

## Top Ten Changes to Watch for in the New Open Meeting Law

1. New requirements for all persons serving on “public bodies” to receive Attorney General’s version of Open Meeting Law, regulations and educational materials; Town or City Clerk or designee shall maintain written certifications of receipt.
2. 48 hour notice – still required, but now cannot count Saturdays, Sundays or holidays. Example: Monday night meeting must be posted before Thursday night.
3. Notices must (1) include list of topics chair reasonably anticipates will be discussed [i.e., agenda], and (2) be posted in or on municipal building to be visible to public *at all hours*.
4. Emails are expressly included in definition of “deliberation,” which is prohibited outside of open session; but distribution of agendas, scheduling information or reports to be discussed at next meeting is permitted.
5. Attendance by a quorum at a location not a “meeting” if not intended to conduct business and no deliberation occurs – for example, attending a conference, social event, or a meeting of another municipal board.
6. Minutes must contain more detailed information; in addition to “date, place, time and matters discussed,” shall include *summaries* of matters discussed, list of documents used, all decisions made/votes taken.
7. “Documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.”
8. Chairs required to periodically review executive session minutes and determine if they should be released, or if purpose for executive session is still ongoing to keep minutes confidential.
9. Attorney General will assume all interpretation and enforcement authority over OML, District Attorneys no longer involved. AG has broader enforcement authority.
10. Citizens making complaints of OML violations must file written complaint with the *governmental body* first; body submits reply to complainant and Attorney General’s office.

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**CHANGES TO THE OPEN MEETING LAW**

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**Overview of the Revised Open Meeting Law [OML]**

- Centralizes oversight and enforcement in Attorney General's Office
- Alters important statutory definitions
- Imposes new requirements for and additional regulation of notices, minutes, executive sessions, exemptions, member participation and related administrative matters
- Significantly changes enforcement process

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**Chapter 28 of the Acts of 2009**

- OML portions effective July 1, 2010
- Will repeal current provisions, G.L. c.39, §§23A-23C
- Revised OML will be found at G.L. c.30A, §§18-25
- Regulations and guidance from AG's Office anticipated before July

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## Role of the Attorney General's Office

- Oversight and enforcement of OML
- May void action taken in violation of OML
- May reinstate employee if violation found regarding employment action
- Promulgate rules and regulations, interpret OML and issue written letter rulings or advisory opinions

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## Alters Important Statutory Definitions

- Deliberation
- Meeting
- Governmental body

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## 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.

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## Deliberation (cont.)

- Specifically includes e-mail communications
- Provided that no opinions of governmental body are expressed, specifically excludes:
  - Distribution of meeting agenda
  - Scheduling information
  - Distribution of other procedural meeting materials, reports or documents that may be discussed

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## Meeting

- "[A] deliberation by a public body with respect to any matter within the body's jurisdiction..." with certain express exceptions.

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## Meeting (cont.)

- Specifically excludes:
  - A quorum at an on-site inspection
  - Attendance by a quorum at a conference or training program or a media, social or other event
  - Attendance by a quorum at meeting of another governmental body
  - A meeting of a quasi-judicial board held for the sole purpose of making a decision in an adjudicatory proceeding

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## Governmental body/ Public body

- Now known as "Public body"
- "[A] multiple-member board, commission, committee or 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; ...and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body."

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## Public body (cont.)

- "Governmental body" now "Public body"
- Includes any multiple-member body "within" any town, as compared to a governmental body "of" any town
- Includes subcommittees, which include any multiple-member body created to advise or make recommendations to a public body

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## New Requirements and Additional Regulation

- Notice
- Minutes and documents used at meetings
- Executive sessions
- Exemptions to OML
- Participation by members
- Related administrative matters

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## Notice

- Shall include "a listing of topics that the chair reasonably anticipates will be discussed at the meeting"
- Must be posted in manner conspicuously visible to the public at all hours in or on municipal building housing clerk's office
- Requires 48 hours in advance of meeting excluding Saturdays, Sundays and legal holidays

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## Minutes

- Must include:
  - A summary of the discussions on each subject
  - The decisions made and actions taken, including a record of all votes
  - A list of documents and other exhibits used by the body at the meeting
  - The documents and other exhibits used

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## Minutes (cont.)

- Shall not be withheld under any of the exemptions to the Public Records Law, except:
  - the following materials shall be exempt as personnel information:
    - materials used in a performance evaluation of an individual bearing on his professional competence that were not created by members of the body for purposes of the evaluation; and
    - materials used in deliberations about employment or appointment of individuals, including applications and supporting materials and excluding resumes

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## Executive Session Minutes

- Must be disclosed when purpose of exemption has been met, unless otherwise protected
- Must be reviewed periodically by chair or public body
- Must be provided within 10 days in response to request, unless review not yet undertaken (then by board's next meeting or 30 days, whichever occurs first)

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## New Executive Session Requirement

- Before going into the executive session, the chair must state the purpose for the session, "stating all subjects that may be revealed without compromising the purpose for which the executive session was called"

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## Exemptions to OML – Executive Sessions

- Combines current exemptions (1) and (2), as follows:
  - "(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. ..."
- Adds right of individual to create independent record of session at own cost

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## Exemptions (cont.)

- + ■ Divides current exemption (3) into two exemptions, as follows:
  - "2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
  - 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 ..."
- Adds requirement that chair declare "detrimental effect" for certain exemptions

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## Administrative Matters

- + ■ Allows remote participation in meetings if authorized by AG and chair and quorum physically present
- Requires public statement by chair regarding video or audio recordings
- Requires permission of chair to address meeting
- Certification of receipt of OML, regulations and AG educational materials; held by appointing authority, city/town clerk. Within 2 weeks of taking office.

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## Enforcement Process

- + ■ Filing Complaint
  - Must first file written complaint with public body, within 30 days of alleged violation
  - Public body must forward complaint to AG within 14 days of receipt and inform AG of any remedial action taken
  - Not less than 30 days after date complaint was filed with public body, complainant may file a complaint with AG

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## Enforcement (cont.)

- Review by the Attorney General
  - Whether there has been a violation
  - Must hold a hearing before imposing civil penalty
  - If a violation is determined to have occurred, the AG must determine whether the public body, or one or more of its members, or both, are responsible, and whether the violation was intentional or unintentional

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## Enforcement (cont.)

- Upon the finding of a violation, the AG may issue an order to:
  - Compel immediate and future compliance with OML;
  - Compel attendance at authorized training session;
  - Nullify in whole or in part any action taken at meeting;
  - Impose civil penalty upon public body of not more than \$1,000 for each intentional violation;
  - Reinstate employee without loss of compensation, seniority, tenure or other benefits;
  - Compel that minutes, records or other materials be made public; or
  - Prescribe other appropriate action

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## Enforcement (cont.)

- Judicial Review of AG Order
  - A public body or any member aggrieved by order may file certiorari action in Superior Court within 21 days of receipt of order
  - AG order stayed pending judicial review
  - If AG order nullifies action, public body shall not implement action

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## Enforcement (cont.)

- Compliance

- AG may file action in Superior Court to compel compliance with order or payment of civil penalty

- Alternative procedure

- AG or 3 or more registered voters may initiate civil action in Superior Court to enforce OML

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## Enforcement (cont.)

- Burden of proof

- Burden on public body to show by a preponderance of the evidence that the action complained of was in accordance with and authorized by OML

- Advice of counsel defense

- Defense to imposition of civil penalty that public body acted in good faith compliance on advice of legal counsel

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