

NAVIGATING PUBLIC RECORDS & OPEN MEETING LAWS



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KP | LAW



THE LEADER IN PUBLIC SECTOR LAW

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Agenda

- Introduction
- Overview of the Open Meeting Law
- Overview of the Public Records Law
- Additional Resources
- Question and Answer Period



Introduction - Sunshine Laws

- The Sunshine Laws: The Open Meeting Law (OML) and Public Records Law (PRL) exist in virtually every state
- Purpose of such laws is to eliminate the secrecy surrounding deliberations and decisions on which public policy is based, and to **ensure government transparency**
- Under the *Open Meeting Law* (“OML”), public bodies may only conduct business at properly noticed accessible, public meetings, unless an exemption allowing an executive session exists



OML Legal Requirements: Four Major Considerations



- **Notice** – required for a gathering of a “quorum of members” to “discuss” matters within the jurisdiction of the “public body”
 - Timing - posting no less than 48 weekday hours prior
 - 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
 - Detailed subject matter items of reasonably anticipated items
 - Separate requirements for true “emergency” (not poor planning)
- **Nature of Meeting**
 - Presumption for open session
 - Certain reasons for closed (executive) session; subject to different procedures
- **Conduct of Meetings**
 - Difference between a meeting and a hearing
 - Who gets to speak and when
 - Remote and hybrid meetings
 - Recording
- **Minutes**
 - Content – detailed to allow someone who was not present to know what was discussed
 - Timing for Approval – for open meetings, generally within three meetings or 30 days, whichever is later

The Open Meeting Law does...and does not!



The Open Meeting Law does:

1. Require that persons can hear the proceedings at a public meeting;
2. Give authority to the Chair to run the meeting;
3. Provide that the Chair must recognize a person in order for them to speak;
4. Authorize the Chair to give a person a series of warnings and, if necessary because the person will not comply with the warnings, eject the person from the meeting;
5. Allow the Chair to silence any person who:
 - a) Speaks without being recognized;
 - b) Continues to speak after the chair has curtailed additional verbal comment;
 - c) Interrupts a recognized speaker;
 - d) Speaks about matters not within the jurisdiction of the public body; or
 - e) Engages in conversations while another person is speaking.

The Open Meeting Law does NOT: Guarantee any person the right to speak.

Open Meeting Law 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....”



Email Considerations



- **Permissible to E-mail about:**
 - Availability for meetings- scheduling matters
 - Distribution of documents and meeting packet only, but do not comment on materials
- **Do Not E-mail:**
 - Comments, opinions, beliefs, concerns or other thoughts on pending or imminently pending topics, application or matters
 - Include open questions, such as “how do you intend to handle...?”
 - “If you ask me, I think the area is too densely developed...”
 - “There is no way I will vote for ...”



Beware of “reply all” on emails.



Social Media Issues



- **Social Media use is also covered by OML**
 - If member posts opinion on social media, group, blog, chat room, or listserv that other members of the board could see, it may violate the OML. The Attorney General cautions public bodies on the use of Facebook and other social media.
- **Best practices**
 - ✓ Do not direct comments to other members of body on social media
 - ✓ If matter directly involves issue pending before body, consider not engaging
 - ✓ Be thoughtful about the manner in which social media comments are made
 - ✓ Consider using separate accounts for campaign and election purposes, if applicable

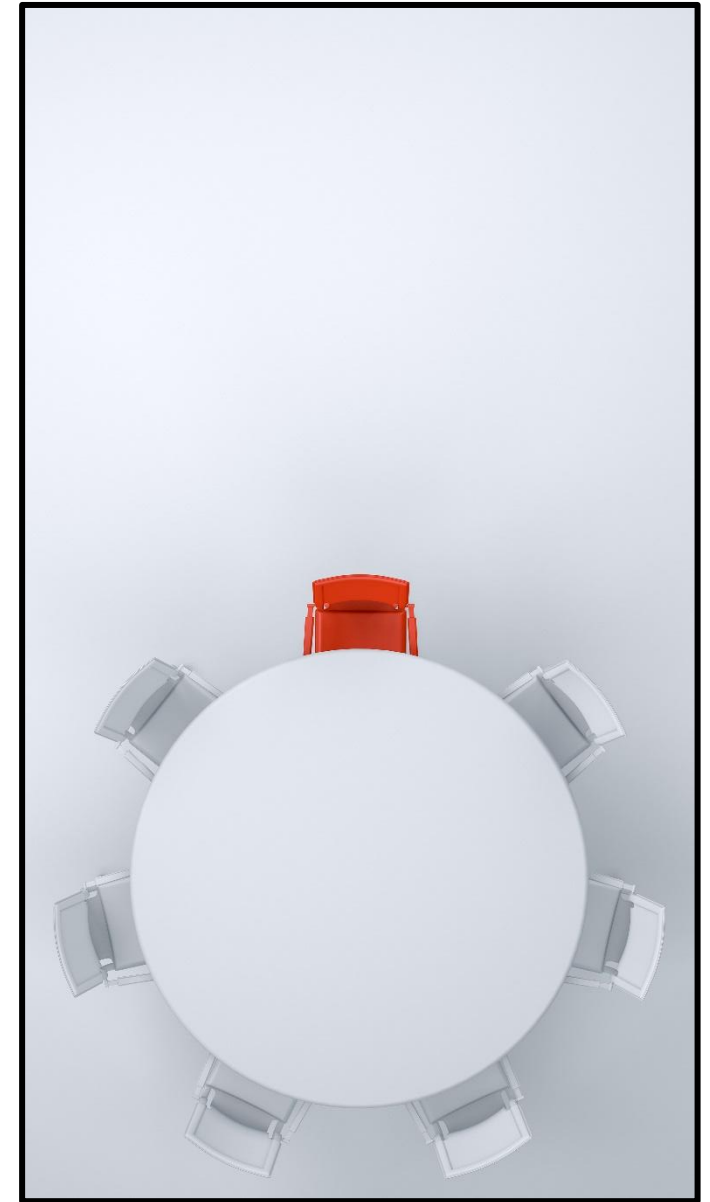
Social Media Issues (Cont.)

- **Public officials should be cautious when conducting public business on social media**
- **OML Declination, May 7, 2020, Select Board:** “The Open Meeting Law does not restrict an individual’s right to make comments to the general public...Moreover, while it is not a violation of the Open Meeting Law for a quorum of members of the Board to also be members of the same Facebook group, if a member of the Board were to communicate with a quorum of the Board over social media platforms such as Facebook, such communication may violate the Open Meeting Law. Recognizing that it may be difficult to determine whether communication constitutes deliberation under the Open Meeting Law, our office cautions public bodies on the use of Facebook and other social media.”
- **OML 2018-145, Select Board:** “When comments are made on an individual public body member’s social media account or on an open social media group, those comments are more likely to be targeted towards a general public. When comments are made in a closed group, it is reasonably inferable that posts are directed solely at the members of that group, and, when a quorum of a public body belongs to a closed group, it becomes likely that posts and comments are targeted towards the other public body members.”

Meetings – Executive Session

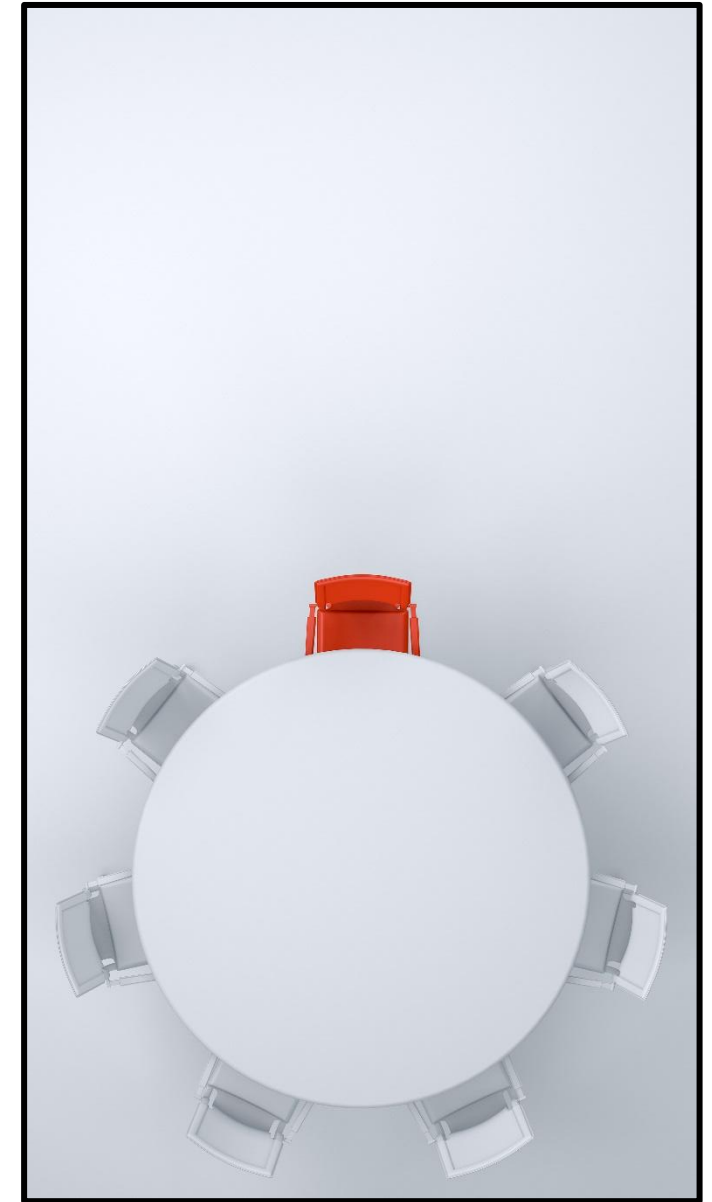
The public has a right to observe the body voting to go into executive session and thus, **an open session must always first be posted and convened. In open session:**

- 1) Announce purpose(s) of executive session “stating all subjects that may be revealed without compromising the purpose for which the executive session was called.”
- 2) Take and record roll-call to go into executive session
- 3) Announce if open session will or will not reconvene afterward
 - Board does not have to reconvene in open session only for purpose of adjournment
 - Chair must announce that the Board will not be reconvening in open session after conclusion of executive session, so members of the public know not to stay
- 4) If Purpose 3, 6, or 8, declare that meeting in open session will have detrimental effect on body’s position (litigation, value of real estate, employment applicants)



Meetings – Executive Session

- Only discuss matters cited in notice
- Take and record all votes by roll-call
- Prepare minutes
 - Timely review and approve minutes
 - Minutes need not be released if public disclosure will defeat the purpose of the executive session, i.e. purpose continues. Minutes can also be reviewed for exemptions under PRL, including for privileged information, after purpose expires.
 - Executive session minutes can be reviewed in an executive session held under the same purpose as the original session OR under Purpose 7, “To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirement”.
 - Periodically review minutes to determine whether continued non-disclosure is warranted or minutes should be released to public, as soon as purpose of meeting will not be compromised and need not be confidential any longer.
 - These determinations must be publicly announced after review in open session.



Meetings : Remote or Hybrid



Notice for Remote Meetings

- On March 29, 2023, the Governor extended the pandemic-era provisions as part of a supplemental budget bill to **March 31, 2025**
- “Adequate, alternative means” of public access includes:
 - telephone, internet, or satellite-enabled audio or video conferencing (i.e., zoom, teams, conference call)
 - any other technology that enables public to follow proceedings in real time
- Authorizes all members of board to meet remotely, suspending OML’s requirement that chair and quorum be physically present at meeting
- Public body may meet in person, while requiring the general public to attend remotely
- ****Legislation currently advancing to extend pandemic-era provisions through June 30, 2027.****

Meetings : Remote or Hybrid (Cont.)



Notice for Remote Meetings

- Where the meeting is to be held virtually, the meeting notice must contain clear instructions on how to access the meeting “location” remotely
- It is **insufficient** to say: “LOCATION: Virtual Zoom Meeting” without including instructions on how to access the meeting.
- Clear Instructions will include:
 - 1) virtual meeting link or call-in number with passcode; or,
 - 2) to minimize so-called “Zoom-bombing,” notice may require the public to call city or town hall for access information, provided that there is clear contact information (e-mail and telephone number) and the public can obtain access for entire meeting (someone monitoring e-mail or phone line to give them access mid-meeting)

Meetings : Remote or Hybrid (Cont.)



Other Requirements for Remote Meetings

- **Announce the Recording**: Chair should announce if meeting is being recorded at the beginning of meeting (wiretap statute). The recording is a public record but can be deleted after the meeting minutes are prepared and approved, unless a request for minutes under OML or PRL is received before minutes are complete
- **Announce All Names**: Chair must announce the names of all board members participating remotely (even if entire board is remote). It is insufficient for names to be displayed on the video platform (as the public could be listening only or be unfamiliar with board). OML 2020-138; OML 2020-98. The names of members participating remotely also must be recorded in the meeting minutes
- **Conduct all votes by roll call**: Every single motion in a remote meeting (to open or adjourn the meeting, take a substantive vote, or simple procedural matters) must be conducted by roll call. OML 2020-89; OML 2020-82. Roll call votes on every matter must be recorded in the meeting minutes as well

Violations & Enforcement

- Enforcement: Upon finding a violation of the OML, the AG has a range of enforcement options, including:
 - Compelling compliance with OML
 - Compelling attendance by the public body at a training session
 - Compelling the creation or disclosure of minutes
 - Nullifying any action taken by Board, and
 - Imposing \$1,000 fine for intentional violations
- AG may file action in Superior Court to require compliance with OML
- 3 registered voters may file action in Superior Court to require compliance



Additional Resources

- KP Law, P.C., www.k-plaw.com
- Attorney General, Division of Open Government
 - www.mass.gov/ago/government-resources/open-meeting-law/
- Attorney General, Open Meeting Law Guide
 - <https://www.mass.gov/doc/2023-guide-with-ed-materials/download>

Overview: What is the Public Records Law?



- The Public Records Law is a series of statutes and implementing regulations
 - G.L. c. 4, § 7(26)
 - G.L. c. 66, §§ 10-10B; G.L. c. 66A.
 - Public Records Access Regulations, 950 CMR 32.00, et seq.
 - The Public Records law contains several exemptions allowing for withholding of records and information contained therein.
- There are many other statutes and regulations that are implicated when considering whether a public record is subject to mandatory disclosure under the Public Records Law and Exemption (a).

Overview: What is a Public Record?



- Definition of public record: “[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...” G.L. c. 4, § 7(26)
- The Public Records Law analyzes the content of a record, not the form
 - Includes e-mails discussing public business, even if on personal e-mail accounts
 - Volunteers and the records they make and receive are not “exempt”
 - Could include text messages or other communications, even on personal devices
 - Could include handwritten notes of an employee, memos, video recordings, etc.
 - Social media/Teams chats

Overview: What is a Public Record? (Cont.)



- Social Media created or received relating to municipal business is a public record!
- Town must retain and archive all social media pages and posts
 - Current guidance recommends taking periodic “screenshots” of Town social media accounts to meet records retention obligations
- Do not post information that is confidential, privileged or exempt under PRL online.
- Try not to use text messages or “DMs” to communicate regarding municipal business; harder to archive and retrieve if there is a public records request.

Public Records Law: Best Practices

- Not sure if record is subject to disclosure under the PRL? Err on the side of caution – check with RAO!
- Always go through RAO before forwarding or sending documents to public, to ensure they are not privileged, confidential or otherwise exempt under PRL
- Retain e-mails and texts regarding municipal business in compliance with records retention requirements
- RAO should ensure appropriate retention requirements are met



Timing for Responses



- Provide all non-exempt records, a good faith estimate or the detailed written response citing withholding of records under PRL exemptions within **10 business days**
- 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
- 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”
- Request is deemed received upon the first business day following receipt, regardless of the form of the request (same rule for oral and written requests)
- **RAO may charge fees in accordance with PRL (to search for and locate records and make redactions “required by law”) if estimate is sent within ten business days following receipt of request.**

Common Exemptions

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- Exemption (a) allows withholding of records that are “specifically or by necessary implication exempted from disclosure by statute.”
 - CORI
 - 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) – Privacy Exemption (e.g. medical information, personnel information, details of a highly personal nature)
- Exemption (d) – Deliberative process documents, including those between governments on matters for which policy positions are being developed, including regarding ongoing litigation matters

Common Exemptions (Cont.)



- 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 municipality provides requested records;
- In court, if plaintiff is successful, public records fees will also be waived unless municipality 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

Additional Resources



- Secretary of the Commonwealth, A Guide to the Public Records Law (2022)
 - <https://www.sec.state.ma.us/divisions/public-records/download/guide.pdf>
- KP Law, P.C.
 - www.k-plaw.com
- Guide to Municipal Records Retention Schedule
 - www.sec.state.ma.us/arc/arcpdf/Municipal_Retention_Schedule_20200406.pdf
- Flow Chart to Respond to Requests
 - <https://www.sec.state.ma.us/divisions/public-records/download/10-Day-Response-Flow-Chart-2018.pdf>

Any questions?

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