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Open Meeting Law Update

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In 2018, several court cases were decided with implications under the Open Meeting Law ("OML"), G.L. c.30A, §§18-25. As municipalities continue to develop OML best practices, these recent notable court decisions may help inform decision making.

Corey Spaulding v. Town of Natick School Committee, Middlesex Superior Court (November 21, 2018) — Public Comment During Public Meetings

In this case, the Middlesex Superior Court concluded that the Natick School Committee violated free speech rights when it silenced persons during the public comment portion of certain meetings. The School Committee had, as a matter of policy, allowed "Public Speak" segments of School Committee meetings. The court concluded that the Committee "ha[d] opened [the meeting] for use by the public as a place to assemble" and discuss School Committee-related topics, thereby creating a designated public forum for purposes of the First Amendment. Under the First Amendment, the government may only impose reasonable time, place and manner restrictions on speech occurring in a designated public forum. Thus, the court concluded that the Committee improperly limited the comments made by members of the public which were critical of the Committee, in violation of their free speech rights.

This is a Superior Court decision, and, therefore, binding only against the Natick School Committee. While the OML (G.L. c. 30A, § 20(g)) gives the public body chair latitude to regulate public participation in open meetings, this decision serves as a strong caution that such authority should not be exercised in a way to suppress free speech rights . Thus, where a multiple member body allows the public to speak during designated portions of meetings, such as "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 29, 2018) – Sufficiency of Meeting Notices

General Laws c.30A, §20(b) provides that public body meeting notices must "be printed in a legible, easily understandable format and shall contain the date, time and place of the meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting." Public bodies throughout the state continue to grapple with the level of meeting notice detail required by this language. The issue is compounded by the interpretation of the Attorney General's Division of Open Government ("Division") that this language requires meeting notices to contain a level of detail "sufficiently specific to reasonably inform the public of the issues to be discussed…."

In this case, the Suffolk Superior Court disagreed with a Division determination that the Town's Board of Selectmen ("Board") violated the OML with respect to the sufficiency of its meeting notices. Here, due to the sheer number of annual appointments to be made by the Board, and the limited space available on the Town Hall bulletin board for posting meeting notices, the meeting notice referenced "Annual Appointments" and indicated that a listing of same was on file with the Town Clerk and the Board's Clerk. The Board followed this procedure for two consecutive meetings, after being told by a Division representative that the practice was acceptable. Although the meeting notices were identical, the Division found that one notice was "sufficiently" detailed because the full list of appointments for that meeting did not fit on the bulletin board, being four pages in length. In contrast, because the list of appointments for the second meeting was only one page in length, the Division concluded that a meeting notice containing that list could have fit on the bulletin board and therefore that the notice of the second meeting was not sufficiently detailed, in violation of the OML.

The Town argued, and the Court agreed, that the Division acted arbitrarily by applying subjective criteria, such as available bulletin board space, to determine whether a meeting notice was sufficiently detailed. The court further held that the Division does not have the authority to expand the meaning of the OML by requiring more detail in meeting notices than is required by G.L. c.30A, §20(b). This is an important decision insofar as it establishes limits on the Division's authority and protects municipalities attempting to comply with the law in good faith. Attorney Gregg Corbo of KP Law successfully prosecuted this case on behalf of the Town, and the Division has not appealed the decision.

Boelter v. Board of Selectmen of Wayland, 479 Mass. 233 (2018) – Employee Evaluation Process By Public Bodies

In another case with practical implications, the Supreme Judicial Court held that the Board of Selectmen ("Board") violated the OML when written evaluations prepared by board members were shared with a quorum in advance of a meeting. Under the OML, the term "deliberation" "shall not include the distribution of a meeting agenda, scheduling information…or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed." G.L. c.30A, §18 [emphasis added].

While the Court recognized that public bodies are permitted to compile aggregate employee evaluations, it nonetheless concluded that the circulation of such evaluations between a quorum of members, in advance of a public meeting and outside of the public view, violated the OML. The critical factor in the case was that the employee evaluations at issue necessarily contained "opinions" of the Board members as the employee's performance, thus, to the Court, distinguishing these materials from other documents that are routinely circulated to board members in advance of public meetings. While the Court indicated that the distribution of materials in this case could be done in compliance with the OML if such distribution had also been "made available to the public" at the same time the documents were circulated to the Board members, such a resolution seems impracticable. Of note, subsequent to this decision, the Division updated its guidance on performance evaluations to track the Boelter decision. This will continue to be a challenging area of the law for municipal boards acting as employers.

Perez v. Gross, U.S. District Court, Mass. (December 10, 2018) – Application to Government Officials of Massachusetts Wiretap Statute, G.L. c.272, §99

This federal case addressed First Amendment principles implicated by the so-called Massachusetts Wiretap Statue, G.L. c.272, §99, with respect to audio recordings of government officials. The Wiretap Statute generally prohibits the secret recording of oral communications (aside from publicly broadcast communications) without the consent of all parties to the communication. In previous court decisions, the First Circuit Court of Appeals held that citizens could openly record law enforcement officers performing their duties in public spaces, without violating the Wiretap Statute.

In this case, the District Court concluded that the Wiretap Statute unconstitutionally prohibits secret recording of government officials, including law enforcement officers, performing their official duties in public spaces. While imposition of certain reasonable time, place and manner restrictions may still be appropriate, such as if the recording interferes with public safety, the District Court declined to make a determination as to what ultimately constitutes a "public space" or a "government official" for purposes of allowing secret recordings. In light of the decision, public officials, particularly in law enforcement, should be aware of the existence of a First Amendment right to audio record public officials performing public functions in public spaces.

This decision did not concern government officials' actions during a meeting governed under the OML, and thus did not address the requirement under G.L. c.30A, §20(f) that any person who wishes to audio or video record an open meeting must first inform the chair of the multiple member body, and the chair must announce that the meeting is being recorded. The current version of G.L. c.30A, §20(f) was adopted to address and reconcile certain inconsistencies between the older version of the Open Meeting Law and the Wiretap Statute. A crucial distinction between G.L. c.272, §99 and G.L. c.30A §20(f) is that the former criminalizes secret recordings, while the later simply provides procedural requirements for the conduct of public meetings. Nonetheless, given the relatively broad language of the District Court decision, it is theoretically possible that G.L. c.30A, §20(f) could be challenged as unconstitutional. The District Court decision is still subject to appeal, and we will keep you apprised of any developments.

Should you have any questions concerning the Open Meeting Law, please contact Attorneys Janelle M. Austin (jaustin@k-plaw.com) or Michele E. Randazzo (mrandazzo@k-plaw.com), or any other member of the firm's Government Information and Access Group at 617.556.0007.