

# Town of North Attleborough

## Open Meeting Law Training March 9, 2023

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**KP** | LAW



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# Overview

## Sunshine Laws

- Open meeting, public records, and conflict of interest laws exist in virtually every state.
- Purpose of such laws is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based.
- Under the Open Meeting Law (“OML”), public bodies can only conduct business through public meetings, held in accordance with the OML, unless an exemption allowing an executive session exists.
- Under the Public Records Law (“PRL”), virtually any record created or received by a government employee or official is subject to mandatory disclosure.

# 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

## Three Major Issues

### 1. Notice

- (a) Timing;
- (b) Location (including ADA accessibility) **or** remote access information while remote meeting provisions are still in place;
- (c) Level of detail.

### 2. Purpose

- (a) Presumption for open session;
- (b) Limited authority to meet in closed (executive) session.

### 3. Minutes

- (a) Content;
- (b) Timing (within three meetings or 30 days, whichever is later);
- (c) Approval.

# Meetings

Meeting includes a **deliberation** amongst a **quorum** to discuss matters within jurisdiction of body

- The term “meeting” does not include an **on-site inspection of a project or a program**, provided that members **do not deliberate** (requirement interpreted very strictly).
- The term “meeting” does not include attendance by a quorum at a **public or private gathering or social event**, provided that members **do not deliberate.**

# 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...,” with certain express exceptions.
- Provided that no opinions of governmental body are expressed, deliberation specifically excludes distribution by a member of the public body 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.**

# Avoiding the Appearance of Deliberation

## Practical approaches:

- If attending a meeting of another body or a social event, **including remotely**, 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 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, **even remotely**, 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

**Email** is explicitly addressed in OML

- A quorum of a public body may **not** use e-mail to share their ideas, feelings, opinions, beliefs, whether serially or in a single e-mail, on committee business, and may not use a non-member to avoid law.
  - ✓ **Beware of “reply to all” on emails**
  - ✓ Limit use of **e-mail to scheduling purposes**, and try to avoid using email to undertake business
  - ✓ Assume that email may be forwarded to unintended recipients, and therefore limit content accordingly
  - ✓ Don’t ask for or express opinions, ideas, or beliefs in an email to other members

**\*\*\*THIS INCLUDES WHEN A PUBLIC BODY IS WORKING REMOTELY; A MEETING MUST BE POSTED BY A PUBLIC BODY\*\*\***

# Deliberation – Social Media

**Social Media.** Also subject to OML.

- Practical approaches to avoid OML 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.



# Examples of Email and Social Media Deliberations

- An email, voice mail, IM, posting, or blog originally addressed to one member of a public body subsequently forwarded to, or reviewed by a quorum of members;
- An email, voice mail, IM, posting, or blog sent by a member to a quorum of members of a public body;
- A reply to an email, voice mail, IM, posting, or blog originally addressed to one member of a public body subsequently forwarded to, or reviewed by a quorum of members;
- A web-based discussion group, chat room, or social networking site in which a quorum is participating, whether contemporaneously or in serial fashion.

# Meeting Notices – Timing

- **Requirements** - Posted at **least 48 hours in advance** of meeting, **excluding** Saturdays, Sundays, and legal holidays unless an “**emergency.**”
  - For a Monday meeting, notice must be posted on Thursday.
  - If Monday is a holiday, a Tuesday meeting must be posted on Thursday.
  - Notice **must state both the date and time** that the **notice is posted.**
  - If revised, must state both the date and time of the original posting and the date and time of the revised posting.

# Meeting Notices – Content

- 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."
  - It must include remote access information if the meeting is being held remotely.
- If the topic may be included or discussed, it should be included on the notice/agenda to ensure compliance.
- Topics must be **sufficiently specific** to “reasonably advise the public of the issues to be discussed at the meeting.” 940 CMR 29.03(1)(b)
- **Regularly occurring items need more detail than simply using generic placeholders (i.e. old or new business).**

# Meeting Notices – Best Practices

- ✓ **Do not use acronyms or abbreviations** – clarify or spell out terms that may not be familiar to the general public.
- ✓ **Include executive sessions** – cite to specific statutory reference(s), quote text of executive session purpose; provide additional detail that would not negatively impact body; more content may be necessary!
- ✓ **Avoid general shorthand references** (i.e., “personnel,” “contract negotiations,” “hiring,” etc.)
- ✓ **If executive session is planned and would be only matter on agenda, notice must also indicate open session as an agenda item.**

# Meeting Notices – Best Practices (cont.)

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

# Posting Notice – Practical Considerations

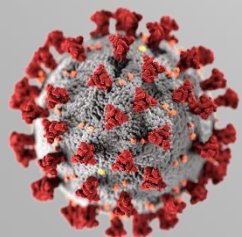


- ✓ **Time stamp notice** to ensure accurate record exists of filing.
- ✓ A meeting may not be continued from one night to the next unless the meeting is properly posted under the OML for the continued time.
- ✓ The notice required under the OML does not substitute for or otherwise supersede notice requirements under other applicable laws.



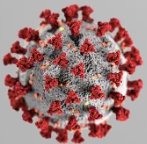
# Posting Notice – Emergencies

- Poor planning does not equal an emergency!
- Public health emergencies, natural disasters, and public safety issues **do** qualify as emergencies.
- **Pre-COVID-19, majority of emergencies were generally limited to weather-related issues.**
- **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.



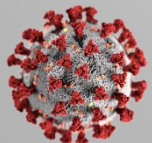
# Conducting Remote Meetings

- Ordinarily, all meetings must be held in a public place, that is open to and accessible by members of the public.
- During COVID-19, Gov. Baker issued an Executive Order suspending certain provisions of the OML. The Legislature has extended this authority through March 31, 2023. A further extension and potential long-term changes are currently being worked on by the legislature.
- **While these provisions remain in effect →**
  - Public bodies are not required to hold meetings in locations that are open to the public, provided that the public body makes provision to ensure public access to the meeting **through adequate, alternative means.**
  - Such means may include, without limitation, providing public access through telephone, internet, or satellite enabled audio or video conferencing or any other technology **that enables the public to clearly follow the proceedings of the public body while those activities are occurring in real time.**



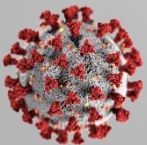
# Conducting Remote Meetings (cont.)

- When meetings are conducted by public bodies virtually, the meeting notice **must provide instructions** as to how the public can view and participate in the meeting, i.e. Zoom link/password.
  - **Practice Tip:** Make sure link to meeting is updated from prior notices/agendas.
- If some public body members are participating in-person and others remotely, the Chair must identify the members who are remote which must be included in the minutes. OML 2020-138; OML 2020-98.
- Chair must announce if meeting is being recorded, under wiretap statute.
- All votes taken in a virtual meeting or hybrid meeting **must be by roll-call vote**, even if the vote is unanimous.
- **All other provisions of the Open Meeting Law apply**, meaning that notice must be posted at least 48 hours prior to the meeting, the notice must contain a detail list of topics the chair anticipates will be discussed, executive session must be identified and for a permissible purpose, and minutes must be kept.



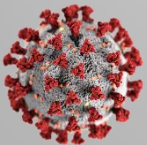
# Conducting Remote Meetings – Technical Difficulties

- If a technical problem prevents the meeting from being accessible in real time (e.g., the live stream goes down), the meeting should be paused or rescheduled, depending on the severity of the technical issue.
  - Continuing meeting and subsequently posting a recording, even immediately afterwards, does not cure the violation. The public must be able to access the meeting *as it happens*. OML 2021-17; OML 2021-166.
- If technical difficulties result in a remote participant being disconnected from the meeting, that fact and the time at which the disconnection occurred must be noted in the meeting minutes – 940 CMR 29.10(6)(d).



# Conducting Remote Meetings – Public Participation and Attendance

- As with public meetings conducted in the normal course, public participation is not required in general business meetings of a public body.
- If, however, the public body allows public participation or if the meeting is a public hearing, members of the public must be able to communicate with the body and be heard by other members of the public.
- A public body may choose to have only the members of the body attend the meeting in person and prohibit in person attendance by members of the public.



# Executive Session

## Process:

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

# Executive Session – Practical Considerations

- 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 board's position); and declaration must be made, as needed.

# Meeting Minutes – Best Practices

- **Meeting minutes must be kept for all meetings;**
- Date, time, place of meeting, and members present or 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 records, documents, and other exhibits **used** by the body at the meeting, which will be “part of record” but not of minutes; document is “used” if:
  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

Minutes must be created and approved in timely manner.

- Approval must occur generally within the next 3 meetings or within 30 days, whichever is later.
- Minutes 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.
- **Because many public bodies are meeting more often since remote meetings have been authorized, steps should be taken to stay as updated as possible on meeting minute drafting and approval.**

# Minutes – Approval

## Executive Session Minutes

- May be withheld until purpose of exemption has been met, **unless otherwise protected under the Public Records Law;**
- Obligation 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 same.
- Must provide a response to a request for executive session minutes within 10 calendar days and shall not assess a fee for time spent reviewing.

# Enforcement Process

## Filing Complaint = Three steps:

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 (cont.)

- **Public Body must 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 cures 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 (Wakefield School Committee).

# Enforcement (cont.)

- 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 (after a hearing) of \$1000 fine for **intentional** violation.
- AG may file action in Superior Court to require compliance.
- Three registered voters may bring action in Superior Court.



# Resources

- Attorney General's Open Meeting Law Website:  
<http://www.mass.gov/ago/government-resources/open-meeting-law/>
- KP Law, P.C. : [www.k-plaw.com](http://www.k-plaw.com)



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