Overview: Public Records and Open Meeting Laws

Town of Lincoln
February 20, 2019

Presented by Lauren F. Goldberg, Esq.

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THE LEADER IN PUBLIC SECTOR LAW

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Sunshine Laws

- Public records, open meeting and conflict of interest laws exist in virtually every state
- Purpose generally is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based
- Under the Public Records Law ("PRL"), virtually any record created or received by a government employee or official is subject to mandatory disclosure
- Under the Open Meeting Law ("OML"), public bodies can only conduct business through public meetings, unless an exemption allowing executive session exists
- The Conflict of Interest Law ("COI Law) is intended to ensure that the Town's interests, rather than personal interests, dictate action by public employees and officials

Public Records Law

- What is a public record (and why do I care ☺)?
- When do records have to be disclosed?
- When can I destroy records?

What is a Public Record?

[A]ll books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee…

Public Records

- The Public Records Law analyzes the CONTENT of a record, not the form.
- May include e-mails and other electronic communications, ***even if sent or received from a personal e-mail account.***
- Volunteers and the records they make and receive are not "exempt"
- Use of municipal e-mail addresses or creation of specific e-mail address for public role can address records retention issues
- Could include text messages

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Public Records Requests

- Request may be made in person, or in writing, whether by mail, request form at "counter", or by e-mail or fax
- Records Access Officer ("RAO") must respond within ten ***business*** days – ***not*** **calendar days** (Saturdays, Sundays and legal holidays do not count; days Town Hall is closed DO count, however)
- If the response does not provide all requested records, detailed written response is required
- Must list specific exemptions and provide detailed explanation of application of exemption to requested record

Public Records Requests - Response

- Must respond within 10 **BUSINESS** days; failure to do so means **NO FEE MAY BE ASSESSED**
- Work with the Records Access Officer (RAO)
  - Duties include assisting requesters, records custodians, preparing guidelines to enable requesters to make "informed" requests, including a listing of categories of records

- If full response, including provision of records, cannot be made within 10 business days, RAO must respond to the requester in writing
- A full list of required elements for response appear on next page, and requires:
  - Confirming receipt
    - Identifying correct custodian/RAO if not correct
    - Outlining what will be withheld, if known, and reason why
    - Explaining reason for inability to provide the same within the timeframe
    - When a response is expected

Public Records Requests - Required Elements of Response

1. Confirm receipt and date of request;

2. Identify requested records or categories of records not within possession or custody of RAO; identify agency, municipality, RAO or custodian with custody, if known;

3. Identify records that RAO intends to withhold and/or redact, ***detailing with specificity*** reasons therefor and asserting applicable exemptions;

4. Identify records produced or intended to be produced and, if necessary, a detailed statement describing why response time in excess of 10 business days is required;

5. Identify anticipated timeframe for production – **cannot exceed 25 business days after receipt of request without extension** – and provide detailed explanation of how request unduly burdens other responsibilities, including, magnitude or difficulty of request, size of office, office hours;

6. If more than 25 days response time is anticipated, notify requester of possible/actual petition to

Supervisor for extension of time and include request for requester's voluntary assent to additional time;

7. Suggest a modification of request if appropriate to reduce estimated response time and cost;

8. Itemized good faith estimate of fees, if fees will be charged; if municipality has 20,000 residents or less, population data to justify charging fees for all time incurred; and

9. Statement informing requester of the right of administrative appeal to the Supervisor of Records under 950 CMR 32.08(1), and the right to seek judicial review of any unfavorable decision by commencing a civil action in the superior court pursuant to G.L. c.66, §10A(c).

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Timing for Responses

- Records or initial response within **10 business days**
- If initial written response provided, additional **15 business days** to provide the records, for a total of **25 business days** from receipt of original request to provide full response
- RAO may, within **20 business days** of receipt of request, petition the Supervisor of Records for additional time, **not to exceed an additional 30 business days** "for good cause shown"
- Requestor can grant additional time, and such grant should be confirmed in writing
- If request is in writing, request is deemed received on the first business day following receipt; oral request is deemed received on the day it was made

Fees

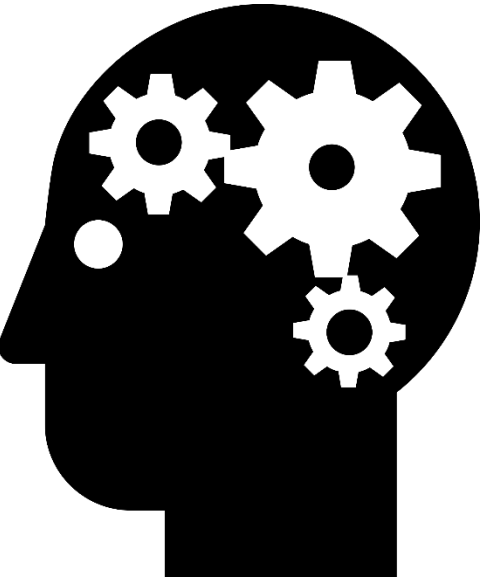
- No fee may be assessed if the initial response is not made within 10 business days
- Copies $.05/page for black and white, two sided
- Otherwise, actual cost (of storage device, postage, oversize plan copying etc.)
- Not eligible for "small town exception" – first two hours of search time are waived
- Rate capped at $25.00 per hour (petition process available)
- Segregation must be "authorized" by law
- The provisions of 950 CMR 32.06 provide. "a records access officer may delay provision of records until all fees related to such requests are paid in full . . . in accordance with 950 CMR 32.07."

Commonly Used Exemptions

- Exemption (a) allows withholding of records that are "specifically or by necessary implication exempted from disclosure by statute."
- Examples include:
  - CORI (e.g., 803 CMR 2.23; 803 CMR 5.14)
  - Domestic Violence Reports (G.L. c. 41, §97D)
  - Student Records (e.g., 603 CMR 23.07)
  - MCAD documents (aside from the initial complaint and investigative determination) (804 CMR 1.04)
  - Abatement Applications (G.L. c. 59, §60)

Commonly Used Exemptions

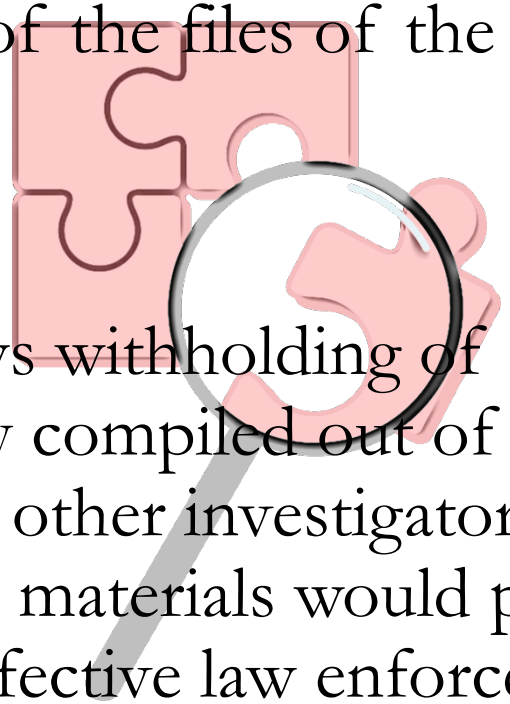
- Exemption (c) allows withholding of "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy."



- Exemption (d) allows withholding of "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based."

Commonly Used Exemptions

- Exemption (e) allows withholding of "notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit."



- Exemption (f) allows withholding of "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest."

Commonly Used Exemptions

- Exemption (n) allows a records custodian, who reasonably believes that disclosure is "likely to jeopardize public safety" to withhold records relative to infrastructure within the commonwealth, and now includes ***cyber security***
- Exemption (o) allows withholding of ***personal e-mail*** and home address and home telephone number of an employee of a municipality or other governmental entity in the custody of a government agency that maintains records identifying persons as falling within those categories

Commonly Used Exemptions

- New PRL exempts from disclosure records divulging or tending to divulge names and addresses of those owning, possessing, or licensed to own or possess firearms or ammunition

- New PRL adds personal e-mail addresses to the list of information that may be withheld for a broad range of law enforcement personnel and victims of adjudicated crimes, domestic violence, or of those who provide or training in family planning services

Appeals

Forum Options

- To Supervisor of Public Records, who must issue decision within 10 days;
- If dissatisfied with Supervisor decision, requester may appeal decision to Superior Court
- Attorney General may enforce orders of Supervisor, seek to intervene in a pending suit or bring her own suit in Superior Court;
- And/or requester may appeal directly to Superior Court;

Risks

- In court, presumption for award of attorneys fees if plaintiff is successful even in part, including if once suit is filed town provides requested records;
- In court, if plaintiff is successful, public records fees will also be waived unless town is able to demonstrate action consistent with previously existing precedent or with prior decisions of Supervisor of Public Records; court has discretion to waive fees even if plaintiff is unsuccessful

Electronic Records Preference

Posting of certain records required, if "feasible", and posting should be monitored by RAO to ensure posting is timely:

- final opinions, decisions, orders, or votes from proceedings;
- annual reports;
- notices of regulations proposed "under chapter 30A";
- notices of hearings;
- winning bids for public contracts;
- awards of federal, state and municipal government grants;
- minutes of open meetings;
- budgets; and
- any public record information of significant interest that is deemed appropriate to post

Best Practices for Producing Records

- Use Town e-mail account for Town business;
- Deliver any records created outside of Town hall or off of Town servers to Town Hall;
- Ensure that when you hit "send" on an e-mail, you are comfortable with that e-mail being forwarded, printed, posted and tweeted;
- Use "formal tone" when conducting Town business in writing (and otherwise);
- Avoid asking for or providing personal information in Town e-mails, including unpublished telephone numbers, medical information, social security numbers, financial account numbers, and the like;
- Consider whether formal record is required (as one Town Manager put it, "Phones still work")

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Open Meeting Law

- What types of meetings are subject to the law?
- What rules need to be followed to hold a meeting?
- What are common violations and why?

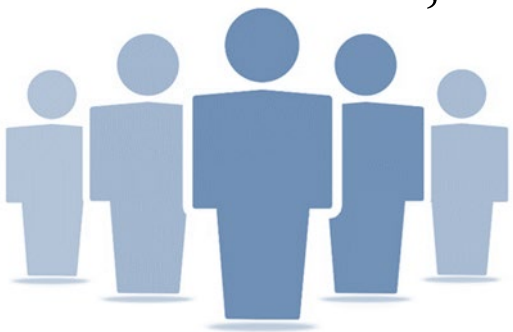
OML Definitions

- **Meeting**: A **deliberation** amongst a **quorum** of a **public body** to discuss matters within the jurisdiction of the 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…"

- **Quorum**: A majority of the full complement of members of a multiple-member body, except in limited circumstances

- **Public body**: A "multiple-member board, commission, committee or subcommittee…within any…city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose…."



OML –Legal Requirements

Addresses three major issues:

1. Notice
    a) timing (posted no less than 48 weekday hours)
    b) location (must be posted in location accessible 24-hours a day, including website, and meeting must be held in ADA accessible location)
    c) level of detail (must list specific matters to be discussed reasonably anticipated by chair of public body; no acronyms; include executive sessions if applicable; avoid shorthand references)

2. Purpose
    a) presumption for open session
    b) limited authority to meet in closed (executive) session

3. Minutes
    a) content (specific enough to allow someone who was not present to know what was discussed)
    b) timing (within three meetings or 30 days, whichever is later)
    c) approval (in accord with above timeframe, either the body or a designee thereof)

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Meetings

Provided no opinions of the governmental body are expressed, attendance or distribution amongst a quorum will **not** constitute a "meeting" or a "deliberation":

1. Distribution to the public body by a member 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.
2. Attendance at an on-site inspection
3. Attendance at a public or private gathering or social event
4. Attendance at a posted meeting of another public body, communicating only by open participation on matters there under discussion and not privately among themselves

Meetings

Practical approaches to avoid violations:

- If attending a meeting of another body or a social event, avoid creating the appearance that a body is discussing municipal business;
- If attending a site visit or meeting of another body, 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;
- If a member wishes to speak at a posted meeting of another public body, the member should be clear that the member is not representing their public body, but instead speaking as an individual
- ***OR:*** Post "joint" meeting to be held at same time and place

Deliberation–Email

- now explicitly addressed in the OML
- A quorum 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

Practical approaches to avoid violations:

- ✓ **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 matters; be prepared to read e-mail in local newspaper or blog
- ✓ Don't ask for or express opinions, ideas, feelings, beliefs or impressions in an e-mail to other members

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Deliberation–Social Media

- Social media also subject to the OML
- Alternative electronic communications have become more prevalent, including blogging, instant messaging, texting, social networking such as Facebook, Snapchat, and Twitter

Practical approaches to avoid violations:

- ✓ 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
- ✓ Remember that applicants have due process rights; if the board member is involved in a matter adjudicating the rights of others, only discuss matter at the hearing

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Personal Use Of Social Media – Practical Steps

- If public official or employee will use social media, make sure to differentiate between any "official site", and a "private" site, such as a campaign site
- If you post on social media in "personal" capacity, make sure that the post so indicates
- Use municipal e-mail address rather than a private e-mail address for "official business"
- Use social media in "official capacity" for public announcements, emergency alerts, event reminders
- DO NOT debate or discuss matters with members of the public if such matters are or could be pending before the Board

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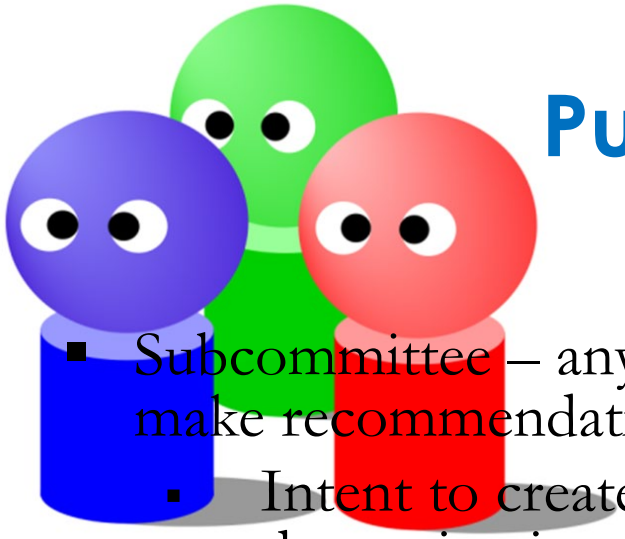


Public Body – Subcommittee

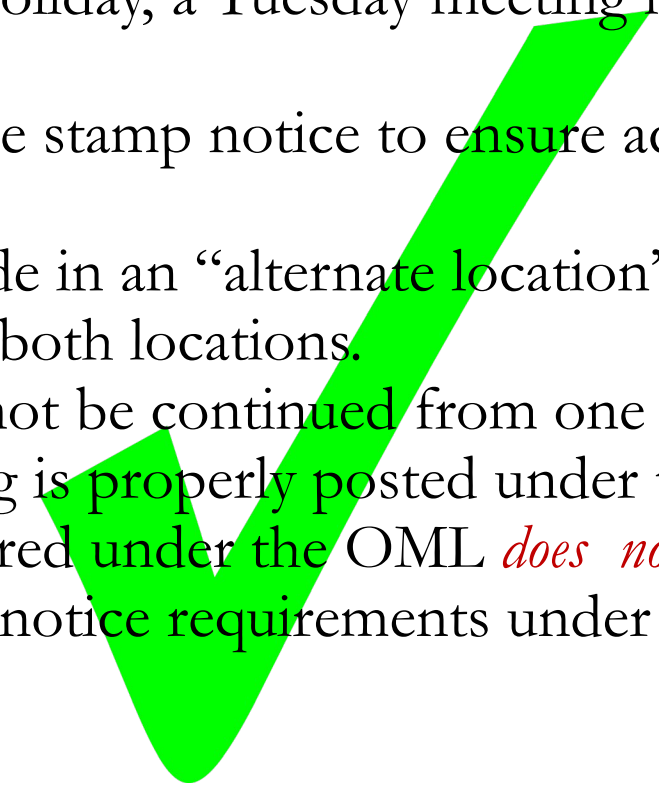
- Subcommittee – any multiple-member body created to advise or make recommendations to a public body:
  - Intent to create a subcommittee is not required or determinative;
  - AG looks to three factors in determining if group constitutes subcommittee, is it "within government", "empowered to act collectively", and serving a "public purpose".
- Practical way to avoid violations:
  - One person does not constitute a subcommittee
  - Conservative approach - when two or more members are tasked to accomplish something together, post meetings and comply with OML
- Note that committees created by sole officer (e.g., Town Manager or Superintendent) who has authority to act independently are excluded, i.e., the so-called "Connelly Rule."

Before the Meeting - Notice/Agenda

- The meeting notice (aka "agenda") must be posted at least 48 hours prior to the meeting, not counting Sat., Sun., or legal holidays.
- The notice must include "the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting." G.L. c. 30A, § 20(b). 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(l)(b).
    - Per the Attorney General's Office, a topic will generally be considered to include sufficient specificity when a reasonable member of the public could read the topic and understand the anticipated nature of the public body's discussion.
    - The sufficiency of the meeting notice will be judged both on its face, and in context of what was actually discussed.

Posting - Practical Considerations

- For a Monday meeting, notice must be posted on Thursday
- If Monday is a holiday, a Tuesday meeting must also be posted on Thursday.
- Clerk should time stamp notice to ensure accurate record exists of filing.
- If posting is made in an "alternate location", notice must be timely posted in both locations.
- A meeting may not be continued from one night to the next *unless* the meeting is properly posted under the OML
- The notice required under the OML *does not substitute for or otherwise supersede* notice requirements under other applicable laws.



More on Agendas…

- Location of Posting – must be filed with Town Clerk and posted in a manner conspicuously visible to the public at all hours in, on or near Town Hall (and accessible at Clerk's office during normal business hours).
- Write 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").
- Meeting notice must indicate time/date of *posting*.
- If revised, must state both the date and time of the original posting and the date and time of the revised posting.

What can we talk about???

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

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Notice – Placeholders Now a "No Go"

Regularly occurring items need more detail, so, unless included to notify the public that unanticipated issues may be discussed:

New Business

Old Business

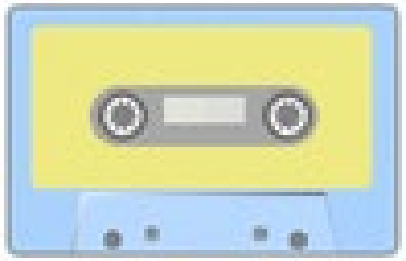
DPW Superintendent Report

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 - Recording

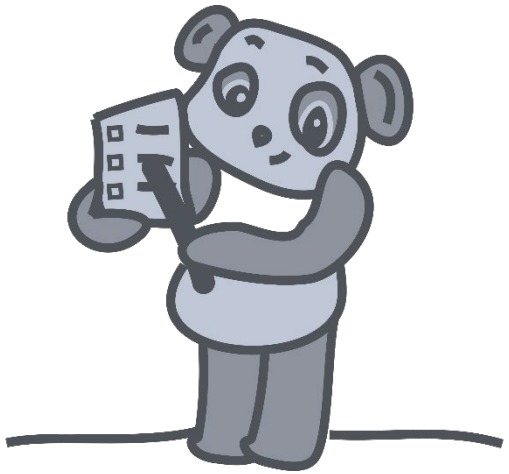
- Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute).
- Recording by individuals:
  - Must inform the Chair;
  - Chair must make required announcement;
  - Chair may reasonably regulate recordings (placement, operation of equipment)



Executive Session

Process:

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



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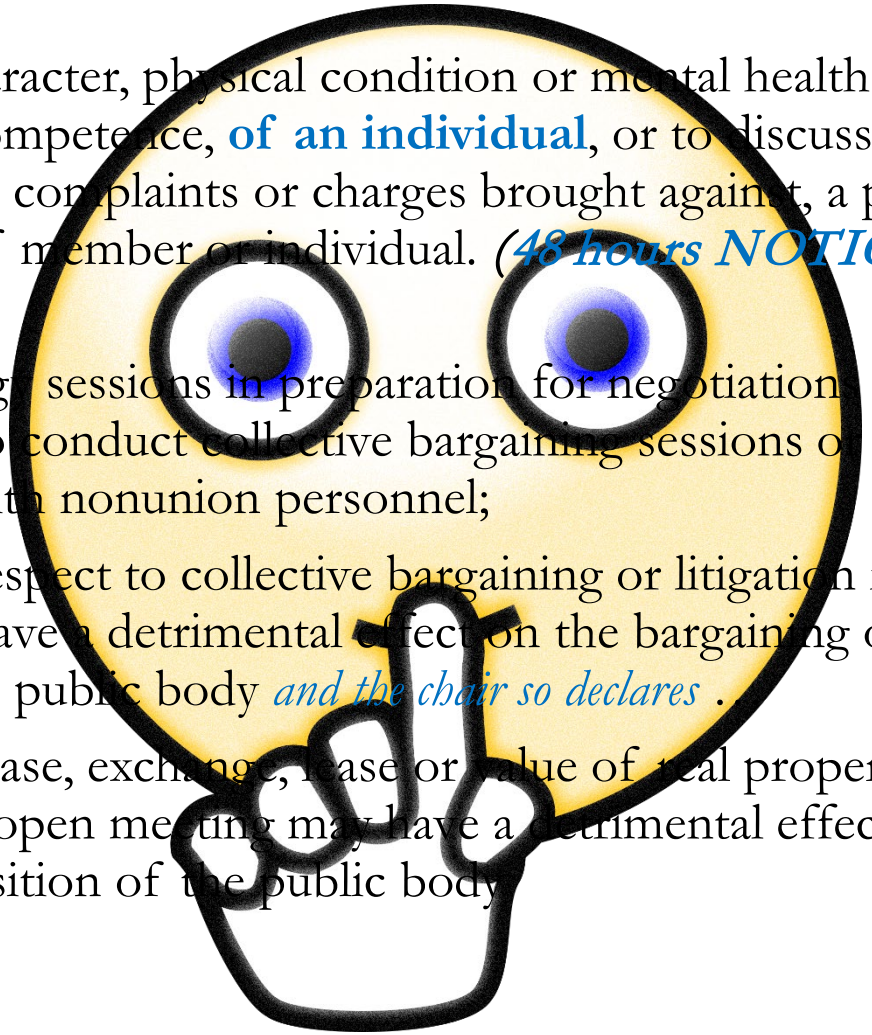
Executive Session – Purposes



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. ***(48 hours NOTICE to individual required)***

2. Conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;

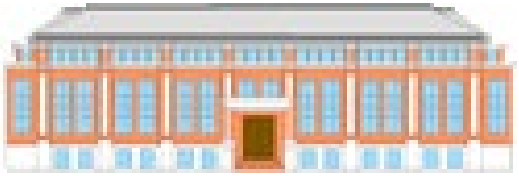
3. Strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body *and the chair so declares* .

6. Consider purchase, exchange, lease or value of real property *if the chair declares* that an open meeting may have a detrimental effect on the negotiating position of the public body.

Executive Session – Practical Issues

- 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**.



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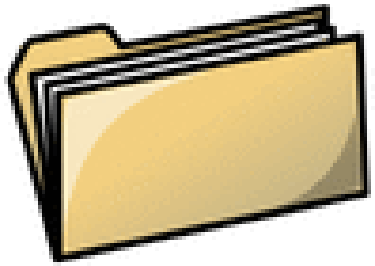
Meeting Minutes - Content

- Date, time, place of meeting, and members present and 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 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

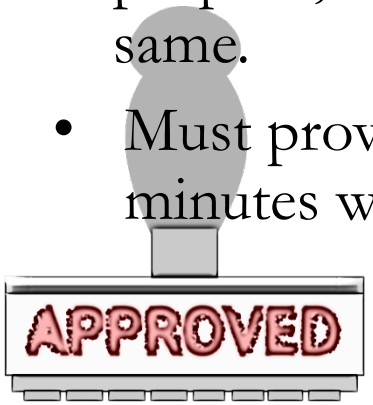
Open session minutes must be created and approved in timely manner.

- New regulations provide that approval must occur generally within the next 3 meetings or within 30 days, whichever is later.
- Minutes of open meetings 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.

Executive Session Minutes - Approval

Executive Session Minutes

- May be withheld until purpose of exemption has been met, **unless otherwise protected under the Public Records Law;**
- Chair of public body directed 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.
  - Must provide a response to a request for executive session minutes within 10 calendar days.



Enforcement

Complaint Process:

1. Complainant must file written complaint with the public body, within 30 days of the alleged violation;
2. Public body must forward complaint to AG within 14 business days of receipt and inform AG of any remedial action taken; and
3. Complainant may file a complaint with AG after 30 days from the date complaint was filed with public body.

Enforcement

- **Attorney General requires Public Body to consider complaint at properly posted meeting:**
  - Matter must appear on meeting notice
  - Body must acknowledge receipt of complaint
  - Should deliberate concerning allegations and possible resolution
  - Vote to resolve complaint
  - If appropriate, authorize response to be prepared and sent to Attorney General and Complainant
- **Cure:**
  - "Public deliberation (at a properly posted open meeting) effectively cure the private discussion which occurred over email because it enabled the public to see the discussion that went into the creation of the policy. To cure a violation of the Open Meeting Law, a public body must make an independent deliberative action, and not merely a ceremonial acceptance or perfunctory ratification of a secret decision." See OML 2011-14.

Enforcement – Attorney General Options

- Upon finding a violation, the AG has a range of enforcement options from compelling compliance with OML and/or attendance at a training session and/or creation or disclosure of minutes, nullifying action taken, imposition of $1,000 fine for intentional violation. Public body may seek judicial review in Superior Court within 21 days of receipt (this would stay the AG's order, but the public body may not implement any action taken, pending appeal)
- AG may file action in Superior Court to require compliance.
- 3 registered voters may bring action in Superior Court.

Resources

PRL --Secretary of the Commonwealth Public Records Law:

http://www.sec.state.ma.us/pre/preidx.htm

Attorney General's Open Meeting Law Website:

https://www.mass.gov/the-open-meeting-law

COI--State Ethics Commission:

https://www.mass.gov/orgs/state-ethics-commission

Any questions?

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