

Open Meeting Law:

Balancing Government Transparency
with Government Efficiency

Sandwich MA Regional Training

September 9, 2015

Purpose of Open Meeting Law (OML)

- Recognizes the necessary balance between government accountability and government efficiency.
- Ensures transparency by public bodies by requiring:
 - Notice
 - Open Deliberations
 - Public Access
- Allows government to efficiently and effectively manage its operations by:
 - Providing for certain deliberations to take place in executive session
 - Maintaining confidentiality of certain records of executive session

Attorney General's Role

- Division of Open Government
 - Educate / train public officials and members of public bodies
 - Promulgate regulations
 - Provide guidance on OML requirements
 - Hotline / Email
 - Website
 - Address OML complaints
 - Make findings and bring enforcement actions

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Open Meeting Law Basics

- 1) Notice must be posted for meetings
- 2) Meetings must be open to the public, unless the public body enters into executive session
- 3) Minutes must be kept for open and executive sessions
- 4) Public body member certification
- 5) Complaint process

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Public Body

Definition

A multi-member board, commission, committee or sub-committee ... however created, elected, appointed or otherwise constituted, established to serve a public purpose ... subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.

- Excludes:
 - Legislature and its committees
 - Bodies of Judicial branch
 - Bodies created by a constitutional officer solely to advise the constitutional officer
 - Bodies that do not serve a public purpose
 - Groups not established with the "jurisdiction" to make decisions or recommendations collectively
- Connelly exception: where a public official creates a group to advise that public official on a decision that he or she has sole responsibility for, the group is not subject to the Open Meeting Law

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Examples: Public Bodies

- **State:** Open Meeting Law Advisory Commission; Board of Library Commissioners; Board of Higher Education; Charter Schools
- **Local:** Board of Selectmen; School Committee, Planning Board
- **Regional:** Regional School Committee; Regional Water Commission; Regional Planning Commission
- **County:** Board of County Commissioners; County Retirement Board; County Charter Review Commission

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Examples: NOT Public Bodies

State: State Senate; House of Representatives; Judicial Nominating Commission; Massachusetts Municipal Association

Regional: Regional high school boosters club

Local: Neighborhood watch association; PTO; Republican/Democratic Town Committees

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Deliberation

Definition

An 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

• Excludes:

- Distribution of meeting agenda, scheduling or procedural information
- Distribution of reports or documents to be discussed
 - Provided no opinion of a member of the public body is expressed
- Subquorum, if not subcommittee and no serial communication
- Discussion of the recess or continuance of a Town Meeting, in the event of a weather-related or public safety emergency

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Meeting

Definition

Deliberation by public body with respect to any matter within the body's jurisdiction

• Excludes:

- On-site inspection provided no deliberation
- Attendance by a quorum at an event provided no deliberation
- Attendance by a quorum at meeting of another public body provided no deliberation
- Meeting of a quasi-judicial board for sole purpose of making a decision in an adjudicatory proceeding
- Town Meeting

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Meeting Notices

- Except in an emergency, a public body must post notice of meeting at least 48 hours in advance, excluding Saturdays, Sundays, and legal holidays
- Notice must include:
 - Date of meeting
 - Time of meeting
 - Place of meeting
 - List of topics chair reasonably anticipates will be discussed at meeting
 - Topics should give enough specificity so that the public will understand what will be discussed.
 - Date and time notice was posted
 - If the notice is revised, the revised notice must record the date and time the original notice was posted, as well as the date and time of the revision
- "Emergency" is a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.
- In an emergency, a public body shall post notice as soon as reasonably possible prior to a meeting

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Meeting Notices: Local Public Bodies

- Local public body must file notice with municipal clerk
- Notice must be posted in a manner conspicuously visible to the public, including persons with disabilities, at all hours in or on the municipal building where the clerk's office is located
- Alternate Posting options
 - Municipal website
 - Cable television/alternate municipal building open 24 hours
 - Newspaper/alternate municipal building open 24 hours
 - Monitor/electronic display where may be viewed 24 hours
 - Audio recording available 24 hours

Note that even if an alternative posting method has been adopted, meeting notices must still be available in or around the clerk's office

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Meeting Notices: County, District and Regional Public Bodies

- Regional or district public bodies must post notice in each city or town within the region or district in the manner prescribed for local public bodies, or may post to a website
- For a regional school district, the secretary of the regional school district is the clerk of the school district and shall file the notice with the clerk of each city or town in the district, or may post to a website
- County public bodies must post notice with the office of the county commissioner and a copy of the notice posted in a manner conspicuously visible to the public at all hours in a place or places designated by the county commissioners, or may post to a website

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Meeting Notices: State Public Bodies

- Post to the public body's website or the website of its parent agency
- Notify the Attorney General of the location of the website where meeting notices will be posted
- Send a copy of the meeting notice to the Regulations Division of the Secretary of State's Office.
 - regs@sec.state.ma.us

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Notice Posting: Common Concerns

- What if a new topic arises after notice is posted?
 - Public bodies are encouraged to update the notice when made aware of new topic within the 48 hour period before the meeting.
 - Chairs should not post notices so far in advance that there is a high likelihood that new topics will arise.
- What if the clerk can't post notice in time?
 - Chairs are encouraged to work with municipal clerks to enable sufficient time for posting.
- Canceling a meeting?
 - Meeting cancellations do not require 48 hours notice.
 - Meetings that are continued, or cancelled and rescheduled, must comply with all notice requirements of the Open Meeting Law.
- Other laws may apply (such as notice for public hearings)

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Accessibility

- Public bodies must continue to abide by the applicable state and federal laws that govern accessibility for the disabled.
- These laws include the Americans with Disabilities Act, the federal Rehabilitation Act of 1973 and state constitutional provisions.
- The Civil Rights Division of the Attorney General's Office is available to assist public with the requirements of these laws.
 - Contact the Civil Rights Division at (617) 963-2939

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Remote Participation

- **Must be adopted before members can use**
 - Local Public Bodies: Chief Executive Officer must authorize for all public bodies in municipality
 - County Public Bodies: County Commissioners must authorize for all county public bodies in county
 - State/Regional Public Bodies: Simple majority vote to authorize for all future meetings
- **Local Commissions In Disability**: Majority vote of the commissioners to permit remote participation, during a specific meeting or all meetings
- **Minimum Requirements**
 - Remote participants and all persons present at the meeting location must be clearly audible to each other
 - A quorum of the body, including the chair or, in the chair's absence, the person authorized to chair the meeting, must be physically present at the meeting location
 - Members of public bodies who participate remotely may vote and shall not be deemed absent

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Remote Participation

- Permissible Reasons for Remote Participation: One or more must make physical attendance unreasonably difficult
 - Personal illness
 - Personal disability
 - Emergency
 - Military service
 - Geographic distance

- Procedures for Remote Participation
 - Notify chair
 - Announcement by chair
 - Roll call votes
 - Executive sessions
 - Distribution of documents

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Remote Participation

- Acceptable Methods
 - Telephone, internet, or satellite enabled audio or video conferencing
 - Any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another
 - Public body determines which method to use

- Video technology
 - If used, remote participant must be clearly visible to all persons present at the meeting location

- Chair decides how to address technical difficulties

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Public Participation

- Public may attend open session of meeting
- Public may not address public body without permission of chair or otherwise disrupt meeting
- Public may make audio or video recording of open session upon notification to chair and subject to reasonable requirements
- Chair must inform other attendees of recording at beginning of meeting
- If a person continues to disrupt a meeting after clear warning from the chair, the chair may order the person to leave the meeting. If the person does not leave, the chair may authorize a constable or other officer to remove that person.

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Executive Session

- OML allows public bodies to conduct closed, or executive, meetings in certain circumstances
- Public bodies must follow OML requirements for executive session:
 - Convene open session prior to going into executive session
 - State publicly the purpose(s) for the executive session
 - Conduct roll call vote to enter executive session and obtain a majority of members
 - Announce whether open session will reconvene after
 - Statement by remote participant(s) that no other person is present / able to hear discussion at remote location, unless approved by body
 - Maintain minutes of and documents from executive session
 - Discuss only matters for which executive session is lawfully called
 - Conduct roll call votes of all votes taken during executive session

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Purposes for Executive Session

1. Discuss reputation, character, health, discipline, charges, complaints, but not professional competence of individual
2. Conduct strategy sessions in preparation for negotiations, to conduct collective bargaining sessions or contract negotiations, with nonunion personnel
3. Discuss strategy for collective bargaining or litigation*
4. Security personnel or devices
5. Criminal misconduct
6. Acquisition of real property*
7. Comply with law or grant-in-aid requirement
8. Preliminary screening for employment*
9. Confer with mediator on litigation or decision
10. Trade secrets in the course of activities conducted by a public body as an energy supplier

*If holding an open meeting would have a detrimental effect and the chair so declares on record beforehand.

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Executive Session Purpose: 1

"To discuss the 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."

If an executive session is held, such individual shall have the following rights:

- Notified in writing at least 48 hours prior to the proposed executive session
- Request that the session be open
- To be present at such executive session during deliberations which involve that individual
- To have counsel or a representative present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session
- To speak on his own behalf
- To cause an independent record to be created by audio-recording or transcription, at the individual's expense

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Executive Session Purpose: 2

"To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel."

- When discussing the contract of nonunion personnel; presumption that professional competence of the individual has already been discussed in open session
- When negotiating a non-union contract in executive session, if the public body reaches an agreement, it must still vote to execute the agreement in open session following executive session
- A public body should identify the specific nonunion personnel with whom it is negotiating before entering executive session, unless public disclosure of that information would compromise the purpose for secrecy
 - While we generally defer to the judgment of public bodies on this issue, a body must be able to demonstrate a reasonable basis for this claim if challenged

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Executive Session Purpose: 3

"To discuss 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."

- Chair must declare that deliberating during an open session would have a detrimental effect
- Litigation must be pending or be imminently threatened
- May approve final terms and execute a collective bargaining agreement in executive session
 - Should disclose in open session following execution
- A public body should identify the specific collective bargaining unit or litigation matter before entering executive session, unless public disclosure of that information would compromise the purpose for secrecy
 - While we generally defer to the judgment of public bodies on this issue, a body must be able to demonstrate a reasonable basis for this claim if challenged

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Purposes for Executive Session

1. Discuss reputation, character, health, discipline, charges, complaints, but not professional competence of individual
2. Conduct strategy sessions in preparation for negotiations, to conduct collective bargaining sessions or contract negotiations, with nonunion personnel
3. Discuss strategy for collective bargaining or litigation*
4. Security personnel or devices
5. Criminal misconduct
6. Acquisition of real property*
7. Comply with law or grant-in-aid requirement
8. Preliminary screening for employment*
9. Confer with mediator on litigation or decision
10. Trade secrets in the course of activities conducted by a public body as an energy supplier

*If holding an open meeting would have a detrimental effect and the chair so declares on record beforehand.

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Executive Session Purpose: 6

"To consider the 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."

- Must be to consider purchase, sale, lease or value of real property
- Chair must declare that discussing during an open session would have a detrimental effect on negotiating position
- Generally, the body should identify the specific piece of property it plans to discuss before entering executive session, unless disclosure of this information would compromise the purpose for secrecy
 - While we generally defer to the judgment of public bodies on this issue, a body must be able to demonstrate a reasonable basis for this claim if challenged

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Executive Session Purpose: 7

"To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements."

- Must cite a statute which requires confidentiality or closed session
- The body should disclose information unless public disclosure would compromise the purpose for secrecy
 - While we generally defer to the judgment of public bodies on this issue, a body must be able to demonstrate a reasonable basis for this claim if challenged

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Executive Session Purpose: 8

"To consider or interview applicants for employment or appointment by preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening."

- Preliminary screening committee must consist of a sub-quorum of the public body, though it may include people who are not members of the public body
- May only interview/screen candidates during a preliminary screening in executive session; once there are finalists, all screenings must be conducted in open session
- Chair must declare that an open meeting will have a detrimental effect in obtaining qualified applicants

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Purposes for Executive Session

1. Discuss reputation, character, health, discipline, charges, complaints, but not professional competence of individual
2. Conduct strategy sessions in preparation for negotiations, to conduct collective bargaining sessions or contract negotiations, with nonunion personnel
3. Discuss strategy for collective bargaining or litigation*
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9. Confer with mediator on litigation or decision
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*If holding an open meeting would have a detrimental effect and the chair so declares on record beforehand.

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Meeting Minutes

- Minutes must state the date, time, place of the meeting, and list of members present or absent
- Minutes must include:
 - A summary of discussion of each topic
 - Decisions made and actions taken, including a record of all votes
 - Secret ballots are explicitly prohibited
 - List of documents and other exhibits used by the body at the meeting, including by remote participants
 - Name(s) of any member who participated remotely and the reason under 940 CMR 29.10(5) for his or her remote participation

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Meeting Records Overview

- Meeting minutes shall be created and approved in a timely manner for both open and executive sessions
 - Whenever possible, approve at the next meeting
- Documents and exhibits used by public body must be retained by the public body but do not need to be physically stored with the meeting minutes
- Minutes of open session must be made available within 10 days of a request, whether in draft or final form
- Executive session records must be disclosed once publication will no longer defeat the purpose for having entered into executive session, unless exempt from disclosure
- Secretary of State's municipal records retention schedule

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Executive Session Minutes

- Minutes must be reviewed periodically by the chair or public body to determine if the purpose for executive session remains. The determination must be announced during the next meeting and be included in the minutes.
- Public body must respond within 10 days to request for executive session minutes
 - Provide minutes if no longer exempt from disclosure; or
 - Undertake review at its next meeting or within 30 days, whichever comes first.

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Exempt From Public Disclosure

The following materials are exempt from public disclosure:

- Materials used in a performance evaluation of an individual bearing on his/her professional competence that were not created by members of the body for purposes of evaluation
- Materials used in deliberations about employment or appointment of individuals, including applications and supporting materials but excluding resumes, which must be disclosed

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Certification

- OML materials must be distributed to all public body members upon taking oath of office or, if none is required, before entering performance of office
 - Local Public Bodies: Municipal clerk
 - Regional, District, County or State Bodies: Appointing authority, executive director, or other administrator or designee
- Members must sign certification within two weeks of receipt
 - Read and understand requirements of law and consequences for violating it
- Person distributing materials also keeps certifications

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Complaint Process

Step 1: The Complainant

- Complaint shall be filed in writing with the public body within 30 days of the alleged violation, or if it could not reasonably have been known at the time, then within 30 days of the date the complainant reasonably should have discovered the alleged violation
- Complaint Form, found at the Division of Open Government website, completed and sent to chair of public body

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Complaint Process

Step 2: The Public Body

- Chair must disseminate the complaint to the members of the public body. The public body has 14 business days in which to respond and inform Division of Open Government of remedial action taken
 - May delegate responsibility for responding after public body review
- Public body may request from the Director an extension of time to respond for good cause

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Complaint Process

Step 3: The Attorney General's Office

- If the complainant is not satisfied with the resolution of the complaint by the public body, he/she may file the complaint with the Division of Open Government 30 days after the complaint is filed with the public body.
- To be considered timely, complaints must be filed with the AGO within 90 days of the date of the original alleged violation.
- The Attorney General's Office will not review allegations that were not raised in the initial complaint filed with the public body.
- In most circumstances, complaints filed with the Attorney General's Office, and documents submitted with the complaint, are considered a public record.

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Complaint Process

Steps 4-10: The Division of Open Government

- Step 4: Acknowledgment
- Step 5: Request for documents and interviews
- Step 6: Has there been a violation?
- Step 7: Was the violation intentional?
- Step 8: Was the action taken by the public body adequate?
- Step 9: Resolution
 - Informal
 - Formal
 - Hearing notice
- Step 10: Public body appeal

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Alternative Complaint Process

- Attorney General or 3 or more registered voters may initiate a civil action to enforce the Open Meeting Law
- Must file in Suffolk Superior Court for state public bodies
- For all other public bodies, must file in superior court in any county in which the public body acts or meets

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Remedies

- Compel immediate and future compliance
- Compel attendance at training
- Compel public release of minutes or other materials
- Nullify any action taken in violation of the Open Meeting Law
- Reinstate an employee and make whole
- Impose a civil penalty of up to \$1,000 on a public body for each intentional violation
- Other appropriate relief

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Review

- 1) Notice must be posted for meetings
 - 48 hours in advance, except for emergency
 - Include date, time, place, and sufficiently detailed list of topics chair reasonably anticipates will be discussed
- 2) Meetings must be open to the public, unless public body enters executive session
 - Discussion must fit within one of 10 purposes for executive session
- 3) Minutes must be kept for open and executive sessions
 - Must include summary of discussion for each topic
 - Must contain a list of documents & exhibits used at the meeting
- 4) Public body member certification
- 5) Complaint process
 - Must be filed with public body first
 - Alternative complaint process in Superior Court

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Resources

Attorney General's Open Meeting Law Website

<http://www.mass.gov/ago/openmeeting>

- Open Meeting Law: G.L. c. 30A, §§ 18-25
- Regulations: 940 CMR 29.00
- Guide
- Checklists
- FAQs
- Determination Letters

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