Open Meeting Law: What is a meeting, and why does it matter anyway?

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THE LEADER IN PUBLIC SECTOR LAW

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Sunshine Laws

- Public records, open meeting and conflict of interest laws exist in virtually every state
- Purpose generally is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based
- Under the Public Records Law ("PRL"), virtually any record created or received by a government employee or official is subject to mandatory disclosure
- Under the Open Meeting Law ("OML"), public bodies can only conduct business through public meetings, unless an exemption allowing executive session exists
- The Conflict of Interest Law ("COI Law) is intended to ensure that the Town's interests, rather than personal interests, dictate action by public employees and officials

Open Meeting Law

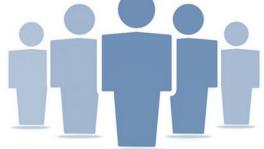
What types of meetings are subject to the law?

- What rules need to be followed to hold a meeting?
- What are common violations and why?



OML Definitions

- Meeting: A deliberation amongst a quorum of a public body to discuss matters within the jurisdiction of the body
- 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..."
- **Quorum:** A majority of the full complement of members of a multiple-member body, except in limited circumstances
- Public body: A "multiple-member board, commission, committee or subcommittee...within any...city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose...."



OML – Legal Requirements

Addresses three major issues:

1. Notice

a) timing (posted no less than 48 weekday hours)



b) location (must be posted in location accessible 24-hours a day, including website, and meeting must be held in ADA accessible location)c) level of detail (must list specific matters to be discussed reasonably anticipated by chair of public body; no acronyms; include executive sessions if applicable; avoid shorthand references)

2. Purpose

a) presumption for open session

b) limited authority to meet in closed (executive) session

3. Minutes

a) content (specific enough to allow someone who was not present to know what was discussed)

b) timing (within three meetings or 30 days, whichever is later)

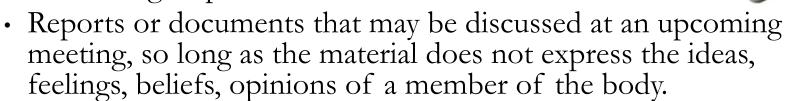
c) approval (in accord with above timeframe, either the body or a designee thereof)

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Meetings

Provided no opinions of the governmental body are expressed, attendance or distribution amongst a quorum will **not** constitute a "meeting" or a "deliberation":

- 1. Distribution to the public body by a member of:
 - A meeting agenda;
 - Scheduling or procedural information;



- 2. Attendance at an on-site inspection
- 3. Attendance at a public or private gathering or social event
- 4. Attendance at a posted meeting of another public body, communicating only by open participation on matters there under discussion and not privately among themselves





Meetings



Practical approaches to avoid violations:

- If attending a meeting of another body or a social event, avoid creating the appearance that a body is discussing municipal business;
- If attending a site visit or meeting of another body, post follow-up meeting of board or committee if members anticipate that they might want to discuss matters amongst themselves or respond to matters raised;
- If a member wishes to speak at a posted meeting of another public body, the member should be clear that the member is not representing their public body, but instead speaking as an individual
- OR: Post "joint" meeting to be held at same time and place
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Deliberation-Email



now explicitly addressed in the OML

• A quorum may not use e-mail to share their ideas, feelings, opinions, beliefs, whether serially or in a single e-mail, on board business, and may not use a non-member to avoid law

Practical approaches to avoid violations:

- ✓ Beware of "reply to all" on emails
- ✓ Limit use of e-mail to scheduling purposes, and try to avoid using e-mail to undertake Town business



- ✓ Assume that e-mail may be forwarded to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog
- ✓ Don't ask for or express opinions, ideas, feelings, beliefs or impressions in an e-mail to other members

Deliberation–Social Media

- Social media also subject to the OML
- Alternative electronic communications have become more prevalent, including blogging, instant messaging, texting, social networking such as Facebook, Snapchat, and Twitter

Practical approaches to avoid violations:

- ✓ Do not direct comments to other members of body
- ✓ If matter directly involves issue pending before body, consider not engaging
- \checkmark Be thoughtful about manner in which comments are made
- Consider using separate accounts for campaign purposes and following election
- ✓ Remember that applicants have due process rights; if the board member is involved in a matter adjudicating the rights of others, only discuss matter at the hearing









CAUTION

Personal Use Of Social Media - Risks

- Beware Violations of the Open Meeting Law
 - Do not directly reference other board members
 - Do not "reply" to posts by other board members
 - Consider not "engaging" in posts where other board members have responded
- Beware Violations of Due Process
 - Do not participate in discussions of matters that are or may be pending before the board
 - Taking a position before a matter is heard can lead to claims of bias

• Beware - Discrimination

- Americans with Disabilities Act
- Failure to provide "equal access" to government; not all people have internet access

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Perronal Ure Of Social Media – Practical Stepr

- If public official or employee will use social media, make sure to differentiate between any "official site", and a "private" site, such as a campaign site
- If you post on social media in "personal" capacity, make sure that the post so indicates
- Use municipal e-mail address rather than a private e-mail address for "official business"
- Use social media in "official capacity" for public announcements, emergency alerts, event reminders
- <u>DO NOT</u> debate or discuss matters with members of the public if such matters are or could be pending before the Board



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Public Body – Subcommittee

- Subcommittee any multiple-member body created to advise or make recommendations to a public body:
 - Intent to create a subcommittee is not required or determinative;
 - AG looks to three factors in determining if group constitutes subcommittee, is it "within government", "empowered to act collectively", and serving a "public purpose".
- Practical way to avoid violations:
 - One person does not constitute a subcommittee
 - Conservative approach when two or more members are tasked to accomplish something together, post meetings and comply with OML
- Note that committees created by sole officer (e.g., Town Manager or Superintendent) who has authority to act independently are excluded, i.e., the so-called "Connelly Rule."

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SCHEDULING MEETINGS

• Accessibility

- $\sqrt{1}$ Location of meeting must be included in notice $\sqrt{1}$ Location of meeting <u>must be accessible</u>; required
- both by the OML and the ADA

• Practical considerations include:

- $\sqrt{1}$ Ability to meet at privately owned location
- √ Moving meeting to different location (e.g., unanticipated attendance) in same or different building
- $\sqrt{\text{Closing door during open session}}$



Notice – Practical Considerations

- Must be posted no less than 48 weekday hours, excluding weekends and legal holidays on official posting location
- Matters not reasonably anticipated by chair MUST be added to agenda after posting deadline to extent feasible
 - ✓ Updated agenda must show time and date of update, as well as change to agenda
- Matters not reasonably anticipated by Chair MAY be discussed and acted upon
 - ✓ AG recommends that unless matter requires immediate action, should be put off to later meeting and included in posting



Notice – **EMERGENCIES**

- Limited instances when a public body can meet without the requisite 48 hours advance notice/posting.
- Poor planning does not equal an emergency!
- Natural disasters and public safety issues do qualify as emergencies.
- Practical Recommendations:
 - Comply with the law to the extent possible;
 - Limit deliberations to emergency matter;
 - Take minutes of meeting, and review and include with minutes of next regularly scheduled meeting;
 - When posting an emergency meeting, consider posting a regular meeting as well, to allow body to ratify the action taken at emergency meeting.



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Conducting Meetings - Recording

- Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute).
- Recording by individuals:
 - Must inform the Chair;
 - Chair must make required announcement;
 - Chair may reasonably regulate recordings (placement, operation of equipment)





Executive Session

Process:

- Notice must list executive session if executive session is anticipated
- First convene in open session.
- State the purpose(s) of executive session "stating all subjects that may be revealed without compromising the purpose for which the executive session was called."
- Take and record roll-call to go into executive session.
- Announce if open session will reconvene afterward.
- Maintain exhibits and documents used in reasonable proximity to minutes.
- Only discuss matters cited.
- Take all votes by roll-call.



Executive Session – Purposes

- 1. 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. *(48 hours NOTICE to individual required)*
- 2. Conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
- 3. 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* ...
- 6. Consider purchase, exchange, lease or value of real property *if the chair declares* that an open meeting may have a detrimental effect on the negotiating position of the public body



Executive Session – Practical Issues

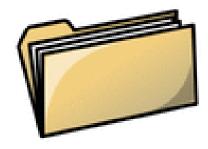
- If executive session is anticipated, it must be listed in appropriate detail on <u>meeting notice</u>, with such specificity as is possible without compromising purpose of the session.
- Related <u>vote to enter executive session</u> must also include all information possible without compromising purpose of session (i.e., name of non-union personnel or union must be identified in notice and vote if bargaining or negotiations will be conducted; case name to be discussed under litigation strategy must be listed, unless doing so would compromise Town's position); <u>and declaration must be made, as needed</u>.





Meeting Minutes - Content

- Date, time, place of meeting, and members present and absent;
- Detailed summary of discussion of each topic sufficient to allow a person not present at the meeting to understand the substance of what occurred at that meeting;
- Decisions made, actions taken, and votes recorded (no secret ballots permitted); and
- List of documents and other exhibits **used** by the body at the meeting, which will be "part of record" but not of minutes;
 - 1. Document is physically present at meeting; and
 - 2. Document is verbally identified; and
 - 3. Content of document is discussed by members (OML 2012-42).





Mínutes - Approval

Open session minutes must be created and approved in timely manner.

- New regulations provide that approval must occur generally within the next 3 meetings or within 30 days, whichever is later.
- Minutes of open meetings are public records as of moment of their creation, regardless of whether they have been approved.
 - Upon request, minutes must be made available within 10 days.



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Executive Session Minutes - Approval

Executive Session Minutes

- May be withheld until purpose of exemption has been met, unless otherwise protected under the Public Records Law;
- Chair of public body directed to review executive session minutes periodically and bring to the body for its approval minutes for which the purpose of the executive session has expired;
 - Can approve in executive session, either under purpose for which session was originally held, or, if more than one purpose, under Exemption 7, referencing law that allows the same.
 - Must provide a response to a request for executive session minutes within 10 calendar days.



ENFORCEMENT

Complaint Process:

- Complainant must file written complaint with the <u>public body</u>, within 30 days of the alleged violation;
 Public body must forward complaint to AG within 14 <u>business</u> days of receipt and inform AG of any remedial action taken; and
- Complainant may file a complaint with AG after
 days from the date complaint was filed with
 public body.

ENFORCEMENT

- Attorney General requires Public Body to consider complaint at properly posted meeting:
 - Matter must appear on meeting notice
 - Body must acknowledge receipt of complaint
 - Should deliberate concerning allegations and possible resolution
 - Vote to resolve complaint
 - If appropriate, authorize response to be prepared and sent to Attorney General and Complainant
- Cure:
 - "Public deliberation (at a properly posted open meeting) effectively cure 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." See OML 2011-14.



Enforcement - Attorney General Options

- Upon finding a violation, the AG has a range of enforcement options from compelling compliance with OML and/or attendance at a training session and/or creation or disclosure of minutes, nullifying action taken, imposition of \$1,000 fine for intentional violation. Public body may seek judicial review in Superior Court within 21 days of receipt (this would stay the AG's order, but the public body may not implement any action taken, pending appeal)
- AG may file action in Superior Court to require compliance.
- 3 registered voters may bring action in Superior Court.

Any questions?

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