

[Open Meeting Law]

Town of Norton
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THE LEADER IN MUNICIPAL LAW
ATTORNEYS AT LAW

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[Purpose]

"The open meeting law is designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based."

Ghiglione v. School Committee of Southbridge,
376 Mass. 70, 72 (1978)



[Open Meeting Law – Fact or Fiction?]

Are these statements true or false?

- A meeting of a governmental body must begin with pledge of allegiance.
- An agenda be prepared or posted.
- Notice of a meeting must be published in a newspaper, aired on cable television, or mailed to abutting property owners.

[Open Meeting Law – Fact or Fiction?]

Are these statements true or false?

- Persons must be provided with the opportunity to speak.
- Meeting must be continued because of the lateness of the hour or because a particular individual cannot attend.
- The law dictates when during an open meeting the governmental body chooses to enter executive session.

[Open Meeting Law – Fact or Fiction?]

- AG Decision 5-4-11 (Sturbridge)
 - OML does not govern what information a public body may accept and consider
 - OML does not govern whether a public body must hold a public hearing on a particular topic
 - BOS did not violate OML in refusing to consider information submitted by applicant or hold hearing

[Open Meeting Law – Fact or Fiction?]

Are these statements true or false?

- The notice provided under the Open Meeting Law substitutes for notice required under other statutes.
- The law requires governmental bodies to audiotape or videotape their meetings.
- The law requires decisions made in executive session to be announced in open session.

[Overview of the Revised Open Meeting Law [OML]]

- Centralizes enforcement in Attorney General's office
- Alters important statutory definitions
- Imposes new requirements for: notices, minutes, executive sessions, exemptions, member participation and related administrative matters



[Chapter 28 of the Acts of 2009]

- OML portions effective July 1, 2010
- Repealed G.L. c.39, 23A-23C
- Revised OML codified at G.L. c.30A, 18-25
- Regulations and guidance from AG's Office



[Alters Important Statutory Definitions]

- Deliberation
- Meeting
- Governmental body



[Deliberation]

- "[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..." with certain express exceptions.



[Deliberation (cont.)]

- Specifically includes e-mail communications
- Provided that no opinions of governmental body are expressed, specifically excludes:
 - Distribution of meeting agenda
 - Scheduling information
 - Distribution of other procedural meeting materials, reports or documents that may be discussed



[Meeting]

- "[A] deliberation by a public body with respect to any matter within the body's jurisdiction..." with certain express exceptions.



[Meeting (cont.)]

- Specifically excludes:
 - A quorum at an on-site inspection
 - Attendance by a quorum at a conference or training program or a media, social or other event
 - Attendance by a quorum at meeting of another governmental body
 - A meeting of a quasi-judicial board held for the sole purpose of making a decision in an adjudicatory proceeding



[Public body]

- "[A] multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; ...and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body."



[Public body (cont.)]

- "Governmental body" now "Public body"
- Includes subcommittees, which include any multiple-member body created to advise or make recommendations to a public body



[Emergency]

- Definition unchanged; threat to public health and safety
- Now requires posting as soon as reasonably possible;
- Practical recommendations:
 - limit its deliberations to the emergency matter
 - take minutes of its meeting, and review and include with minutes of next regularly scheduled meeting.
 - when posting emergency meeting, consider posting a regular meeting as well, to allow body ratify the action taken at emergency meeting.



[New Requirements and Additional Regulation]

- Notice
- Minutes and documents used at meetings
- Executive sessions
- Exemptions to OML
- Participation by members
- Related administrative matters



[Notice]

- Shall include "a listing of topics that the chair reasonably anticipates will be discussed at the meeting"



[Notice]

- Notice must include particular details of matters to be discussed by body that the Chair reasonably anticipates at least 48 hours prior thereto
- E.g., OML 2011-15 (Melrose) – AG concluded that School Committee violated law by failing to include in notice of meeting name of non-union personnel with whom it would be negotiating.



[Notice]

- E.g., OML 2011-9 (Natick) –AG concluded that School Committee violated law by failing to include specific details of proposed vote on Town Meeting warrant articles where item simply listed "Town Meeting Update"
- Recommended that notice should have said, "Discussion of Town Meeting Warrant Articles 1, 9, 10, 18, 32, 33 and 35. The School Committee may vote to recommend action on these articles at Town Meeting."



[Notice]

- E.g., OML 2011-11 (Freetown) – AG concluded that notice for Soil Board hearing was deficient where it listed "Renewal of Fall Soil Permits", as it reasonably anticipated that particular permits would be considered and "it should take the additional step of listing into meeting notice the details of those specific permits, including the name of the applicant and the location under consideration."



[Notice]

- E.g., OML 5-4-11 (Sturbridge) AG stated that although Board of Selectmen did not violate law by discussing matter not listed on meeting notice (matter was raised by member of public and not reasonably anticipated), body was "strongly encourag[ed] . . . not to consider topics that may be controversial or of particular interest to the public until the topic has been properly listed in a meeting notice in advance of a meeting."



[Notice]

- Must be posted in manner conspicuously visible to the public at all hours in or on municipal building housing clerk's office; regulations allow posting on website
- Requires posting 48 hours in advance of meeting excluding Saturdays, Sundays and legal holidays



[Minutes]

- Must include:
 - Date; time; place; members present and absent, and action taken at each meeting
 - A summary of the discussions on each subject
 - The decisions made and "action taken," including a record of all votes
 - A list of documents and other exhibits used by the body at the meeting
 - The documents and other exhibits used are "official record" of meeting, in addition to minutes



[Minutes (cont.)]

- Open meeting minutes shall not be withheld under any of the exemptions to the Public Records Law, except:
 - the following materials shall be exempt as personnel information:
 - materials used in a performance evaluation of an individual bearing on his professional competence that were not created by members of the body for purposes of the evaluation; and
 - materials used in deliberations about employment or appointment of individuals, including applications and supporting materials and excluding resumes



[Executive Session Minutes]

- Must be disclosed when purpose of exemption has been met, unless otherwise protected
- Must be reviewed periodically by chair or public body
- Must be provided within 10 days in response to request, unless review not yet undertaken (then by board's next meeting or 30 days, whichever occurs first)



[Executive Session Minutes (cont.)]

- **Must also contain:**
 - **The roll call vote of each member to go into executive session;**
 - **Cited statutory purpose of the executive session; and**
 - **Whether the governmental body will return to public session after the executive session is concluded.**

[New Executive Session Requirement]

- Before going into the executive session, the chair must state the purpose for the session, "stating all subjects that may be revealed without compromising the purpose for which the executive session was called".



[Exemptions to OML – Executive Sessions]

- Combines current exemptions (1) and (2), as follows:
 - "(1) To discuss the 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. ..."
- Adds right of individual to create independent record of session at own cost



[Exemptions (cont.)]

- Divides previous exemption (3) into two:
 - "2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
 - "3. To discuss 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 ..."
- Adds requirement that chair declare "detrimental effect" for certain exemptions



[Administrative Matters]

- Allows remote participation in meetings if authorized by AG and chair and quorum physically present – currently not authorized – draft regulations issued would prohibit members of a municipal public body from participating remotely because of geographic distance
- Requires permission of chair to address meeting (no change)
- Certification of receipt of OML, regulations and AG educational materials; held by appointing authority, city/town clerk; must be provided within 2 weeks of taking office.



[Administrative Matters (cont.)]

- Recording
 - Person seeking to record meeting must notify chair;
 - Chair must notify meeting that it is being recorded;
 - Recording, including transmission through any medium, is "subject to reasonable requirements of the chair as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting."
- Appears intended to address inconsistency between former OML and so-called State Wiretap Statute, G.L. c. 272, §99, which prohibits secret recordings of oral communications.



[E-mail, etc.]

- Even before new OML was adopted, nearly unanimous opinion among district attorneys that e-mail exchange among a quorum of members, or a serial e-mail exchange among a quorum, was a violation of OML. Now e-mail is explicitly addressed.

[E-mail, etc.]

- E.g., OML 2011-14 (Wakefield) prohibits exchange of e-mail in which members express opinions about substantive matters, even where such distribution is intended to be discussed at a future meeting; such "opinions" may be as limited as, "I suggest we go with this version based on Joe's feedback."

[E-mail, etc. (cont.)]

- Over the past few years, alternative electronic communications have also become more prevalent, including the use of instant messaging, blogging, and social networking such as Facebook, MySpace and Twitter.
- Communications among a quorum on these types of services also appear to implicate the OML.

[E-mail, etc. (cont.)]

- Potential transactions that could lead to a violation:
 - An e-mail, voice mail, IM, posting, or blog originally addressed to one member of a public body subsequently forwarded to, or reviewed by a quorum of members;
 - An e-mail, voice mail, IM, posting or blog sent to a quorum of members of a public body; and
 - A web-based discussion group, chat room or social networking site where a quorum is participating, whether contemporaneously or in serial fashion.

[Public Records Law]

- All e-mail or other electronic form of communication related to municipal business is likely to be considered a public record.
- Whether municipal-related e-mail or other electronic communication is created at Town Hall or on a person's private computer, likely considered a public record subject to all requirements of the Public Records Law.

[Public Records Law (cont.)]

- If a violation of the Open Meeting Law occurs as a result of such electronic communication, one remedy often required by the district attorneys was the production of the communication, and the placement of the same as an addendum to the minutes of a properly posted meeting or filed with the Town Clerk.

[Role of the Attorney General's Office]

- Oversight and enforcement of OML
- May void action taken in violation of OML
- May reinstate employee if violation found regarding employment action
- Promulgate rules and regulations, interpret OML and issue written letter rulings or advisory opinions



[Enforcement]

- Filing Complaint
 - Must first file written complaint with public body, within 30 days of alleged violation
 - Public body must forward complaint to AG within 14 days of receipt and inform AG of any remedial action taken
 - Not less than 30 days after date complaint was filed with public body, complainant may file a complaint with AG



[Enforcement (cont.)]

- Remedial action may include:
 - making minutes of improperly called or held executive session public by including them as an addendum to minutes at a properly called meeting, or filing with Town Clerk
 - creating minutes if the same were not properly created
 - providing for public debate and voting on matters considered at an improperly called or held meeting



[Enforcement (cont.)]

- Cure - Consistent with prior case law, the AG recognizes: "Public deliberation (at a properly posted open meeting) effectively cured 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 to merely a ceremonial acceptance or perfunctory ratification of a secret decision. See In OML 2011-14 (Wakefield)



[Enforcement (cont.)]

- Review by the Attorney General
 - Whether there has been a violation
 - Must hold a hearing before imposing civil penalty
 - If a violation is determined to have occurred, the AG must determine whether the public body, or one or more of its members, or both, are responsible, and whether the violation was intentional or unintentional



[Enforcement (cont.)]

- Upon the finding of a violation, the AG may issue an order to:
 - Compel immediate and future compliance with OML;
 - Compel attendance at authorized training session;
 - Nullify in whole or in part any action taken at meeting;
 - Impose civil penalty upon public body of not more than \$1,000 for each intentional violation;
 - Reinstate employee without loss of compensation, seniority, tenure or other benefits;
 - Compel that minutes, records or other materials be made public; or
 - Prescribe other appropriate action



[Enforcement (cont.)]

- Judicial Review of AG Order
 - A public body or any member aggrieved by order may file certiorari action in Superior Court within 21 days of receipt of order
 - AG order stayed pending judicial review
 - If AG order nullifies action, public body shall not implement action



[Enforcement (cont.)]

- Compliance
 - AG may file action in Superior Court to compel compliance with order or payment of civil penalty
- Alternative procedure
 - AG or 3 or more registered voters may initiate civil action in Superior Court to enforce OML



[Enforcement (cont.)]

- Burden of proof
 - Burden on public body to show by a preponderance of the evidence that the action complained of was in accordance with and authorized by OML
- Advice of counsel defense
 - Defense to imposition of civil penalty that public body acted in good faith compliance on advice of legal counsel



[Resources]

- Attorney General's Division of Open Government

<http://www.mass.gov/?pageID=cagosubtopic&L=3&L0=Home&L1=Government&L2=The+Open+Meeting+Law&sid=Cago>

Phone: (617) 963-2540

[Resources]

- Secretary of the Commonwealth's
Public Records Division

<http://www.sec.state.ma.us/pre/>

Phone: (617) 727-2832

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