

# Summary of the New Open Meeting Law

## I. Introduction.

Newly added statutes<sup>1</sup> due to become effective on July 1, 2010<sup>2</sup> will change the Open Meeting Law (“OML”) in ways that are important to all of us who serve in local government, whether on boards, commissions, committees, subcommittees or the City Council (collectively, “boards”). This Memorandum briefly sets forth the most important changes and offers some practical guidance under the new OML.

## II. What Kind of “Meeting” Does the New Open Meeting Law Apply To?

The new OML offers explicit instruction on some points that had been contentious under the old OML.

A. Public Bodies. What kind of body does the new OML apply to? Like the term “governmental body” under the old law, the term “public body” under the new OML covers any “board, commission, committee or subcommittee within ... any city ..., however created, elected, appointed or otherwise constituted, established to serve a public purpose.”<sup>3</sup> But unlike the prior law, there is some question whether the new OML applies even to a body created to advise a single officer for a “public purpose.”<sup>4</sup>

B. Site Inspections. When board members meet on a site, such as the Conservation Commission does to inspect wetlands (an “on site inspection of a project or program”), the new OML makes clear that it is not a meeting “so long as the members do not deliberate.”<sup>5</sup>

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<sup>1</sup> G.L. c. 30A, §§ 18 – 25 will replace current G.L. c. 39, §§ 23A - 23C.

<sup>2</sup> Pending legislation may postpone the effective date of some, but not all, changes to November 1, 2010.

<sup>3</sup> Id.

<sup>4</sup> G.L. c. 30A, § 18.

<sup>5</sup> G.L. c. 30A, § 18.

C. Attendance by One Board at Another Board's Meeting. What happens when a quorum from one board attends a posted meeting of another board? The conservative view under the old OML has been that both boards should post notice – that, in effect, it should be treated as a meeting of both boards. But now, attendance “by a quorum of a public body at a meeting of another public body that has complied with the notice requirements of the open meeting law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion by the host body and do not deliberate,” is not a “meeting” within the meaning of the new OML.<sup>6</sup>

D. Conferences and Training. It was always clear that a “chance or social gathering” does not constitute a meeting, but what if a quorum attends a convention, a press conference or a training session? The quorum may now come together without posting notice “at a public or private gathering, including a conference or training program or a media, social or other event, so long as the members do not deliberate.”<sup>7</sup>

E. Deliberation by Quasi-Judicial Bodies. After a quasi-judicial board has heard all the evidence and closed the hearing, may the members hold a meeting to deliberate in private? Under the old OML, this would not have been advisable. Now, under the new OML, they may. “Meeting” is defined in the new OML to exclude “a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it.”<sup>8</sup> Note, however, that the board must in all events comply with its own rules and regulations, which may require public deliberation.

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<sup>6</sup>

Id.

<sup>7</sup>

G.L. c. 30A, § 18.

<sup>8</sup>

Id.

F. E-Mails, Agendas and Scheduling. Under the new OML, “deliberation” is now specifically defined to include e-mail.<sup>9</sup> It is now clear that board members may exchange “a meeting agenda, scheduling information or ... other procedural” information outside a meeting, and “reports or documents that may be discussed at a meeting” may be distributed to members outside a meeting, “provided that no opinion of a member is expressed.”<sup>10</sup> These changes make explicit what had typically been understood to be good practice.

### III. How Do You Post Notice of a Meeting?

There are three big changes here: what has to be posted, when and where.

A. Agendas Required to Be Posted. For the first time, the posted notice of a meeting must include an agenda. It has always been the case that the posted notice should set forth the date, time and place of the meeting, but now the notice must also include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting.”<sup>11</sup> This means that a board which might previously have discharged its responsibility in January by giving the City Clerk a list of meeting times for the whole upcoming year is no longer going to be able to do so. Instead, each notice must list all substantive topics that the chair expects to come up at each meeting. Advance notice may still be posted, but it will have to be updated as the date of the meeting nears if, as is likely, the chair learns of items that are probably going to be discussed.

B. A Listing of Reasonably Anticipated Topics. As just noted, the notice must also include a listing of topics that the chair reasonably anticipates will be discussed at the meeting. This requirement is bound to lead to disputes. A suggestion is to include in the notice the following disclaimer language:

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<sup>9</sup>

Id.

<sup>10</sup>

Id.

<sup>11</sup>

G.L. c. 30A, § 20(b).

“The listing of topics that the chair reasonably anticipates will be discussed at the meeting is not intended as a guarantee of the topics that will have been discussed. Not all topics listed may in fact be discussed, and other topics not listed may also be brought up for discussion to the extent permitted by law.”

C. Old Business/Round Table Subjects.

What if there is a portion of the meeting dealing with old business, or a part of the meeting where the floor is opened to board members to bring up whatever subjects they wish? The best thing to do is to list such things generically (e.g., “Old Business” or “Going Around the Table”) unless the chair reasonably anticipates, more than 48 hours before the meeting, that one or more substantive issue will be discussed in such a part of the meeting -- in which case the topic should be listed in the posted notice. While there is no requirement of including times in the notice when the various topics will come up, it is still advisable to include the times of any formal, public hearings, such as when the ZBA will open a variance hearing or the Planning Board will open a definitive subdivision plan hearing.

D. Saturdays Do Not Count. As mentioned above, the rule is still that, absent an emergency, notice must be posted at least 48 hours prior to the meeting. However, under the old OML, Saturdays counted as part of the 48 hours and now they do not. (It remains the case that Sundays and legal holidays do not count.)<sup>12</sup> Suppose that a board plans to meet on a Monday at 7:30 p.m. Under the old OML, the latest that notice could be posted was the preceding Friday at 7:30 p.m. Under the new OML, notice will need to be posted by the preceding Thursday at 7:30 p.m. If a board meets on the Tuesday after a Monday holiday, it will need to post notice by the preceding Thursday. For topics that come to the attention of the public body within the 48-hour time period leading up to a meeting, the Attorney General has verbally

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<sup>12</sup> G.L. c. 30A, § 20(b).

indicated that the rule of reason should be applied, such as when there is an ‘emergency,’ whatever that turns out to mean in a dispute.

E. 24-Hour Accessibility of Posting. It used to suffice to post notice on the principal official bulletin board outside the City Clerk’s office, even if City Hall were open only during limited hours.<sup>13</sup> No more. Under the new OML, “notice shall be filed with the municipal clerk and 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.”<sup>14</sup> Following regulations proposed by the Attorney General’s office, the Mayor has determined that the methods of compliance with the new OML’s notice-posting requirements will include 1) posting notice on the bulletin board outside the City Clerk’s office, 2) posting notice on the City’s website, and 3) providing Internet access in the Marlborough police station (which is open to the public 24 hours daily). Further, a description of methods 2) and 3) will itself be posted at all times on or adjacent to the handicapped-accessible entrances to City Hall, and the City Clerk will file notice with the Director of the Open Government Division of the Attorney General’s office as to those alternative methods.<sup>15</sup>

#### **IV. How Do You Handle Executive Sessions?**

A. Specify the Subject Matter. The old OML provided that a governmental body could not go into executive session until the chair had “cited the purpose” in open session.<sup>16</sup> Now, before going into executive session, the chair must “stat[e] all subjects that may be revealed without compromising the purpose for which the executive session was called.”<sup>17</sup>

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<sup>13</sup> G.L. c. 39, § 23B.

<sup>14</sup> G.L. c. 30A, § 20(c) (emphasis added).

<sup>15</sup> 940 CMR 29.10(2)(a & b).

<sup>16</sup> G.L. c. 39, § 23B.

<sup>17</sup> G.L. c. 30A, § 21(b)(3).

Time will tell how significant this change is, but it appears that the Legislature intended to hold boards more accountable for the reasons they give for resorting to executive sessions.

B. Audio Recording or Transcript. When an executive session is called to “discuss the reputation, character, physical condition or mental health ... 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,” the person in question now has the right to arrange for an audio recording or transcript, at his own expense.<sup>18</sup> The law does not grant him or her the right to make a video recording of an executive session. (But it remains the case that any person may make a video recording of, or may broadcast, an open session, provided that he or she first notify the chair and not interfere with the conduct of the meeting. The chair “shall” inform all attendees at the beginning of the meeting of any such recordings.)<sup>19</sup>

C. Declarations by Chair. The chair must make “declarations” in open session prior to going into executive session for certain reasons.

i. Collective Bargaining or Litigation. If the purpose of the executive session is to discuss “strategy with respect to collective bargaining or litigation,” the chair must first declare that an open meeting “may have a detrimental effect on the bargaining or litigating position of the public body.”<sup>20</sup>

ii. Real Property. If the purpose of the executive session is to “consider the purchase, exchange, lease or value of real property,” the chair must first declare that an open meeting “may have a detrimental effect on the negotiating position of the public body.”<sup>21</sup>

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<sup>18</sup> G.L. c. 30A, § 21(a)(1)(iv).

<sup>19</sup> G.L. c. 30A, § 20(e).

<sup>20</sup> G.L. c. 30A, § 21(a)(3).

<sup>21</sup> G.L. c. 30A, § 21(a)(6).

iii. Preliminary Screening Committee. If the purpose of the executive session is to “consider or interview applicants for employment or appointment by a preliminary screening committee,” the chair must first declare that an open meeting “will have a detrimental effect in obtaining qualified applicants.”<sup>22</sup>

D. Other Duties of Chair at Meetings.

The chair of a meeting will want to make sure that someone, whether another member of the public body or the staff member assigned to that body, is keeping track of the documents and other exhibits, such as photographs, recordings or maps, used at the meeting. This will mean not only writing down a list of the documents and other exhibits, but also getting (or making arrangements to get) physical copies of those documents and other exhibits.

V. How Do You Handle Minutes?

A. Summary. For the first time, the Open Meeting Law will require that minutes include “a summary of the discussions on each subject.”<sup>23</sup> Just how detailed the “summary” must be, is still unclear. But the minutes should contain at least some substantive description, and minute-takers avoid such stock phrases as “discussion ensued” in favor of offering at least a taste of what board members actually said.

B. Draft Minutes are Public Records. The new OML codifies case law that has developed under the Public Records Law, G.L. c. 66, by providing that “minutes of an open session, if they exist and whether approved or in draft form, shall be made available upon request by any person within 10 days.”<sup>24</sup> Board members often think that minutes may not be released until approved by the full board, but the new OML (like the existing case law) says otherwise.

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<sup>22</sup> G.L. c. 30A, § 21(a)(8).

<sup>23</sup> G.L. c. 30A, § 22(a).

<sup>24</sup> G.L. c. 30A, § 22(c) (emphasis added).

The same section also requires that minutes “be created and approved in a timely manner,” without explaining what “timely” means.<sup>25</sup>

C. Documents and Exhibits. The minutes must include “a list of documents and other exhibits used at the meeting.”<sup>26</sup> All such documents and exhibits – including photographs, maps, plans, etc. – together with the minutes compose the “official record of the session.”<sup>27</sup> The photos, maps, plans and the like that a board viewed during a meeting need not be filed with the minutes, but (i) they all have to be listed in the minutes, and (ii) they must be stored in such a way that they can be readily accessed by the board should there be any need for the official record of the meeting. It is as yet unclear how long a time period such records need to be stored – or how municipalities are supposed to grapple with the physical storage of such records.

D. Public Records. The new OML provides clearer guidance than the old OML as to the public record status of documents concerning meetings. The “minutes of any open session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session” are public records.<sup>28</sup> The only exceptions are “materials used in a performance evaluation of an individual bearing on his professional competence,” and “materials used in deliberations about employment or appointment of individuals, including applications and supporting materials.”<sup>29</sup> But there are two exceptions-to-the-exceptions, that is, two exemptions from disclosure as “personnel information:”

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<sup>25</sup> Id.  
<sup>26</sup> G.L. c. 30A, § 22(a).  
<sup>27</sup> G.L. c. 30A, § 22(d).  
<sup>28</sup> G.L. c. 30A, § 22(e).  
<sup>29</sup> Id.

i. Evaluations by Board Members. Evaluation materials made by board members themselves are public records.<sup>30</sup> This is a statutory resolution of the long-simmering issue whether School Committee members' evaluations of the Superintendent are public records. Under the new OML, they are.<sup>31</sup>

ii. Resumes. Resumes submitted by job applicants are public records.<sup>32</sup> Applications are not.

E. Release of Executive Session Minutes. It has long been true that executive session minutes are to be made public when the need for secrecy ceases to exist. Now, the chair or his/her designee is required "at reasonable intervals" to review the executive session minutes to determine what can be released.<sup>33</sup> That determination shall be announced publicly at the next open session.<sup>34</sup> What is a "reasonable interval?" The answer may come in regulations to be issued by the Attorney General. If anyone makes a public record request for a set of executive session minutes, and the public body has not conducted the review just described, then it must do so and release any part of the minutes that no longer require secrecy no later than the body's next meeting or 30 days after the request, whichever comes first.<sup>35</sup>

## **VI. How Is the New Open Meeting Law Going to be Enforced?**

A. Attorney General Replaces District Attorneys. The old law was enforced by the various District Attorneys throughout the Commonwealth, which meant that there were

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<sup>30</sup>

Id.

<sup>31</sup> You may recall that the Supreme Judicial Court recently reached a different conclusion based on the old statute. See District Attorney for Northern District v. School Committee of Wayland, 455 Mass. 561 (2009).

<sup>32</sup>

Id.

<sup>33</sup> G.L. c. 30A, § 22(g)(1).

<sup>34</sup>

Id.

<sup>35</sup> G.L. c. 30A, § 22(g)(2).

multiple different interpretations of the statute and as many approaches toward compelling compliance. Now there will be one enforcement agent, the Attorney General.<sup>36</sup>

B. Complaint Process. Anyone complaining of an OML violation will need to file a written complaint with the public body within 30 days after the alleged violation.<sup>37</sup> The public body has 14 days after receipt of the complaint to send a copy of the complaint to the Attorney General, along with a written statement of any remedial action taken.<sup>38</sup> If the complainant remains dissatisfied, he/she may file his/her complaint with the Attorney General, but the complainant must wait 30 days from the date he/she first filed with the public body.<sup>39</sup> Is there a statute of limitations for filing a complaint with the Attorney General, that is, a deadline by which a dissatisfied citizen may forward his complaint to the Attorney General? The statute does not say, but perhaps the Attorney General will.

C. Penalties. In response to a complaint, the Attorney General may now order the kind of relief previously available only from a court, including nullifying action taken at an illegal meeting, reinstating an employee who was terminated at such a meeting, compelling production of minutes and records, and – after a hearing – ordering payment of a civil penalty of up to \$1,000 for each intentional violation.<sup>40</sup> The new OML is ambiguous as to whether individual board members may be fined, and instead speaks of civil penalties imposed “upon the public body.”<sup>41</sup> But elsewhere it refers to the possibility of civil penalties against “an individual.”<sup>42</sup> Also, the new OML allows not just public bodies but also individual members to seek judicial review of orders of the Attorney General, and contemplates that enforcement action

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<sup>36</sup> G.L. c. 30A, § 23(a).

<sup>37</sup> G.L. c. 30A, § 23(b).

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> G.L. c. 30A, § 23(c).

<sup>41</sup> Id.

<sup>42</sup> G.L. c. 30A, § 23(f).

may be taken against both public bodies and individual members for failure to pay civil penalties.<sup>43</sup> It is advisable to assume that individual members, and not just public bodies, are now susceptible to fines of up to \$1,000 per violation.

D. Defense of Reliance on Counsel. The new OML states that it shall be a defense to the imposition of a penalty if the public body acted in reliance on advice of legal counsel after making full disclosure to him/her of the facts.<sup>44</sup>

E. Investigations by the Attorney General. The new OML vests the Attorney General with the authority to investigate when there is reasonable cause to believe that any public body or member thereof has violated that law. The authority brings with it the power for the Attorney General to, among other things, take testimony under oath of any individual who does not voluntarily provide relevant information to the Attorney General within thirty days of having received notice of the investigation.

## **VII. What Should You Watch For in the Future?**

The future of the new OML will no doubt bring final regulations, as well as advisory rulings on specific issues, issued by the Attorney General's Division of Open Government. There may also be remedial legislation, including but not limited to a Senate-approved bill that, as of the date of this Memorandum, is pending in a House conference committee and which would delay some, but not all, of the new OML until November 1, 2010.

## **VIII. Conclusion.**

To say the least, the new OML will take some getting used to, for all concerned.<sup>45</sup> When you do have a question, you should ask one of us – early enough – to see how we can help out.

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<sup>43</sup> G.L. c. 30A, § 23(d & e).

<sup>44</sup> G.L. c. 30A, § 23(g).

<sup>45</sup> In fact, this Memorandum is in large part based on the work of other municipal attorneys, including counsel for the towns of Wakefield and Hull, who collectively have been striving to bring the new OML into better focus.