



TOP 10 CHANGES IN THE NEW OPEN MEETING LAW

10. All persons serving on "public bodies" to receive Attorney General's version of Open-Meeting-Law, regulations and educational materials. Town or City Clerk or designee shall maintain written certifications of receipt.
9. 48 hour notice – still required, but now cannot count Saturdays, Sundays or holidays. Example: Monday night meeting must be posted before Thursday night.
8. Notices must (1) include list of topics chair reasonably anticipates will be discussed, i.e., an agenda, and (2) be posted in or on municipal building to be visible to public *at all hours*.
7. Emails are expressly included in definition of "deliberation," which is prohibited outside of open session; but distribution of agendas, scheduling information or reports to be discussed at future meetings is permitted.
6. Attendance by a quorum at a location is not a "meeting" if not intended to conduct business and no deliberation occurs – for example, attending a conference, social event, or a meeting of another municipal board. In addition, a meeting of a quasi-judicial board solely to make a decision required in an adjudicatory proceeding is not a "meeting".
5. Minutes must contain more detailed information. In addition to date, place, time and matters discussed, they must include summaries of matters discussed, list of documents used, and all decisions made and actions taken, including a record of all votes (yeas, nays and abstentions).
4. Documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.
3. Chair required to periodically review executive session minutes and determine if they should be released, or if purpose for executive session is still ongoing to keep minutes confidential.
2. Attorney General will assume broad interpretation and enforcement authority over Open Meeting Law; District Attorneys no longer involved.
1. Citizens making complaints of Open Meeting Law violations must file written complaint with the public body first. Then the body submits reply to complainant and Attorney General's office.

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January 20, 2010

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: The New Open Meeting Law – An Overview

On July 1, 2009, Governor Patrick signed into law Chapter 28 of the Acts of 2009, entitled “An Act to Improve the Laws Relating to Campaign Finance, Ethics and Lobbying.” The Act made extensive changes to the lobbying laws and Chapter 268A, the Conflict of Interest Law (we issued Memoranda on the Chapter 268A changes dated September 3 and November 6, 2009), as well as an overhaul of the Open Meeting Law. However, the portions of the Act relative to the Open Meeting Law (“the Law”) were expressly designated to go into effect on July 1, 2010. Prior to that date, it is anticipated that the Office of the Attorney General will issue detailed educational materials, regulations, and guidance regarding the manner in which the law will be implemented. Given the importance of the Law to all municipal boards, however, board members and other municipal officials should begin familiarizing themselves with these important changes.

As of July 1, 2010, the current Open Meeting Law provisions, G.L. c.39, §§23A-23C will be repealed. The revised Open Meeting Law will be found at G.L. c.30A, §§18-25. Some of the important differences are highlighted below. We will provide separate memoranda, however, regarding new requirements for taking and maintaining minutes and the transition of enforcement authority from the District Attorneys to the Attorney General.

1. Definitions

The revised Law contains some significant changes to defined terms, highlighted below:

- “Deliberation” is communication between or among a quorum of a public body.
 - Explicitly includes communications by e-mail and other written medium;
 - The following are specifically excluded from the definition, provided no opinions of members are expressed:
 - distribution of a meeting agenda;
 - scheduling information; or
 - distribution of other procedural meeting materials, or reports or documents that may be discussed at the meeting.

It is significant that the Law specifically refers to “email” as constituting deliberation. Be advised, however, that similar types of electronic communication, such as blogging,

2. Notice

Certain notice requirements have been revised and are summarized below:

- Any public meeting (except for emergencies) must still be posted at least 48 hours in advance of the meeting. It should be noted, however, that in addition to Sundays and holidays not being counted, *Saturdays* cannot be counted for this purpose under the new Law. This means, for example, that for any meeting scheduled for a Monday evening at 7:00 p.m., notice must be posted not later than 7:00 p.m. on the preceding Thursday.
- Notice of any open meeting shall include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” Many boards already have a practice of posting an agenda as part of the notice, although agendas were not required under G.L. c.39, §23B. Under the new Law, a list of anticipated topics must be included. Boards will still be able to accommodate last-minute and/or unforeseen matters (i.e., not anticipated), as the Law does not prohibit a board’s consideration of such matters. Boards may wish to include in their posted agendas entries for “New Business” and “Old Business” to provide notice to the public that matters not specifically named on the agenda may be handled.
- Notice must be posted in a manner “conspicuously visible to the public at all hours in or on the municipal building in which the clerk’s office is located.” (emphasis added). While the new Law expressly recognizes electronic posting (i.e., on a city or town website), it also requires posting in a form visible at all hours to passers-by at City or Town Hall. For those buildings that do not already post written notices in a glass case or on the front door, some visible posting location must be devised to comply with this new requirement.

3. Remote Participation

Most District Attorneys have interpreted the current Open Meeting Law as prohibiting participation by a board member by electronic means, such as speaker phone, teleconferencing or videoconferencing. The new Law provides that the Attorney General may permit such remote participation, but only by issuing a regulation or a “letter ruling” setting forth the permitted procedure. It is likely that the Attorney General will allow some form of remote participation, but the Law provides that all members and the public must be able to hear each other and that there must be a quorum of the body physically present in the room. The Law also prohibits the chair from participating remotely. In our opinion, this means that if the chair is not present, the vice-chair or another member designated as temporary chair should run the meeting from the meeting room. Remote participation should not be used until authorized by the Attorney General.



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Re: The New Open Meeting Law – Taking and Maintaining Minutes

The revised Open Meeting Law [G.L. c.30A, §§18-25], which takes effect on July 1, 2010, will continue to require that multi-member bodies subject to the law take minutes of all meetings, including executive sessions. There are new requirements, however, that municipal boards and their recording clerks must be prepared to follow to comply with the Law. This memorandum will address the responsibility for keeping minutes generally and highlight the major new provisions that will become law in July.

The Open Meeting Law and the Public Records Law require public bodies to prepare accurate meeting minutes to serve as a permanent record of the meeting, but do not require that a transcript, written or otherwise, be prepared. The current Open Meeting Law, G.L. c.39, §§23A-23C, applies to all “governmental bodies,” which are statutorily defined to include every multiple member municipal board, commission, committee or subcommittee, whether elected, appointed or otherwise constituted, but excludes Town Meetings. The new Law, while changing the name to “public bodies,” covers the same entities (and in fact broadens the scope of covered bodies, as discussed in our “Overview” memorandum). The current law provides that, at a minimum, minutes must set forth the date, time and place of the meeting, the identity of the members present or absent and all action taken. *In addition* to these requirements, the new Law calls for the following information to be included:

- a summary of the discussions on each subject;
- a list of documents and other exhibits used at the meeting;
- the decisions made and the actions taken at each meeting, including the record of all votes.

The minutes still need not be a verbatim transcription of everything that was said at the meeting. Rather, the minutes must reflect a summary of each discussion. When votes are taken at a meeting, however, the Public Records Law, G.L. c.66, §5A, requires that the minutes record exactly each vote taken.

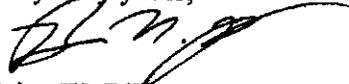
The new Law also requires that “documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.” While many boards maintain copies of large plans and maps, for example, as part of a particular project file,

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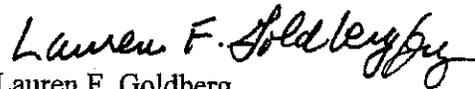
This latter provision will require a regular and systematic review of outstanding executive session matters. For example, it appears that a board could be required, within 10 days of a request for executive session minutes, to turn over a copy of the minutes even if the board has not yet determined that the purpose of the executive session is completed. In addition, the previous requirement seems to give the chair of the body authority to make that determination individually, which is a broad departure from the current practice of evaluating executive session minutes *within* an executive session. Minutes from executive sessions that have not been completed will still be exempt from disclosure. The new Law is clearly aimed, however, to address concerns about boards not going back and completing the process of wrapping up executive session matters and releasing such minutes to the public in a timely manner.

As with certain other aspects of the new Open Meeting Law, we anticipate that the Attorney General will issue regulations or advisories as to how the amended minutes requirements should be implemented. All multi-member boards and their recording clerks should begin to familiarize themselves with these requirements now, however, to prepare for their implementation on July 1, 2010.

Very truly yours,



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January 20, 2010

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
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Re: The New Open Meeting Law – Role of the Attorney General

One of the most compelling changes included in the new Open Meeting Law [G.L. c.30A, §§18-25, effective July 1, 2010; hereafter “the Law”] is the removal of District Attorneys as the interpreters and enforcers of the Law and the centralization of this authority in the Office of the Attorney General. We do not anticipate that the Attorney General will adopt significantly different readings of the provisions of the Law that carry over from the current version. Based on the many new provisions and some new and far-reaching enforcement authority, however, municipal boards and officials should be aware of the Attorney General’s role under the new Law. We expect that the Attorney General will issue regulations and advisories regarding the new Law. This memorandum will address the principal changes in the enforcement of the Open Meeting Law taking effect in July.

Under the new Law, all enforcement authority will be under the Attorney General. A Division of Open Government will be created within the Office of the Attorney General, led by a Director of Open Government, which will handle all of the responsibilities created under the new Law. An “Open Meeting Law Advisory Commission” will also be created, consisting of representatives of state government, the Massachusetts Municipal Association, the Massachusetts Newspaper Publishers Association and the Attorney General. The Commission will analyze the new Law and make recommendations to the Attorney General for regulations and for training initiatives for state and local bodies subject to the Law.

Under the current Law, an individual that believes a public body has violated the Law may submit a written complaint to the local District Attorney. The District Attorney investigates the complaint, assesses whether there has been a violation, and issues a determination to the body as to any actions necessary to remedy the violation. While rarely used, the District Attorney could also enforce violations through civil or criminal actions. Under the new Law, however, the complainant must first file a written complaint with the *public body itself*. The public body shall, within 14 days of receipt, forward a copy of the complaint to the Attorney General and inform the Attorney General of any remedial action taken. The Attorney General may authorize an extension of the time to respond for “good cause.”

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Not less than 30 days after the date the complaint is filed with the public body, the complainant may file a complaint with the Attorney General if he or she believes the public body has not sufficiently addressed the alleged violation. The Attorney General must then determine whether there has been a violation and, before imposing a civil penalty, shall hold an administrative hearing on the complaint. Following a determination that a violation has occurred, the Attorney General shall determine whether the public body, or one or more of the members, or both, are responsible and whether the violation was intentional or unintentional.

Upon the finding of a violation, the Attorney General may issue an order to:

1. compel immediate and future compliance with the open meeting law;
2. compel attendance at a training session authorized by the Attorney General (i.e., conducted by the Division of Open Government or other authorized source);
3. nullify in whole or in part any action taken at the meeting;
4. impose a civil penalty upon the public body of not more than \$1,000 for each intentional violation;
5. reinstate an employee without loss of compensation, seniority, tenure or other benefits;
6. compel that minutes, records or other materials be made public; or
7. prescribe other appropriate action.

Remedy 5 in particular is a significant departure from the current Law. While a District Attorney could, in theory, request that a court reinstate a terminated employee for Open Meeting Law violations in the termination process, the new Law authorizes the Attorney General to make such an order directly to the public body. This remedy could obviously have substantial consequences if a terminated employee is suddenly entitled to reinstatement, based only upon what is determined to be an improper open meeting or executive session. While it is, of course, important that *every* meeting be conducted in accordance with the Law, public bodies should take particular care to insure that any meeting that may lead to a suspension, termination or other disciplinary measure comply with all notice and posting requirements and that all executive session procedures are followed and documented.

A public body or any member of a body aggrieved by any order issued by the Attorney General may obtain judicial review of the order through an action in Superior Court. Any such action, however, must be commenced in Superior Court within 21 days of receipt of the order. Any order issued by the Attorney General that is appealed will be stayed pending judicial review. In addition, however, if the order nullifies an action taken by the public body, the body also cannot implement such action pending judicial review.

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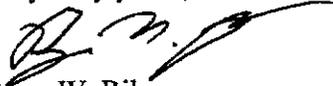
If any public body or member fails to comply with the requirements set forth in any order issued by the Attorney General, or fails to pay any civil penalty imposed within 21 days of the date of issuance of such order (or within 30 days following the decision of the Superior Court upholding the Attorney General's order), the Attorney General may file an action in Superior Court to compel compliance. It should be noted that if the public body does not appeal the Attorney General's order and also fails to comply with such order and the Attorney General brings litigation to compel compliance, the body is prohibited from contesting the merits of the order in court. The Court may also impose any of the remedies given to the Attorney General listed above.

In the alternative, the Attorney General or three or more registered voters of the municipality may initiate a civil action in Superior Court to enforce the Open Meeting Law. In any court hearing, the burden will be on the public body to show, by a "preponderance of the evidence," that the action complained of in such complaint was in accordance with and authorized by the Law. It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel. The courts will have an expedited hearing process on such actions, requiring an answer to be filed within 10 days and setting a hearing date to provide "the speediest possible determination of the cause consistent with the rights of the parties."

Finally, the Attorney General has authority to initiate an independent investigation of an alleged Open Meeting Law violation and to conduct an administrative hearing and penalty procedure, at which it may compel testimony and the production of documents.

As with many other aspects of the new Open Meeting Law, the Attorney General will likely be issuing regulations and advisories as to how the enforcement process will be implemented. By becoming familiar with the Law's provisions and following them, however, public bodies will be better able to avoid actual or apparent violations and responding to complaints will be made easier as well.

Very truly yours,



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CHANGES TO THE OPEN MEETING LAW

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Overview of the Revised Open Meeting Law [OML]

- Centralizes oversight and enforcement in Attorney General's Office
- Alters important statutory definitions
- Imposes new requirements for and additional regulation of notices, minutes, executive sessions, exemptions, member participation and related administrative matters
- Significantly changes enforcement process



Chapter 28 of the Acts of 2009

- OML portions effective July 1, 2010
- Will repeal current provisions, G.L. c.39, §§23A-23C
- Revised OML will be found at G.L. c.30A, §§18-25
- Regulations and guidance from AG's Office anticipated before July



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



Alters Important Statutory Definitions

- Deliberation
- Meeting
- Governmental 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..." 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



Governmental body/ Public body

- Now known as "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 any multiple-member body "within" any town, as compared to a governmental body "of" any town
- Includes subcommittees, which include any multiple-member body created to advise or make recommendations to a public body



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



Minutes

- Must include:
 - A summary of the discussions on each subject
 - The decisions made and actions 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



Minutes (cont.)

- 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)



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 current exemption (3) into two exemptions, as follows:
 - "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
- Requires public statement by chair regarding video or audio recordings
- Requires permission of chair to address meeting
- Certification of receipt of OML, regulations and AG educational materials; held by appointing authority, city/town clerk. Within 2 weeks of taking office.



Enforcement Process

- 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.)

- 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;
 - Reinstatement of 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



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