

OPEN MEETING AND PUBLIC RECORDS LAWS - RESOURCES

**NAHANT
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PRESENTED BY LAUREN F. GOLDBERG, ESQ.

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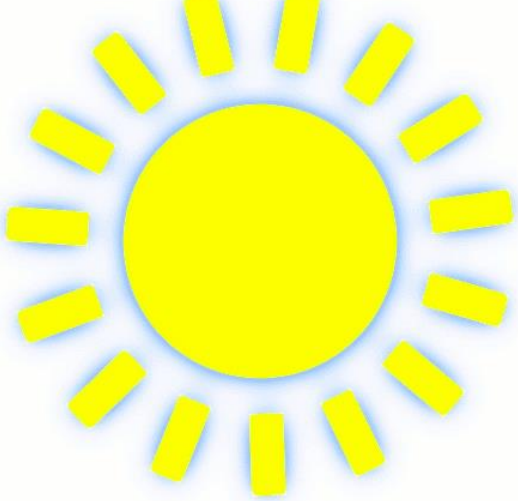


THE LEADER IN PUBLIC SECTOR LAW
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Sunshine Laws

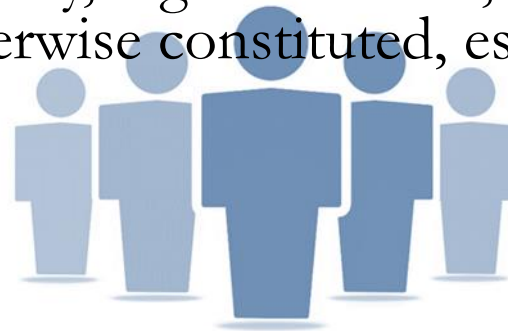
- Under the Open Meeting Law (“OML”), public bodies can only conduct business through public meetings, unless an exemption allowing executive session exists
- Under the Public Records Law (“PRL”), virtually any record created or received by a government employee or official is subject to mandatory disclosure
- 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

****All communications between a quorum of members must occur at a properly posted meeting****

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
- (b) Location (including ADA accessibility)
- (c) Level of detail

2. Purpose

- (a) Presumption for open session
- (b) Limited authority to meet in closed (executive) session

3. Minutes

- (a) Content
- (b) Timing (within three meetings or 30 days, whichever is later)
- (c) Approval

Meetings - Exceptions

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;
 - Reports or documents that may be discussed at an upcoming meeting, so long as the material does not express the ideas, feelings, beliefs, opinions of a member of the body.
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

Deliberation–Email

-  now explicitly addressed in the OML
- A quorum may not use e-mail to share their feelings, ideas, beliefs, or 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 emails
- ✓ Use **e-mail ONLY for scheduling** 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 is also subject to the OML

Practical approaches to avoid violations:



- ✓ Do not direct comments to other members of body
- ✓ If matter directly involves issue pending before body, not engaging
- ✓ 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

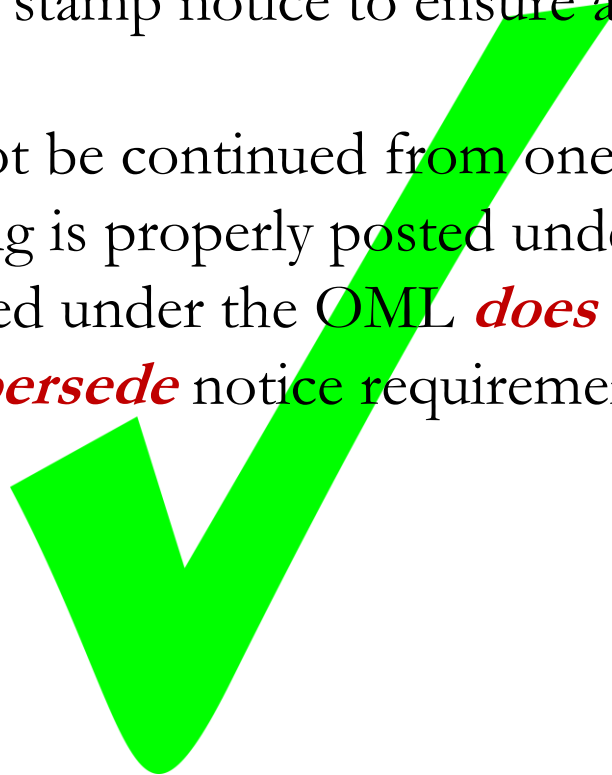


Notice/Agenda

- The meeting notice (aka “agenda”) must be posted at least 48 hours prior to the meeting, not counting Sat., Sun., or legal holidays.
- The notice must include "the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting."
- Topics must be sufficiently specific to “reasonably advise the public of the issues to be discussed at the meeting.”
940 CMR 29.03(1)(b)

Posting - Practical Considerations

- Clerk should time stamp notice to ensure accurate record exists of filing.
- A meeting may not be continued from one night to the next ***unless*** the 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...

- Write out terms that may not be familiar to the general public (i.e. replacing "HUD CPD HOME" with "Department of Housing and Urban Development Community Planning and Development HOME Investment Partnerships Program").
- Meeting notice 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, and specify what was updated.

What can we talk about???

- **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**

- Poor planning does not equal an emergency!
- Natural disasters and public health safety issues do qualify as emergencies. Pre-COVID-19, emergencies were typically limited to weather-related issues
- **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.



REMOTE MEETINGS

- General Court extended remote AND hybrid meeting options until April 1 – See Section 20 of Chapter 20 of the Acts of 2021
 - Public bodies are not required to hold meetings in locations that are open to the public, provided that they provide access through adequate, alternative means.
 - Such access may be provided through :telephone, internet, or satellite enabled audio or video conferencing or any other technology
 - Members of a board may meet in person, remotely, or in a hybrid environment

REMOTE MEETINGS

- Same rules apply to remote meetings as to in-person meetings
- Public participation is not required in general business meetings of a public body.
- If public body allows public participation or if meeting is also public hearing, members of the public must be able to communicate with the body and be heard by other members of the public.
- The Attorney General takes the position that if any members of the public are permitted to attend in person, there must be enough room for all those who have a matter before the board to also be in person.
- If in-person attendance is permitted, must comply with any applicable laws, regulations or rules relative to building use; if can't do that, *meeting must be postponed* or moved to a larger location.

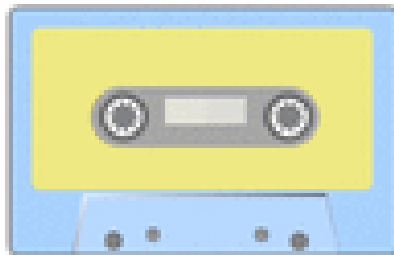
REMOTE MEETINGS

Final Tips

- When meetings are conducted virtually, the meeting notice must provide instructions as to how the public can view and participate in the meeting.
- All votes taken in a virtual meeting must be by roll-call vote, even if the vote is unanimous.
- Notice must be posted at least forty-eight hours prior to any meeting, including a remote meeting, and the notice must contain a detail list of topics the chair anticipates will be discussed; for executive session, that will also include referring to the appropriate exemption; minutes must be kept

Conducting Meetings - Recording

- Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute).
 - In the Covid-19 OML environment, if the meeting is being held remotely, the Chair should inform those present about the remote nature of the meeting.
- Recording by individuals:
 - Must inform the Chair;
 - Chair must make required announcement;
 - Chair may reasonably regulate recordings (placement, operation of equipment)



Executive Session



Process:

- 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.

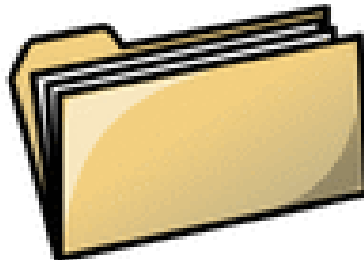
Executive Session – Practical Issues

- 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.



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 timely manner.

- 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.



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:

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.

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.



Recent Notable Court Decisions

- 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.

Any questions?

Lauren F. Goldberg, Esq.

KP Law, P.C.

101 Arch Street, 12th Floor

Boston, MA 02110

(617) 556-0007

www.k-plaw.com

