

OPEN MEETINGS AND EXECUTIVE SESSION

Open Meetings

The Open Meeting Law is based on the premise that the public is entitled to see the process of government and not simply its result. In general, the public and the news media have the right to attend all meetings. However, the law does provide ten specific exceptions to this rule that permit to meet behind closed doors, in "executive session," to discuss certain subjects. While the law does not limit what may be discussed or acted upon at any meeting, it does impose restrictions on the way in which meetings are called, conducted, and recorded. Any rules of procedure adopted must be in conformance with the Open Meeting Law.

The Open Meeting Law, M.G.L. c. 30A, Sections 18-25, is required reading for Finance Committee members. (The Attorney General has promulgated open-meeting regulations, see 940 CMR 29.00 et seq.)

First Things First: When is a meeting a meeting?

Basically, a meeting is any deliberation by a public body on a matter within its jurisdiction. A "deliberation" is any oral or written communication, including email, between or among a quorum of the public body but does not include distribution of meeting agendas, scheduling information, or meeting materials, provided that no opinion of a member of the public body is expressed.

The following activities are not considered a meeting and therefore are exempt from the requirements of the open meeting law: (a) an on-site inspection of a project or program, (b) attendance by a quorum of a public body at a public or private gathering, (c) attendance by a quorum of a public body at a meeting of another public body nor does it include (e) attendance by quorum at

Town Meeting. Keep in mind, however, that if a quorum of the committee engages in any of these activities (except for attendance at Town Meeting), it should not deliberate — or discuss public business within its jurisdiction — while doing so.

What is a Public Body?

The term "public body" is used throughout the statute and these entities are subject to the open meeting law requirements. A public body is any "multiple-member board, commission, committee and 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..." The term also includes subcommittees that are created to advise or make recommendations to a public body.

Thus, a Town Finance Committee is a "public body" subject to the open meeting law, as is a subcommittee of the Finance Committee.

Calling a meeting: Notice Requirements

The public body is responsible for filing a notice of the meeting with the Town Clerk at least forty-eight hours before a meeting is to take place, not including Saturdays, Sundays, and legal holidays. Notice of the meeting, printed in "legible, easily understandable format" must include the date, time, and place, as well as a listing of topics that the chair of the public body "reasonably anticipates" will be discussed. Such notice must be "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." The Attorney General has authorized five alternative posting methods by regulation, (see 940 CMR 29.03(2)(b)). Each municipality must adopt one of these methods (unless postings in or on the municipal building housing the clerk's office are visible

24 hours a day) and notify the Attorney General in writing of the method chosen. That method must be used by all municipal boards and committees unless and until a different method is chosen and the Attorney General notified. (See 940 CMR 29.03{1}(c)).

In case of an emergency, defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action," an open meeting may be held even though notice was not posted in time. Some reasonable notice of an emergency meeting should still be posted as much in advance of the meeting as possible.

Recording and Addressing Meetings

Any person may make a video or audio recording of the open meeting of a public body so long as that person notifies the chair of the public body beforehand and the chair informs all in attendance at the beginning of the meeting that such a recording has been authorized. Furthermore, any person may transmit the meeting through any medium subject to reasonable requirements imposed by the chair.

While anyone may attend an open meeting of a public body, no one may address a meeting without first obtaining the permission of the chair. All persons attending must remain silent during the proceedings and if they do not, a warning shall be given by the chair. If the person continues to interrupt after the warning is given, the chair may remove the person using a constable or other officer.

Remote Participation at Meetings

As authorized by the Open Meeting Law, the Attorney General has promulgated regulations governing remote participation in open meetings. (See 940 CMR 29.10). Before remote participation may be used by a municipality's boards and committees, it must be adopted by the board of selectmen (in towns) or by the mayor (in cities). Once adopted, remote participation may be used in the following circumstances: a quorum of the board and the chair of the meeting must be physically

present in the meeting room; members may be absent by reason of personal illness, personal disability, emergency, military service, or geographic distance; participation must be through a method that allows all board members to be audible to one another; and all votes must be taken by roll call. At the commencement of the meeting, the chair must publicly explain the reason(s) for remote participation.

Reasons for Convening Executive Session

As previously mentioned, the law allows a public body to convene behind closed doors, or in "executive session," for a number of prescribed purposes. (See M.G.L. Chapter 30A, Section 21). A public body may enter into "executive session" for the following ten (10) purposes:

- (1) To discuss the reputation, character, physical condition or mental health - rather than the professional competence - of an individual.
- (2) To consider the discipline or dismissal of, or to hear complaints or charges brought against a public officer, employee, staff member or individual.
- (3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the government's bargaining or litigating position. Also, to conduct strategy sessions in preparation for negotiations with non-union personnel; to actually conduct collective bargaining and contract negotiations with non-union personnel.
- (4) To discuss the deployment of security personnel or devices, e.g., a "sting operation."
- (5) To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.
- (6) To consider the purchase, exchange, taking, lease, or value of real property if such discussion may have a detrimental effect on the negotiating position of the governmental body.
- (7) To comply with the provisions of any general or special law or federal grant-in-aid requirements (generally privacy).

- (8) To hold a preliminary screening, (including interviews if they are part of the preliminary screening process) of candidates for employment if an open meeting would have a detrimental effect in obtaining qualified candidates.
- (9) To meet with a mediator regarding any litigation or decision.
- (10) To 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 in the course of activities conducted by a cooperative consisting of governmental entities.

Although the Massachusetts Supreme Judicial Court ("SJC") unequivocally held that the attorney-client privilege applies to public entities, including municipal boards and commissions, see *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444 (2007), the Attorney General has taken the position that a public body may meet in executive session with its counsel only for one of the ten enumerated executive-session reasons. This tension may be resolved by a future court decision

Procedure to Convene in Executive Session

In order to enter into executive session in the aforementioned circumstances, the law requires five (5) - - sometimes six (6) - events that must take place:

- (1) The public body must convene in open session and valid notice must be provided for as described already;
- (2) A majority of members vote, by roll call, to enter into executive session;
- (3) Before doing so, the chair must state the purpose of entering into executive session (one of the ten purposes in the preceding section) as well as indicate the subjects that may be discussed without compromising the purpose for

- which the executive session was called;
- (4) The Chair must publicly announce whether an open session will reconvene at the conclusion of the executive session;
- (5) Accurate records of the session are maintained in accordance with the statute; AND
- (6) If the executive session is being called under Reasons 3, 6, or 8, the Chair must publicly declare that holding the discussion in an open session would be detrimental to the position of the public body. Although committee members may discuss multiple topics in executive session, all reasons for the executive session must be stated on the record. It is not acceptable to go into executive session under one reason and then discuss a different matter, even if that matter might have warranted its own executive session.

Meeting Records

Section 22 of the statute sets forth those requirements as they relate to meeting minutes and retention of the same. Minutes must be maintained for both open and executive sessions and must include the date, time and place, members present or absent, the summary of discussions on each subject, list of exhibits used at the meetings and decisions made, including a record of all votes.

All exhibits shall be part of the official record, except materials used in a performance evaluation as to professional competence or in deliberations about employment or appointment. Keep in mind that discussing a confidential document in an open session can destroy its confidential status under Section 22 of the law. If the committee needs to discuss a confidential document that needs to remain so, it will have to be discussed in executive session (to comply with the law making the document confidential, Reason No. 7).

Minutes of open meeting session must be made available upon request to any person within 10 days. Minutes of executive sessions may be withheld from disclosure "as long as publication may defeat the lawful purposes of the executive session..." At reasonable intervals, or within 30 days

of a request, a public body shall review the minutes of executive sessions to determine if continued nondisclosure is warranted.

Violations of the Open Meeting Law

As has been stated already, the Attorney General is vested with the sole authority to interpret and enforce the Open Meeting Law.

With reasonable cause, the Attorney General may conduct an investigation by requesting that information be voluntarily provided or, if not provided within 30 days, by taking testimony under oath and requiring that documents be produced.

At least 30 days prior to submission of the Attorney General, but within 30 days of the alleged violation, a complaint must be filed with the public body, providing it an opportunity to remedy the same. The public body shall notify the Attorney General of any remedial action taken within 14 days of receipt of the complaint. Upon receipt of a complaint, the Attorney General shall determine whether a violation of the open meeting law occurred in a timely manner.

If he/she so determines, the Attorney General may: (a) compel compliance, (b) compel attendance at training session, (c) nullify action taken at meeting, (d) impose a civil penalty upon the public body of up to \$1,000 for each intentional violation, (e) compel materials to be made public, (f) reinstate a dismissed employee, or (g) prescribe other action. The Attorney General has recently defined "intentional violation" to include practices that continue after a court or the Attorney General has advised that the practice is illegal.

As existed previously, and as an alternate to the aforementioned procedure, the new law authorizes three or more voters and/or the Attorney General to sue to enforce the open meeting law. Under the new law, such a suit can be brought in Superior Court in the county in which the public body is located. The burden of proof will be on the public body to show by a preponderance of the evidence that the requirements of the law

were satisfied. The remedies detailed above are available in such proceedings.

The law provides that the public body may defend itself from imposition of any penalty that, after full disclosure, it acted in good faith compliance with the advice of its legal counsel.

New State Open Meeting Agencies

Section 19 of the 2009 open meeting law established the Division of Open Government within the Attorney General's office to perform the duties imposed upon the AG by the Open Meeting Law. The Attorney General shall designate an assistant attorney general as the Director. The Attorney General shall provide educational materials and training to Public Bodies on the Open Meeting Law. Further, the AG is authorized to issue advisory opinions regarding any provision of the statute.

Secondly, this section of the law establishes a five-member Open Meeting Law Advisory Commission consisting of the two chairs of the Joint Committee on State Administration and Regulatory Oversight, the Attorney General, the president of the Massachusetts Municipal Association, and the president of the Massachusetts Newspaper Publishers Association. The commission is charged to review issues relative to the open meeting law and submit to the attorney general recommendations for changes to the regulations, trainings, and educational initiatives relative to the open meeting law as it deems necessary and appropriate.

Certification Requirements

The Open Meeting Law requires that all persons serving on a public body certify, within two weeks of qualification for office, that they have received a copy of the law, the regulations promulgated pursuant thereto and educational materials prepared by the Attorney General's office. Such certification shall be maintained on file by the Town Clerk and serves as evidence that the person read and understands the open meeting

law and the consequences for violating it.

*This appendix was prepared by Matthew G. Feher and
updated by Juliana deHaan Rice.*

Open Meeting Law Guide



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF ATTORNEY GENERAL
MARTHA COAKLEY



MARCH 12, 2013

Dear Massachusetts Residents:

On July 1, 2010, the Attorney General's Office assumed responsibility for the enforcement of the Open Meeting Law (OML) from the state's District Attorneys. We believe that transferring all enforcement to one central statewide office will allow for greater consistency and will ensure that local officials have access to the information they need to comply with the law.

Our office is committed to ensuring that the changes to the Open Meeting Law will provide for greater transparency and clarity - both of which are hallmarks of good government. We are focused on providing educational materials, outreach and training sessions to ensure that all members of the public understand the law.

Whether you are a town clerk or town manager, a member of a public body, or an involved resident, I want to thank you for taking the time to understand the Open Meeting Law. We strive to be a resource to you, and encourage you to contact the Division of Open Government at (617) 963-2540 or visit our website at www.mass.gov/aeo/openmeetinR for more information.

Cordially,

A handwritten signature in black ink that reads "Coakley".

Martha Coakley
Massachusetts Attorney General

Attorney General's Open Meeting Law Guide

Overview

Purpose of the Law

The purpose of the Open Meeting Law is to ensure transparency in the deliberations on which public policy is based. Because the democratic process depends on the public having knowledge about the considerations underlying governmental action, the Open Meeting Law requires, with some exceptions, that meetings of public bodies be open to the public. It also seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently.

AGO Authority

The Open Meeting Law was revised as part of the 2009 Ethics Reform Bill, and now centralizes responsibility for statewide enforcement of the law in the Attorney General's Office (AGO). G.L. c. 30A, § 19 (a). To help public bodies understand and comply with the revised law, the Attorney General has created the Division of Open Government. The Division of Open Government provides training, responds to inquiries, investigates complaints, and when necessary, makes findings and takes remedial action to address violations of the law. The purpose of this Guide is to inform elected and appointed members of public bodies, as well as the interested public, of the basic requirements of the law.

Certification

Within two weeks of a member's election or appointment or the taking of the oath of office, whichever occurs later, all members of public bodies must complete the attached Certificate of Receipt of Open Meeting Law Materials certifying that they have received these materials, and that they understand the requirements of the Open Meeting Law and the consequences for violating it. The certification must be retained where the body maintains its official records. All public body members should familiarize themselves with the Open Meeting Law, the Attorney General's regulations, and this Guide.

In the event a Certificate has not yet been completed by a member of a public body, the member should complete and submit the Certificate at the earliest opportunity to be considered in compliance with the law.

Open Meeting Website

This Guide is intended to be a clear and concise explanation of the Open Meeting Law's requirements. The complete law, as well as the Attorney General's regulations, training materials, advisory opinions and orders can be found on the Attorney General's Open Meeting website, <http://www.mass.eov/aeo/openmeetine>. Local and state

CERTIFICATE OF RECEIPT OF OPEN MEETING LAW MATERIALS

I, _____, who qualified for the office of
(Name)

_____, on _____, certify pursuant
(Office) (Date)

to G.L. c. 30A, § 20(g), that I have received copies of the following Open Meeting Law materials:

- 1) the Open Meeting Law, G.L. c. 30A, §§ 18-25;
- 2) regulations promulgated by the Attorney General under G.L. c. 30A, § 25; and
- 3) educational materials promulgated by the Attorney General under G.L. c. 30A, § 19(b), explaining the Open Meeting Law and its application.

I have read and understand the requirements of the Open Meeting Law and the consequences for violating it. I further understand that the materials I have received may be revised or updated from time to time, and that I have a continuing obligation to implement any changes in the Open Meeting Law during my term of office.

(Name)

(Name of Public Body)

(Date)

Pursuant to G.L. c. 30A, §20 (g), an executed copy of this certificate shall be retained, according to the relevant records retention schedule, by the appointing authority, city or town clerk, or the executive director or other appropriate administrator of a state or regional body, or their designee.