

Open Meeting Law

Overview & Practical Considerations for Public Entities

Massachusetts Municipal Association Annual Meeting
January, 2020

PRESENTED BY LAUREN F. GOLDBERG, ESQ.

KP | LAW



THE LEADER IN PUBLIC SECTOR LAW
ATTORNEYS AT LAW

© 2020 KP LAW, P.C. | ALL RIGHTS RESERVED.

Disclaimer

This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship between the presenter and the recipient. You are advised not to take, or to refrain from taking, any action based on this information without consulting legal counsel about the specific issue(s).

Overview– Sunshine Laws

- Open meeting , public records and conflict of interest laws exist in virtually every state
- Purpose of such laws is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based
- Under the Open Meeting Law (“OML”), public bodies can only conduct business through public meetings, held in accordance with the OML, unless an exemption allowing an executive session exists

OML -Legal Requirements

- Meeting Notices/ Agendas
 - Meeting must be properly posted
 - 1) timing
 - 2) location
 - 3) detail
- Minutes
 - Accurate, timely prepared and approved
 - Verbatim transcripts not required, but significantly detailed
 - Guidance from AG on process for approving
- Attorney General's Office promulgated revisions to the Open Meeting Law regulations in 2017

OML -Meetings

Meeting includes a **deliberation** amongst a **quorum** to discuss matters within jurisdiction of body

- The term “meeting” does not include an **on-site inspection of a project or a program**, provided that members **do not deliberate** (AG interprets this requirement very strictly)
 - ✓ **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
- The term “meeting” does not include attendance by a quorum at a **public or private gathering or social event**, provided that members **do not deliberate**
 - ✓ **Best practice-avoid creating the appearance** that a public body is discussing public business

Meetings- 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.
- Provided that no opinions of governmental body are expressed, deliberation specifically excludes distribution by a member of the public body 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.

Deliberation-Email & Social Media

Email is explicitly addressed in OML

- A quorum of a public body may **not** use e-mail to share their ideas, feelings, opinions, beliefs, whether serially or in a single e-mail, on board business, and may not use a non-member to avoid law.
 - ✓ **Beware of “reply to all” on emails**
 - ✓ Limit use of **e-mail to scheduling purposes**, and 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
 - ✓ Don't ask for or express opinions, ideas, beliefs in an e-mail to other members

Deliberation–Email & Social Media

Social Media. Also subject to OML

- As we all know, alternative electronic communications have become more prevalent, including blogging, instant messaging, texting, social networking such as Facebook, and Twitter. Some considerations:
 - ✓ Do not direct comments to other members of body
 - ✓ If matter directly involves issue pending before body consider not engaging
 - ✓ Be thoughtful about manner in which comments are made
 - ✓ Consider using separate accounts for campaign purposes and following election, if applicable

Meetings – Email & Social Media

- **Potential Violations.** Communications among a quorum would likely implicate the OML. There are also public records implications.
 - 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 by a member to a quorum of members of a public body;
 - A reply to 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;
 - A web-based discussion group, chat room or social networking site where a quorum is participating, whether contemporaneously or in serial fashion.

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.)

- Any multiple-member board, commission, committee, or sub-committee, however created or otherwise constituted, established to serve a public purpose :
 - “Within government”;
 - Empowered to act collectively; and
 - Serve a public purpose.
- The focus of the rule is on the manner in which the committee is created, either formally or informally, rather than on who created it.
- Conservative approach is to err on side of compliance with law.

Scheduling Meetings: Location

- **Accessibility**
 - √ Location of meeting must be included in notice
 - √ Location of meeting **must be accessible**; required both by the OML and the ADA
- **Practical considerations to consider include:**
 - √ Ability to meet at privately owned location
 - √ Moving meeting to different location (e.g., unanticipated attendance)
 - √ Opening door during open session

Meeting Notices - Posting

- **Requirements** - Posted at least 48 hours in advance of meeting, **excluding** Saturdays, Sundays and legal holidays unless an “emergency.”
 - For a Monday meeting, notice must be posted on Thursday
 - If Monday is a holiday, a Tuesday meeting must also be posted on Thursday
 - Notice **must state both the date and time** that the **notice is posted**
 - If revised, must state both the date and time of the original posting and the date and time of the revised posting

Meeting Notices - Content

- **Date, time and place**
- **“Listing of TOPICS that the chair reasonably anticipates will be discussed at the meeting.”** G.L. c. 30A, § 20(b).
- Note that the list of topics shall have "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." 940 CMR 29.03(1)(b).
- Interpreted by the AG to mandate that the notice include a listing of the **particular ITEMS** to be discussed, rather than general topics of discussion; **must be very detailed**.
- Regularly occurring items need more detail than simply using generic placeholders (i.e. old or new business).

Notices – Best Practices

- ✓ **Do not use acronyms or abbreviations**– clarify or spell 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")
- ✓ **Include executive sessions** – cite to specific statutory reference(s), quote text of executive session purpose; provide additional detail that would not negatively impact body; more content may be necessary!
- ✓ **Avoid general shorthand references** (i.e., “personnel”, “contract negotiations,” “real estate,” “licenses, “hiring”, etc.)
- ✓ **If executive session is planned and would be only matter on agenda, notice must also indicate open session as an agenda item**

Notices – Best Practices

- ✓ **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
 - **Note:** AG recommends that unless matter requires immediate action, should be put off to later meeting and included in posting

Meeting Notice - Emergencies

- Limited instances when a public body can meet without the requisite 48 hours advance notice/posting.
- Poor planning does not equal an emergency!
- Natural disasters and public safety issues **do** qualify as emergencies.
- **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.

Conducting Meetings

- **Order of Meeting**
- **Common areas of concern**
 - Open session/public comment session
 - Executive Session
- **Practical considerations with public participation period:**
 - Allow? **NOT required by OML.** See OML 2015-12
 - Beginning or end of meeting?
 - Controls:
 - Protect individual rights;
 - Don't try to resolve issues at time; consider adding issue as agenda item at future meeting;
 - Avoid debate;
 - Limit time per person and total time.

Executive Session

Process:

- First convene in open session beforehand.
- 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 records, exhibits and documents used in reasonable proximity to minutes.
- **Only discuss matters cited.**
- Take all votes by roll-call.

Executive Session – Practical Considerations

- 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 – Best Practices

- Date, time, place of meeting, and members present or 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 records, 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.

- Approval must occur generally within the next 3 meetings or within 30 days, whichever is later.
- Minutes 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.

Minutes - Approval

Executive Session Minutes

- May be withheld until purpose of exemption has been met, **unless otherwise protected under the Public Records Law;**
- Obligation 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.
- In response to a request, must provide a response to a request for executive session minutes within 10 calendar days and shall not assess a fee for time spent reviewing.

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.

Lauren F Goldberg, Esq.

KP Law, P.C.

101 Arch Street, 12th Floor

Boston, MA 02110

(617) 556-0007

www.k-plaw.com

