

**TOWN COUNSEL
UPDATE ON
THE NEW OPEN MEETING LAW
(G.L. c. 30A, §§ 18-25)**

BY

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SIGNIFICANT CHANGES

- Became effective July 1, 2010
- New notice and posting requirements
- Content of minutes
- Use of documents at the meeting
- Attorney General (AG) responsible for training and enforcement
- Penalties for violation

PURPOSES OF NEW LAW

- Ensure greater transparency in government operations
- Provide more notice to public about when meetings will be held and what will be discussed
- Create uniform procedures for maintenance of meeting records



APPLICABILITY

- All town multiple member boards including subcommittees; not staff meetings.
- Meeting is a deliberation of a quorum.
- Meeting does not include site inspection, social event or training session, or attendance at another board's meeting if there is no deliberation.

POSTING

- Notice of meeting and agenda posted 48 hours in advance excluding Saturday, Sunday, holidays.
- Emergency meetings exempt.
- Agenda includes topics the chair reasonably anticipates will be discussed at the meeting.
- Topics that arise after posting should wait until next meeting if possible. OML 2011-13
- Agenda should be sufficiently detailed to apprise public.

MINUTES

- All boards shall create and maintain accurate minutes, including date, time and place, members present, votes, summary of discussion, list of documents used at the meeting, decisions made and actions taken.
- Executive session minutes should be maintained separately until released to public.
- Minutes to be created in timely manner.
- Minutes provided within 10 days of request.
- Minutes should provide sufficient detail but need not be a transcript. “Discussion” not enough.

MEETING

- Location must be accessible to citizens.
- This means location should be in town or close by.
- Public has right to see and hear meeting. If room is too small, board must seek another location.
- Right to record meeting. Chairman shall announce if meeting being recorded.
- Chairman runs the meeting, including whether to allow public to speak.

Attorney General's Role

- New Division of Open Government
- Adopt regulations and issue letter rulings
- Provide training and outreach
- Investigate violations and enforce the new law
- Require new public body members to certify receipt of copy of law

AG's Regulations

- 940 CMR 29.00
- Address specific provisions of new law:
 - Definitions
 - Alternate notice and posting methods
 - Complaint and investigation procedures
 - Advisory opinions
 - What constitutes a knowing and willful violation
 - Remote participation

REMOTE PARTICIPATION

- Members are encouraged to attend in person but may participate remotely under certain circumstances if BOS votes to authorize
- BOS may generally accept the AG regulations or may adopt more stringent requirements.
- Each individual board may adopt its own restrictions after BOS authorizes.

REMOTE PARTICIPATION

- All members must be audible
- At least a quorum must attend in person
- Remote participants may vote
- Participation by telephone, internet, satellite enabled audio or video conferencing, or other technology that makes all members audible – public body to determine acceptable method

REMOTE PARTICIPATION

- Reasons:
 - Personal illness
 - Personal disability
 - Emergency
 - Military service
 - Geographic distance

REMOTE PARTICIPATION

- Responsibilities of Chair or Acting Chair:
 - Determine that the person's attendance is unreasonably difficult for one of the permitted reasons
 - Announce at start of meeting
 - When feasible, distribute materials to remote participants in advance
 - Address technical difficulties and may suspend discussion if problem interferes with audibility

REMOTE PARTICIPATION

- Member must submit request to chair as soon as reasonably possible
- All votes in which remote participant participates must be by roll call
- If participating in executive session, must state no one else is present

PURPOSES OF EXECUTIVE SESSION

1. 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 (subject to certain rights of individual)
2. Negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel
3. Collective bargaining or litigation strategy
4. Deployment of security personnel or devices, or strategies with respect thereto
5. Investigate charges of criminal misconduct or consider filing criminal complaints
6. Purchase, exchange, lease or value of real property

PURPOSES OF EXECUTIVE SESSION

7. Comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements
8. Consider or interview applicants for employment or appointment by a preliminary screening (not including applicants who have passed a preliminary screening)
9. Meet or confer with a mediator with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity, provided that (i) vote to mediate is taken in open session and the purpose is disclosed; and (ii) action taken on the subject is voted in open session
10. Discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier, municipal aggregator, or cooperative of government entities

EXECUTIVE SESSION PROCEDURES

1. The body must first convene in an open session;
2. Majority of members vote to go into executive session and the vote of each member is recorded by roll call and entered into the minutes;
3. Before the executive session, the chair shall state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called;
4. Chair shall publicly announce whether the open session will reconvene at the conclusion of the executive session; and
5. Accurate records of the executive session shall be maintained pursuant to section 23.

EXECUTIVE SESSION PROCEDURES

- For litigation/collective bargaining, real estate, and interviewing applicants, chair must state that open session would have a detrimental effect
- Vote to enter executive session and all votes during executive session must be by roll call vote recorded in the minutes

EXECUTIVE SESSION MINUTES

- Chair or designee must review
 - At “reasonable intervals” to see if continued non-disclosure is still warranted
 - Determination announced at next meeting and included in meeting minutes
 - Must respond to request for minutes within 10 days
 - If body has not already reviewed minutes and there is a request, body is to review minutes and release non-exempt minutes no later than body’s next meeting or within 30 days, which ever first
 - Cannot assess fee for time spent in review

DISCLOSURE OF EXECUTIVE SESSION DISCUSSIONS

- The OML is silent on responsibilities of individual public body members to keep executive session discussions confidential
- AG declines to comment on premature disclosure of confidential executive session discussions. Auburn Bd. of Selectmen OML 2011-29.

BUT...

DISCLOSURE OF EXECUTIVE SESSION DISCUSSION

- Improper disclosure is a violation of the Conflict of Interest Law. G.L. c. 268A, §23.
- State Ethics Commission advises:

The law prohibits you from publicly revealing confidential information, or from using it for private or political purposes. Anything that is not a "public record" under the Massachusetts Public Records Law is considered confidential. Remember that matters discussed while the board is in executive session are confidential until after the executive session minutes are released as public records.

AG RESOURCES

- AG determinations regarding alleged violations of the new OML are posted on the AG's website
- Also posted on website are OML Guide, regulations, and FAQ's

SELECTED DETERMINATIONS

- Agenda must identify applicant, property location, and permit number for annual permit renewals. OML 2011-11
- Agenda should identify specific warrant articles to be discussed if reasonably anticipated. OML 2011-7

SELECTED DETERMINATIONS

- Email from one member of a committee to a quorum of the committee which contains opinions or information within the scope of the committee's jurisdiction constitutes deliberation in violation of OML, even if no other member replies to the email. OML 2012-93; OML 2012-84

ENFORCEMENT

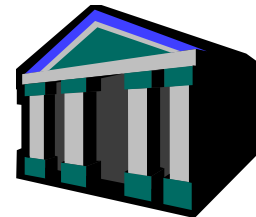
- Complaint filed in writing with Town Clerk within 30 days of occurrence or discovery of alleged violation
- Public body must review within 14 business days
- Public body must take remedial action if appropriate and send copy of complaint and description of remedial action to AG, with copy to complaining party
- Complainant may apply to AG for further action if not satisfied

PENALTIES – NO HEARING

- Informal action – telephone call or letter explaining violation and clarifying obligations, providing reasonable time to comply with remaining obligations
- Formal action – AG may issue order to require:
 - Immediate and future compliance with OML
 - Attendance at a training session
 - That minutes, records or other materials be made public
 - Other appropriate action

PENALTIES – AFTER HEARING

- AG may issue order to require:
 - Immediate and future compliance with OML
 - Attendance at a training session
 - Nullification of action taken
 - Fine issued to public body up to \$1,000 per intentional violation
 - Reinstate employee without loss of benefits
 - That minutes, documents or other records be made public
 - Other appropriate action
- Can appeal to Superior Court



INTENTIONAL VIOLATIONS

- Following determination that violation has occurred, AG determines whether violation was intentional or unintentional
- May impose fine on public body only if intentional
- “Intentional violation” is defined as “an act or omission by a public body or a member thereof, in knowing violation of the open meeting law.”

INTENTIONAL VIOLATIONS

- Act or omission by public body or member thereof in knowing violation of OML. Evidence of intentional violation: Acting with specific intent to violate the law, acting with deliberate ignorance of the law's requirements, or acting in violation of the law where the public body or member has been informed previously by receipt of a decision from a court of competent jurisdiction or advised by the Attorney General that such conduct violates the law.

INTENTIONAL VIOLATIONS

- Where a public body or public body member has made a good faith attempt at compliance with the law, but was reasonably mistaken about its requirements, or after full disclosure acted in good faith compliance with the advice of the public body's legal counsel, such conduct will not be considered a knowing violation.