "hub and spokes" method of board participation in the drafting of a document, whereby members submit individual contributions to a document to be compiled by one "hub" member (or a staff person). Each member's contributions to the composite writing are preserved in a final draft, which then is finalized and approved at an open meeting.

In response to a complaint by the *Boelter* plaintiffs, the attorney general found that the board did not violate the open meeting law because "the [c]hair performed an administrative task exempt from the law's definition of deliberation." In Superior Court, judge Dennis Curran disagreed, ruling that the board had violated the open meeting law and ordering the attorney general's guidance on the issue stricken [*Boelter v. Board of Selectmen of Wayland,* No. MICV201400591H, 2016 WL 3617839 (Mass. Super., June 29, 2016)].

The SJC considered, for the first time, the meaning of the exemption to the definition of "deliberation" in the open meeting law as amended in 2009 (Ch. 28, Secs. 17-20, of the Acts of 2009). That definition, which became effective in July 2010, permits members of public bodies to distribute to each other "reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed" [M.G.L. Ch. 30A, Sec. 18]. The SJC concluded that this exemption was "enacted to foster administrative efficiency, but only where such efficiency does not come at the expense of the open meeting law's overarching purpose, transparency in governmental decision-making" [479 Mass. at 235]. As the individual and composite evaluations contained opinions of board members, "the circulation of such documents among a quorum prior to the open meeting does not fall within the exemption, and thus constituted a deliberation to which the public did not have access, in violation of the open meeting law" [*Id.*].

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> **—Massachusetts Supreme Judicial Court**

The SJC observed that the Legislature "amended the open meeting law expressly to allow public bodies to distribute some materials internally in advance of open meetings without triggering the definition

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of 'deliberation'; this change seems to have been a response to the practical realities of local governmental service" [*Id*. at 241]. By permitting officials to review certain administrative materials and reports in advance of an open meeting, "the Legislature took steps to ensure that the work of those officials at the meetings could be focused and efficient" [*Id*.]. At the same time, the SJC concluded that "the Legislature specified that no opinion of a board member could be expressed in any documents circulated to a quorum prior to an open meeting. … However inefficient this may prove for local bodies in certain circumstances, this is the balance that the Legislature has struck" [*Id*. at 241-242].

The SJC concluded that the attorney general's interpretation "is not supported by the plain meaning of the statute, and therefore is not accorded … deference" [*Id*. at 242]. Unlike the lower court, however, the SJC did not "strike" the attorney general's determination, but rather vacated that part of the lower court decision. Instead, the SJC noted, "The Attorney General has represented that if we affirm the judge's decision, she will amend her guidance and adjust her interpretation of the open meeting law when resolving complaints" [*Id*. at 245, n. 11].

In response to a question on the Attorney General's Office website ("May the individual evaluations of an employee be aggregated into a comprehensive evaluation?"), the AG now advises:

Members of a public body may create individual evaluations and submit them for compilation into a master evaluation to be discussed at an open meeting. To avoid improper deliberation, members must submit their evaluations to someone who is not a member of the public body—for example, an administrative assistant or executive secretary. The aggregated evaluation may then be distributed to the members one of two ways: (i) at a properly noticed open meeting, or (ii) via public posting to a municipal website in a manner that is also available to members of the public, as long as paper copies are also made available in the city or town clerk's office. See Boelter v. Board of Selectmen of Wayland, *SJC-12353, slip op. at 19-20 (Mass. April 5, 2018). Even if the public body posts the aggregated evaluation to a website, members may not discuss it outside of a properly noticed public meeting.*

***Boelter* supports a conclusion that no open meeting law violation occurs provided that deliberative documents are posted contemporaneously with their circulation among the quorum.**

Consequences of the Decision

By barring advance circulation to a board of written documents containing board members' opinions, in strict compliance with transparency objectives of the open meeting law, the SJC could have left boards no choice but to take time to read such documents and perhaps line edit them during an open meeting, in addition to, or instead of, verbal exchanges on the agenda item. The added time for such document review during an open meeting could impair the efficient conduct, careful verbal deliberation, and timely completion of the business of a packed meeting agenda. Imagine the burden to review a voluminous document compiled by several board members acting separately—for example, a report to town meeting from a finance committee with each member reviewing a different set of appropriations for operating and capital budgets—and then the board as a whole having to sufficiently absorb the material at the beginning of a duly called meeting to carefully deliberate on it and make decisions.

But, in an apparent nod to the impracticalities and inefficiencies of that option, the SJC observed:

The result here would have been different if the board had made the individual and composite evaluations publicly available before the open meeting. For example, the board could have posted the evaluations on its Web site and made paper copies available for inspection at or about the time that the evaluations were circulated among a quorum of board members. Ordinarily, the board is required only to make the minutes of open meetings, along with "the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session," available to the public, upon request, within ten days after an open meeting has taken place. G. L. c. 30A, § 22 (c), (e). Nothing in the open meeting law or the public records statute, however, precludes the board from prior disclosure, at least in these circumstances. If board members wish to circulate documents containing board member opinions among a quorum in advance of an open meeting, as here, prior and relatively contemporaneous public disclosure of those documents, where permissible, is necessary in order to comply with the open meeting law and to advance the statute's overall goal of promoting transparency in governmental decision-making. [*Id*. at 243-244]

The SJC's ad hoc attempt to provide an alternative to document review during a meeting itself, while it has no express basis in the open meeting law, provides a practical option. The SJC now seems to sanction the exchange of documents with board members' opinions (i.e., written deliberations) outside of a duly posted meeting, provided they are posted publicly. The SJC recognized that, heretofore, post-meeting public release of writings shared among a quorum prior to convening in open meeting served to cure an open meeting law violation of deliberating outside of an open meeting [*Id*. at 237 ("typical remedy for such a violation is public release of the documents at issue")]. *Boelter* now supports a conclusion that no open meeting law violation occurs at all, provided that deliberative documents are posted contemporaneously with their circulation among the quorum.

Questions linger as to the breadth of application of this "cure" in advance of an open meeting. If *Boelter* sanctions publicly posted opinions shared in written documents by a quorum of a board, may a quorum engage in publicly posted email exchanges in advance of a duly posted meeting? Would they be able to deliberate on items in an upcoming agenda on a publicly available blog post or Listserv?

These comments presume that *Boelter* would apply to the circulation to a quorum of more than just employee evaluations containing individual member opinions. Consider *Boelter*'s application to draft permit and licensing decisions, contracts, ordinances, bylaws and regulations, town meeting warrants, annual budgets and reports—to mention just a few of the kinds of writings likely to go through many successive revisions and that boards are expected to consider in the course of ordinary municipal business.

As of this writing, the Attorney General's Office has applied *Boelter* to find violations by circulating in advance of an open meeting the following:

- A draft decision containing revisions by a Belmont Planning Board member approving a site plan, distributed by staff to the board (OML 2018-17);
- A spreadsheet of comparative building permit values prepared by and with an opinion on the best valuation method for proposed construction, distributed by staff to the Groton Board of Selectmen (OML 2018-49);
- A draft townwide strategic plan, prepared by a consultant to the Brewster Coastal Advisory Council and containing revisions submitted separately by board members (OML 2018-58).

Additional cases may flesh out how broadly to construe what constitutes an "opinion." *Boelter* references a dictionary definition of "opinion" as "a view, judgment, or appraisal formed in the mind about a particular matter" [*Id.* at 239]. Minor and non-substantive editing of a document by individual board members and subsequent circulation of the edited document would likely fall short of the sharing of opinions. But advance circulation to a quorum of a draft document containing individual members' substantive revisions may now be viewed by a court as sharing of "views, judgments or appraisals" proscribed by *Boelter,* unless the revised document is posted publicly in advance of the meeting at which it is discussed.

From a broader perspective, the once distinct regulatory schemes governing public records and open meetings, and a corresponding recognition of the difference between written and verbal communications, have largely converged, fostered by the ease of communication through electronic media. That convergence is not, however, without rough edges.

For example, the public records law protects from disclosure "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency" [M.G.L. Ch. 4, Sec. 7, cl. 26(d)]. The so-called deliberative policy exemption is intended to prevent premature disclosure, scrutiny and criticism of draft policy documents and to facilitate careful policy development, vetting of alternatives, candid assessment of risks and benefits, and clear written articulation prior to discussion and adoption of a policy document by decision-makers. Where board members participate in the development of policy documents, the open meeting law's requirements to make publicly available the written "deliberations" of a board quorum, as interpreted in *Boelter,* may now supplant the public records protection for documents that reflect evolving intra-agency policy positions.

The strictures of the open meeting law, as construed in *Boelter,* may also lead to greater reliance on and delegation to staff to draft documents, and thus reduce the active participation of board members in document drafting. Ironically, to avoid violations of the open meeting law, reliance on professional staff in developing policy documents at the expense of the more hands-on participation of citizen volunteer board members would seem to attenuate the open meeting law's objectives of transparency in the decision-making process and accountability of decision-makers.

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Practical Tips

- "It is not 'deliberation' when written materials distributed to a quorum fall into one of two categories: first, purely procedural or administrative materials (such as agendas), and second, reports or documents to be discussed at a later meeting, so long as such materials do not express the opinion of a board member" [479 Mass. at 240 (paraphrasing definition of "deliberation" in M.G.L. Ch. 30, Sec. 18)].
- The attorney general advises that employee evaluations by individual board members be submitted to a staff member for compilation. The individual evaluations, and/or the compilation, may then be held until the meeting, or circulated in advance to the board, provided that they are publicly posted in the latter case. The individual evaluations would not necessarily need to be released as public records unless they were either circulated in advance or discussed and used at an open meeting.
- Boards should assume that *Boelter* is relevant to more than just employee evaluations. Therefore, individual members should contribute their edits and revisions to any document (excluding procedural and administrative materials) to a staff person to hold or to compile into one document. This advice presumes that a board is supported by staff. Boards without staff support may have to rely on the chair or another member to collect the contributions of the other members. Even this latter option would not be available to a three-member board without staff support, since communication between any two individual board members would trigger a possible unlawful deliberation among a quorum.
- If a board wishes to review a document, as substantively revised by individuals, ahead of a duly posted meeting, the document should be posted publicly on the municipal website, with hard copies made available at the meeting.
- Boards should consider carefully the kinds of draft documents they are willing to share publicly. Where written licensing or permitting decisions go through successive drafts, with the addition and deletion of substantive provisions by individual board members, premature disclosure and public reaction may unduly influence a board's decision-making. Changes between drafts and a final writing, if made publicly available, may subject a board to litigation risk.
- Boards should balance the burden of reading, reviewing and editing a writing at a duly called open meeting against possible risks in premature exposure of draft writings by public posting.