

*S. Majocchi*  
*School Committee*

Memo to: All Department Heads and Committee Chairs  
Re: Changes to Open Meeting Law  
Date: June 29, 2010  
From: Steve Maio

As you may be aware, the state of Massachusetts has adopted changes to the open meeting law. Accordingly, Town Counsel Mullen has drafted a memo highlighting the changes. Please familiarize yourself with the memo. Accordingly, to achieve compliance with the law the following procedures will occur immediately.

- 1) All requests to the Town Clerk's office to post meetings must include an Agenda as well as the Meeting Notice.
- 2) All meetings will continue to be posted on the bulletin board in the Town Hall and the Town Clerk will continue to maintain a binder with the Meeting Notices and Agendas.
- 3) All meetings will be posted on a similar bulletin board at the Public Safety Building. The town clerk will forward all Meeting Notices and Agendas to the Police Department c/o Lt. McKay. The day Sergeant will post meetings on the Board and keep the loose leaf binder for agendas.
- 4) A notice will be affixed to the door of the Town Hall directing interested parties to the Public Safety Building after hours.
- 5) All Meeting Notices and Agendas will be posted on the Town website.
- 6) To ensure timely posting of the meetings on the web site, ALL MEETING NOTICES AND AGENDAS MUST BE EMAILED TO THE FOLLOWING AT LEAST 72 BUSINESS HOURS BEFORE THE MEETING  
[seskenas@wakefield.ma.us](mailto:seskenas@wakefield.ma.us) or [tmurphy@wakefield.ma.us](mailto:tmurphy@wakefield.ma.us)

FAXES OR HAND DELIVERED AGENDAS WILL NOT BE ACCEPTED FOR WEBSITE POSTING.

TOWN COUNCIL WILL HOLD A BRIEF SESSION ON THE NEW LAW ON WEDNESDAY AUGUST 4<sup>TH</sup> @ 8:00 AM @ TOWN HALL

## MEMORANDUM

To: All Town Officials  
From: Thomas A. Mullen, Town Counsel  
Date: June 23, 2010  
Re: Changes to 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 in ways that are important to all of us who serve in local government. This Memorandum briefly sets forth the most important changes and offers some practical guidance.

### II. What Kind of "Meeting" Does the Open Meeting Law Apply To?

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

A. Site Inspections. When board members meet on-site, such as the Conservation Commission does to inspect wetlands (an "on site inspection of a project or program"), the new statute makes clear that it is not a meeting "so long as the members do not deliberate."<sup>3</sup>

B. Attendance by One Board at Another Board's Meeting. What happens when a quorum from one board attends a posted meeting of another board? I had always taken the conservative view that both boards should post notice – that, in effect, it should be treated as a meeting of both boards. No more. 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

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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 the changes to November 1, 2010.

<sup>3</sup> G.L. c. 30A, § 18.

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.<sup>4</sup>

C. 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, press conference or 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>5</sup>

D. Deliberation by Quasi-Judicial Bodies. After a quasi-judicial board (such as the Board of Appeals when hearing an appeal or the Planning Board when hearing an application for a subdivision) has heard all the evidence and closed the hearing, may the members hold a meeting to deliberate in private? I would not have advised them to do so. Now they may. “Meeting” is defined in the new law 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>6</sup> Note, however, that the board must in all events comply with its own rules and regulations, which may require public deliberation.

E. E-Mails, Agendas and Scheduling. “Deliberation” is now specifically defined to include e-mail.<sup>7</sup> And 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>8</sup> I do not believe these

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Id.

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G.L. c. 30A, § 18.

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Id.

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Id.

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Id.

changes will alter the way our boards conduct business. They are welcome changes, nonetheless, because they make explicit what had long been understood to be good practice.

F. Bodies Appointed to Advise a Single Official. What kind of body does the Open Meeting Law apply to? Like the old law, the new one covers any “board, commission, committee or subcommittee.”<sup>9</sup> But unlike the prior law, the new statute appears to apply even to a body created to advise a single officer, such as when the Town Administrator appoints a committee to advise him on the disposition of Town land.<sup>10</sup>

### 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 boards which might previously have discharged their responsibility in January by giving the Town Clerk a list of meeting times for the whole upcoming year are no longer going to be able to do so. Instead, each notice must list all substantive topics that the chair expects to come up. 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. What if there is a public participation portion of the meeting, or a part of the meeting where the floor is opened to members to bring up whatever subjects they wish? My advice is to list such things generically (e.g., “Public Participation” or “Going Around the Table”) unless the chair reasonably anticipates, more than 48 hours before the meeting, that one or more substantive issue

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<sup>9</sup>

Id.

<sup>10</sup>

G.L. c. 30A, § 18.

<sup>11</sup>

G.L. c. 30A, § 20(b).

will be discussed in such a part of the meeting, in which case the topic should be listed. You will be relieved to know that there is no requirement of including times in the notice when the various topics will come up. I would advise including the times of any formal, public hearings, however, such as when the Board of Appeals will open a variance hearing or the Selectmen will open a liquor license hearing.

B. 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 law 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> Let's say a board plans to meet on a Monday at 7:30 p.m. Under the old law, the latest that notice could be posted was Friday at 7:30 p.m. Now notice will have to be posted by Thursday at 7:30 p.m. If a board meets on the Tuesday after a Monday holiday, it will have to post notice by the preceding Thursday.

C. 24-Hour Accessibility of Posting. It used to suffice to post notice in the Town Clerk's office "or on the principal official bulletin board" of the Town, even if the Town Hall were open only during very limited hours.<sup>13</sup> No more. Now "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> Possible means of compliance include using a bulletin board or looseleaf binder that is attached to the exterior of the Town Hall or that is in a lighted part of the Town Hall open 24 hours a day. The Attorney General's proposed regulations allow the following alternative methods of posting:

1. public bodies may post notice of meetings on the municipal website, AND, post notice or provide Internet access in an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;

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<sup>12</sup> G.L. c. 30A, § 20(b).

<sup>13</sup> G.L. c. 39, § 23B.

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

2. public bodies may post notice of meetings on cable television, AND, post notice or provide cable television access in an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;
3. public bodies may post notice of meetings in a newspaper of general circulation in the municipality, AND, post notice or a copy of the newspaper containing the meeting notice at an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;
4. public bodies may place a computer monitor or electronic bulletin board displaying meeting notices on or in a door, window, or near the entrance of the municipal building in which the clerk's office is located in such a manner as to be visible to the public from outside the building, or;
5. public bodies may provide an audio recording of meeting notices, available to the public by telephone at all hours.<sup>15</sup>

Note that if any of these alternative means are used, (a) conventional posting in the Town Clerk's office or Town Hall must also be used, (b) a description of the alternative method must be posted at all times on or adjacent to the handicapped-accessible entrances to the Town Hall, and (c) the Town Clerk must file notice with the Director of the Open Government Division of the Attorney General's office as to the alternative method chosen.<sup>16</sup>

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

A. Specify the Subject Matter. The old law provided that a governmental body could not go into executive session until the chair had "cited the purpose" in open session.<sup>17</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>18</sup> Time will tell how significant this change is, but it appears that the Legislature intended to put flesh on the often skeletal statement of reasons boards give for resorting to executive sessions.

<sup>15</sup> 940 CMR 29.11(1)(a).

<sup>16</sup> 940 CMR 29.10(2)(a & b).

<sup>17</sup> G.L. c. 39, § 23B.

<sup>18</sup> G.L. c. 30A, § 21(b)(3).

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>19</sup> The law does not grant him 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 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>20</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>21</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>22</sup>

iii. Preliminary Screening Committee. If the purpose of the executive session is to “consider or interview applicants for employment or appointment by a preliminary

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<sup>19</sup> G.L. c. 30A, § 21(a)(1)(iv).

<sup>20</sup> G.L. c. 30A, § 20(e).

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

<sup>22</sup> G.L. c. 30A, § 21(a)(6).

screening committee,” the chair must first declare that an open meeting “will have a detrimental effect in obtaining qualified applicants.”<sup>23</sup>

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>24</sup> Just how detailed must the “summary” be? No one knows. But I recommend that minutes contain at least some substantive description, and that minute-takers avoid such stock phrases as “discussion ensued” in favor of offering at least a taste of what members actually said.

B. Draft Minutes are Public Records. The new law 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>25</sup> Board members often think that minutes may not be released until approved by the full board, but the new statute (like the existing case law) says otherwise. The same section also requires that minutes “be created and approved in a timely manner,” without explaining what “timely” means.<sup>26</sup>

C. Documents and Exhibits. The minutes must include “a list of documents and other exhibits used at the meeting.”<sup>27</sup> All such documents and exhibits – including photographs, maps, plans, etc. – together with the minutes compose the “official record of the session.”<sup>28</sup> The photos, papers 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

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<sup>23</sup> G.L. c. 30A, § 21(a)(8).

<sup>24</sup> G.L. c. 30A, § 22(a).

<sup>25</sup> G.L. c. 30A, § 22(c) (emphasis added).

<sup>26</sup> Id.

<sup>27</sup> G.L. c. 30A, § 22(a).

<sup>28</sup> G.L. c. 30A, § 22(d).

stored in such a way that they can be readily accessed should there be any need for the official record of the meeting.

D. Public Records. The new statute provides clearer guidance than its predecessor 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>29</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>30</sup> But there are two exceptions-to-the-exceptions:

i. Evaluations by Board Members. Evaluation materials made by board members themselves are public records.<sup>31</sup> This is a statutory resolution of the long-simmering issue whether School Committee members’ evaluations of the Superintendent and Selectmen’s evaluations of the Town Administrator are public records. Yes, they are.<sup>32</sup>

ii. Resumes. Resumes submitted by job applicants are public records.<sup>33</sup> Applications aren’t. Go figure.

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 designee is required “at reasonable intervals” to review the executive session minutes to determine what can be released.<sup>34</sup> That determination shall be announced publicly at

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<sup>29</sup> G.L. c. 30A, § 22(e).

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</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>33</sup> Id.

<sup>34</sup> G.L. c. 30A, § 22(g)(1).

the next open session.<sup>35</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>36</sup>

## VI. How Is the Open Meeting Law 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 multiple different interpretations of the statute and as many approaches toward compelling compliance. Now there will be one enforcement agent, the Attorney General.<sup>37</sup>

B. Complaint Process. Anyone complaining of an Open Meeting Law violation will have to file a written complaint with the public body within 30 days after the alleged violation.<sup>38</sup> The public body has 14 days from receipt of the complaint to send a copy of the complaint to the Attorney General with a written statement of any remedial action taken.<sup>39</sup> If the complainant remains dissatisfied, he may file his complaint with the Attorney General, but he must wait 30 days from the date he first filed with the public body.<sup>40</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. I understand from a representative of the Attorney General that regulations may issue soon announcing a 90-day cut-off.

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<sup>35</sup>

Id.

<sup>36</sup>

G.L. c. 30A, § 22(g)(2).

<sup>37</sup>

G.L. c. 30A, § 23(a).

<sup>38</sup>

G.L. c. 30A, § 23(b).

<sup>39</sup>

Id.

<sup>40</sup>

Id.

C. Penalties. 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 violation.<sup>41</sup> The new statute is ambiguous as to whether individual members may be fined. The section listing potential remedies speaks of civil penalties imposed “upon the public body.”<sup>42</sup> But elsewhere it refers to the possibility of civil penalties against “an individual.”<sup>43</sup> Also, the statute allows not just public bodies but also individual members to seek judicial review of orders of the Attorney General, and contemplates that enforcement action may be taken against both public bodies and individual members for failure to pay civil penalties.<sup>44</sup> My advice is 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. It shall be a defense to the imposition of a penalty that the public body acted in reliance on advice of legal counsel after making full disclosure to him of the facts.<sup>45</sup> SO WHEN IN DOUBT, CALL ME BEFORE ACTING!

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<sup>41</sup> G.L. c. 30A, § 23(c).

<sup>42</sup> Id.

<sup>43</sup> G.L. c. 30A, § 23(f).

<sup>44</sup> G.L. c. 30A, § 23(d & e).

<sup>45</sup> G.L. c. 30A, § 23(g).