

OVERVIEW AND CURRENT TRENDS OPEN MEETING AND PUBLIC RECORDS LAWS



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Sunshine Laws

- Open Meeting Law
- Public Records Law



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 – Legal Requirements



Law addresses 4 major issues:

1. Notice

- a) Timing - posting no less than 48 weekday hours prior
- b) Location - must be posted in location accessible 24-hours a day, including website, and meeting must be held in ADA accessible location; include remote/virtual information if meeting remotely
- c) Detailed subject matter items

2. Nature of Meeting

- a) Presumption for open session
- b) Certain reasons for closed session; subject to different procedures

3. Conduct of Meetings

- a) Difference between a meeting and a hearing
- b) Who gets to speak and when
- c) Remote and hybrid meetings

4. Minutes

- a) Content – detailed to allow someone who was not present to know what was discussed
- b) Timing – for open meetings, within three meetings or 30 days, whichever is later
- c) Approval - in accordance with above timeframe, either the body or a designee thereof (executive session minutes – until purpose has been served)



Subcommittees

- ***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;
 - Attorney General 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
- Committees created by sole officer who has authority to act independently are excluded from application of OML. Connelly v. School Committee of Hanover, 409 Mass 232 (1991).

Quick Summary - Meetings

- (1) Nearly all meetings must be posted not less than 48 weekday hours prior to the date of the meeting;
- (2) The meeting notice must list all the topics to be discussed with specificity, including executive sessions.
- (3) Regardless of whether a meeting was posted correctly, a meeting occurs whenever a quorum of a public body discuss matters within its jurisdiction
- (4) The quorum can be reached simultaneously (an e-mail to everyone on the board) or serially (one person forwards the e-mail to the next who forwards it to the next)



Tips to Stay Out of Trouble!!

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 may want to discuss matters amongst themselves or respond to matters raised

Post “joint” meeting to be held at same time and place

Avoid E-mail

Deliberation – E-mail Considerations

E-mail explicitly addressed in the OML – Often reason for violation

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

Practical approaches to avoid violations:

- **Beware of “reply to all” on e-mails**
- 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 (particularly if more than one member has already commented)
 - Be thoughtful about the manner that 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 – due process issue



Conducting the Meeting

- The Open Meeting Law does not mandate that any particular person be allowed to speak at a meeting
- The Open Meeting Law does not require that the public body allow any kind of public participation or public comment
- Instead, the Open Meeting Law provides that the Chair has sole discretion as to who may speak, and for how long

Allowing the public to speak during a meeting, or restricting such speech based upon issues other than time, place and manner, has serious constitutional implications.

Conducting the Meeting –

Public Participation

Whether to allow public participation remains a policy decision with several significant implications, for example:

When will the public participation period occur?

How long will the period be?

How long will each person be permitted to speak?

Whether people will be permitted to speak more than once?

Conducting the Meeting – Policy Issues for Public Speak Periods

Any rules about public participation must relate to the process for such participation, and may not relate to speech protected by constitutional principles- any restrictions on speech, including as to time, must be content neutral and narrowly tailored to the public body's interest.

Items to consider:

1. Avoid debate
2. Avoid responding to a comment before the board has had the opportunity to discuss it OR when the matter is controversial
3. Leave matters raised during public speak “unresolved”
4. Not engaging and instead placing the item on an upcoming agenda for which formal notice of the item appears

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).

Minutes - Approval

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

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

Executive Session Minutes

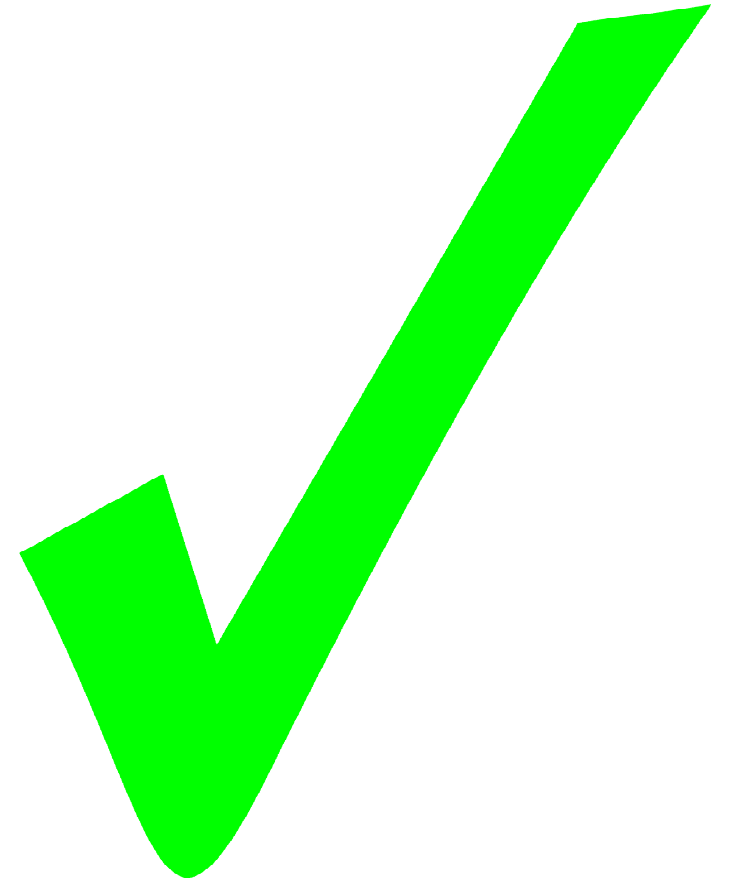
- May be withheld until purpose of exemption has been met, unless otherwise protected under the Public Records Law;
- Chair of public body directed to review executive session minutes periodically and bring to the body for its approval minutes for which the purpose of the executive session has expired;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



Posting - Practical Considerations

A meeting may not be continued from one night to the next unless the following meeting is properly posted under the OML

The notice required under the OML *does not substitute for or otherwise supersede* notice requirements under other applicable laws.



More on Agendas...

- Location of Posting – must be filed with Town or City Clerk and posted in a manner conspicuously visible to the public at all hours in, on or near Town or City Hall (and accessible at Clerk's office during normal business hours).
- No acronyms
- No abbreviations
- Must indicate time/date of *posting*.
- If revised, must state both the date and time of the original posting and the date and time of the revised posting.

What can we talk about???

- **Matters not reasonably anticipated** by Chair **MUST** be added to agenda after posting deadline to extent feasible; if responsibility for the agenda is delegated to staff, then this may be critiqued from the perspective of that staff person
 - Updated agenda must show time and date of update, as well as change to agenda
- **Matters not reasonably anticipated** by Chair (see above) **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 – Placeholders Now a “No Go”

Regularly occurring items need **more detail**, so, agendas should be updated to include **more detail** than the following examples:

- **New Business**
- **Old Business**
- **DPW Superintendent Report**

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, public health matters 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; and
- When posting an emergency meeting, consider posting a follow-up regular meeting as well, to allow body to ratify the action taken at emergency meeting.

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 Sessions

Process:

- First convene in open session.
- Announce 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 enumerated in G.L. c. 30A, s. 21.*



Executive Session – Practical Issues

- If executive session is anticipated, it must be listed in appropriate detail on meeting notice, with such specificity as is possible without compromising purpose of the session.
- Related vote to enter executive session 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); and declaration must be made, as needed.

Enforcement

Complaint Process – Step 1

1. Written complaint filed with public body within 30 days of alleged violation;
2. Public body must forward complaint to AG within 14 business days of receipt and inform AG of any remedial action taken; and
3. Complaint may be filed with AG after 30 days from the date complaint was filed with public body.

Attorney General Options – Step 2:

- 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.

Notable Court Decisions

Barron v. Kolenda, SJC-13284 ("Southborough")

- Concerning the constitutionality of a select board policy addressing participation during "public comment" periods of its meetings. The SJC concluded that the policy, which sought to implement standards of civility for public comment periods by limiting critique and rude or disparaging remarks, violated Articles 19 and 16 of the Massachusetts Declaration of Rights. In short, the SJC observed that "[a]lthough civility can and should be encouraged in political discourse, it cannot be required."
- While this case did not examine the application of the Open Meeting Law, the Court seemed to premise its conclusions on the fact that the Board invited public comment by including "public comment" on its meeting agenda. Once public comment was included as an item for discussion during the meeting, the Court concluded that constitutional considerations applied to the Board's efforts to regulate public comments.
- In summary, state law does not require municipalities to provide public comment periods during board and committee meetings. Some charters and special acts do require such public comment periods, however. Each municipality should review its governing documents to determine whether public comment is mandated. To the extent that public comment is permitted, the rights of individuals participating will be protected by Articles 16 and 19 of the Massachusetts Declaration of Rights. For these reasons, following the decision in Southborough, great care should be taken to ensure that any regulation of public comment periods is limited to reasonable time, place, and manner restrictions, rather than mandated civility, or other content-based, restrictions.

Corey Spaulding v. Town of Natick School Committee, Middlesex Superior Court (November 2018)

- Public comment during public meetings. Committee improperly limited comments made by members of the public which were critical of the Committee in violation of free speech rights.
- Where a multiple member body allows "public comment," or "open forum," its public comment policies and practices must ensure that any restrictions on such discussions, including as to time, are specific and narrowly tailored to the public body's interest.

Town of Swansea v. Maura Healey, Suffolk Superior Court (October 2018)

- Sufficiency of meeting notices. Division applied subjective criteria, such as available bulletin board space, to determine whether a meeting notice was sufficiently detailed.

Boelter v. Board of Selectmen of Wayland, 479 Mass. 233 (2018)

- Employee evaluation process by public bodies. Circulation of employee evaluations containing opinions of Board members as to employee's performance between a quorum of the Board violated the Open Meeting Law.
- Updated guidance from the DOG on performance evaluations to track the Boelter decision.

Current State of the Open Meeting Law

How long will this last?

- Pandemic era changes are in place to March 31, 2025.
- On March 29, 2023, Governor Healey signed into law a supplemental budget bill that further extended the temporary provisions pertaining to the Open Meeting Law to March 31, 2025.

▪What is authorized?

- Instead of holding meetings in a public place, a public body **may** provide “adequate alternative means” of public access.
- Public body members **may** participate in meetings remotely.

▪Must meetings be held remotely?

- No, these changes are optional, meetings may still (or again start to be) conducted in person.

Adequate Alternative Access

What does this mean?

- A public body must provide real time access (lag of ~20 seconds is acceptable).
- If a technical problem prevents the meeting from being accessible in real time (e.g., the live stream crashes), the meeting should be paused or rescheduled, depending on the severity of the technical issue.
- Continuing a meeting and subsequently posting a recording, even immediately afterwards, does not cure the violation. The public must be able to access the meeting as it happens. See OML 2021-166; OML 2021-17.
- Zoom is the typical “adequate alternative means” but it is not required, any method that allows the public to follow in real time is acceptable.

Additional Considerations if Remote

If the meeting will be recorded, the Chair must make a public statement regarding the recording per the MA wiretap statute.

All votes must be taken with a roll call (just like what is required in executive session).

Remote members must introduce selves (or be introduced) at start of meeting.

Cameras should be on (not required if a device does not have camera).

When holding an executive session remotely, each member participating remotely must state that no other person is present or able to hear the discussion at the remote location, unless the public body has approved the presence of that individual.

Hybrid Meetings

- A public body may meet in person but require members of the public to watch a livestream. See OML 2020-100.
- Direct participants on agenda matters may still attend in person, even if the general public must attend remotely. See OML 2020-159.
- A member may attend remotely even if other members attend in person
- REMEMBER, if live access stops, the meeting must stop.
 - Be careful not to deliberate while troubleshooting occurs.
 - The public body may resume the meeting once the technical problem is resolved and members of the public are again able to view the meeting in real time.
- The public must be able to hear and follow the meeting from their remote location.

In Person Meetings



Meetings *may* be held in person.



If a meeting is open to the public, there must be sufficient room for all of the public to attend (e.g., no capacity restrictions due to COVID). See OML 2021-43.

If a meeting is in-person and open to the public, it does not need to be accessible via Zoom or other “adequate alternative means.”

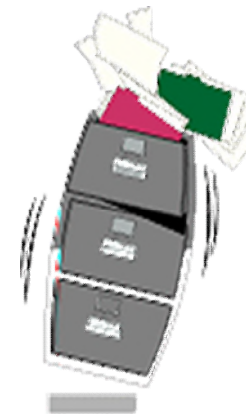


The AG’s Office has issued guidance stating that meetings may be held in locations that require masks.

Public Records Law

- **What is a public record?**
- **When do records have to be disclosed?**
- **Appeals Process**

[A]ll books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee...



What is a Public Record?

Public Records Requests



Request may be made in person, or in writing, whether by mail, request form at “counter”, or by e-mail or fax



Records Access Officer (“RAO”) must respond within ten **business** days – **not calendar days** (Saturdays, Sundays and legal holidays do not count; days Town Hall is closed DO count, however)



If the response does not provide all requested records, detailed written response is required



Must list specific exemptions and provide detailed explanation of application of exemption to requested record

Public Records Requests - Response



Have 10 **BUSINESS** days to respond

Work with the Records Access Officer (RAO)

- Duties include assisting requesters, records custodians, preparing guidelines to enable requesters to make “informed” requests, including a listing of categories of records

If full response, including provision of records, cannot be made within 10 business days, RAO must respond to the requester in writing

A full list of required elements for response appear on next page, and requires:

- Confirming receipt
 - Identifying correct custodian/RAO if not correct
 - Outlining what will be withheld, if known, and reason why
 - Explaining reason for inability to provide the same within the timeframe
 - When a response is expected

Timing for Responses



Records or initial response within **10 business days-citing exemptions to Public Records Law if applicable**

If initial written response provided, additional **15 business days** to provide the records, for a total of **25 business days** from receipt of original request to provide full response

RAO may, within **20 business days** of receipt of request, petition the Supervisor of Records for additional time, **not to exceed an additional 30 business days** “for good cause shown”

Requestor can grant additional time, and such grant should be confirmed in writing

If request is in writing, request is deemed received on the first business day following receipt; oral request is deemed received on the day it was made

Fees

Copies \$.05/page for black and white, two sided

Otherwise, actual cost (of storage device, postage, oversize plan copying etc.)

Less than 20,000 people – first two hours of search time must be provided at no cost

Rate capped at \$25.00 per hour (petition process available)

Segregation must be “authorized” by law

The provisions of 950 CMR 32.06 provide. “a records access officer may delay provision of records until all fees related to such requests are paid in full . . . in accordance with 950 CMR 32.07.”



Commonly Used Exemptions

Exemption (a) allows withholding of records that are “specifically or by necessary implication exempted from disclosure by statute.”

Examples include:

- CORI (e.g., 803 CMR 2.23; 803 CMR 5.14)
- Domestic Violence Reports (G.L. c. 41, §97D)
- Student Records (e.g., 603 CMR 23.07)
- MCAD documents (aside from the initial complaint and investigative determination) (804 CMR 1.04)
- Abatement Applications (G.L. c. 59, §60)

Exemption (c) – Personnel or medical records where privacy rights of record subject outweigh public’s “right to know”

Exemption (d) – Deliberative process documents, including those between governments on matters for which policy positions are being developed, including legal advice

Commonly Used Exemptions

Exemption (e) – Personal notes not properly part of the “file” and that have not been shared

Exemption (f) – Records of ongoing investigations until disclosure will not affect investigation AND records reflecting the names and identifying details of voluntary complainants and witnesses

Exemption (n) – Infrastructure exemption for withholding of records that the custodian reasonably believes is “likely to jeopardize public safety”, including ***cyber security***

Exemption (o) – Personal ***e-mail***, home address and home telephone number of a public employee in public entity’s records where persons are characterized as such

Appeals

Forum Options

To Supervisor of Public Records (decision must issue in **10 days**);

If dissatisfied with Supervisor decision, requester may appeal decision to Superior Court

Attorney General may enforce orders of Supervisor, seek to intervene in a pending suit or bring her own suit in Superior Court; and/or

Requester may appeal directly to Superior Court

Risks

In court, presumption for award of attorneys' fees if plaintiff is successful even in part, including if once suit is filed town provides requested records;

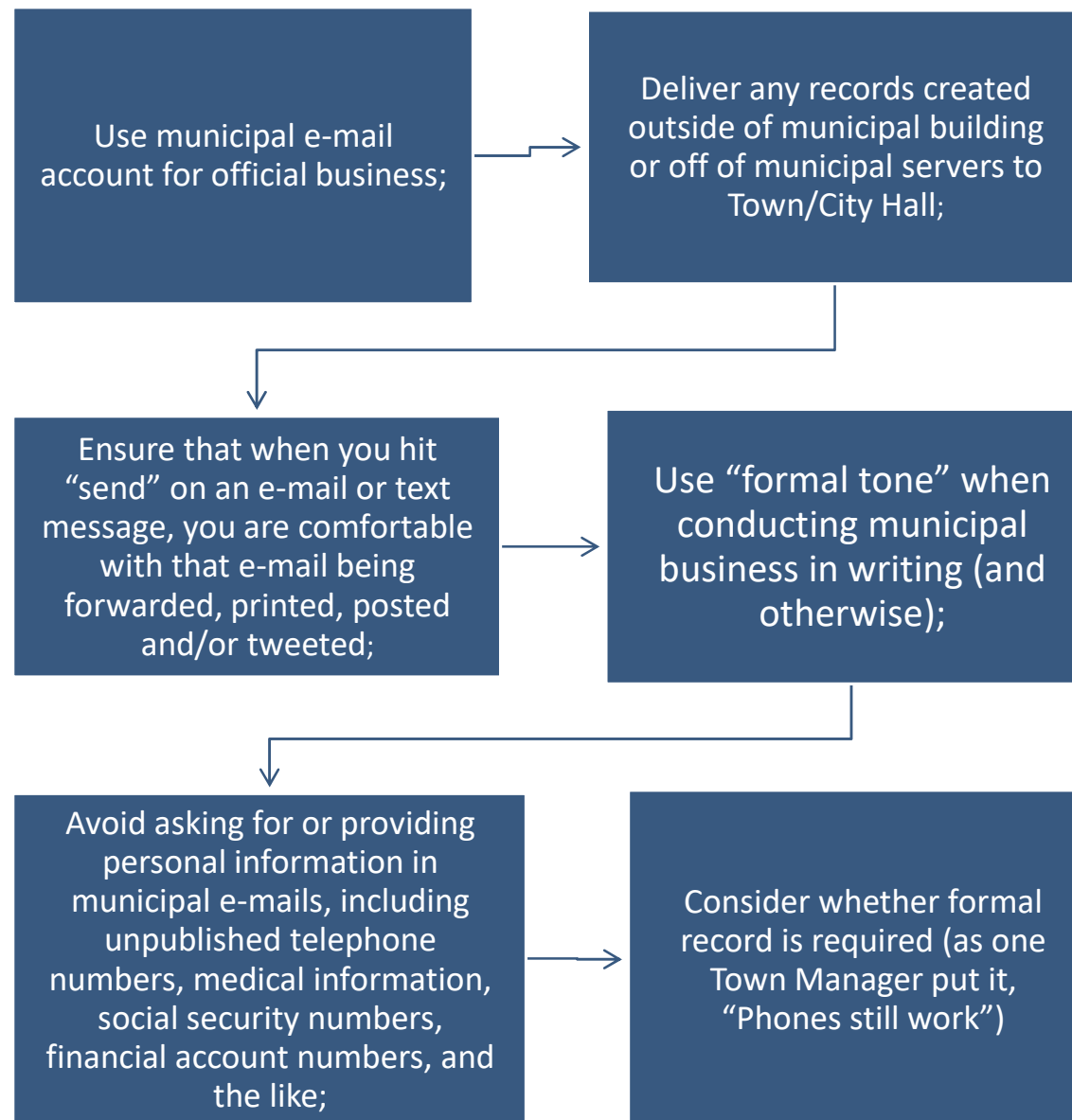
In court, if plaintiff is successful, public records fees will also be waived unless town is able to demonstrate action consistent with previously existing precedent or with prior decisions of Supervisor of Public Records; court has discretion to waive fees even if plaintiff is unsuccessful

Electronic Records Preference

Posting of certain records required, if “feasible”, and posting should be monitored by RAO to ensure posting is timely:

- final opinions, decisions, orders, or votes from proceedings;
- annual reports;
- notices of regulations proposed “under chapter 30A”;
- notices of hearings;
- winning bids for public contracts;
- awards of federal, state and municipal government grants;
- minutes of open meetings;
- budgets; and
- any public record information of significant interest that is deemed appropriate to post

Creating Records – Best Practices



Any questions?

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