A Guide to
Open Meetings

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The degree to which a government is open is a measure of the strength of its democracy. Open meeting laws are important instruments for doing the people's business in public. Open meetings increase public understanding of governmental actions; they make officials, both elected and appointed, accountable to the public for the actions they take; they foster a free press that is freely able to acquire information without currying favor; and they improve procedural and record-keeping standards of governmental bodies.

The sunshine laws, of which the open meeting laws are a part, are largely a development of the 1970s. There had been laws relating to open government in the past, but the lessons of Watergate prompted a spate of open meeting laws that seek to make officials accountable for their actions. Today, every state has some sort of statute that requires open meetings of governmental bodies.

The Massachusetts open meeting law was enacted in 1976

The League of Women Voters supports this law. Our testimony promoted its passage. During 1977, in conjunction with the Attorney General's office, we monitored compliance with the law. Twenty years of experience observing and participating in government have given us a perspective on how the open meeting law works.

General Provisions of the Massachusetts Open Meeting Law

The Massachusetts statute has three distinct parts: (1) Chapter 30A, Sections IIA, IIA-1/2, 11B, and IIC; (2) Chapter 34, Section 9; and (3) Chapter 39, Sections 23A, 23B, and 23C of the General Laws of Massachusetts. These different chapters apply at the state, county, and local levels, respectively. Each begins: All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided…. Whether the law applies to the state, county, or local level, it establishes procedures for notification of meetings, standards for keeping records of all meetings, protections for individuals who may be the subject of a closed meeting, and exclusive reasons for which a closed session may be held. At the state and county levels, there are

seven exclusive reasons for closed session; at the local level, there are two more.

This discussion of the implementation of Massachusetts' open meeting law focuses primarily on the local law.

Where the Law Applies

The open meeting law applies to every meeting of most governmental bodies. There are a few public bodies that are exempt, and some for which the law's application may be undetermined. The law covers nearly all governmental groups at the local and county levels. The law makes it clear that town meetings are not considered to be governmental in the sense of this statute. Town meetings have their own standards of notification and record keeping, which can be found in state law, specific representative town meeting acts, and town bylaws.

The open meeting law does not apply to the judicial branch of government at any level. And it does not apply to administrative meetings of government employees, such as the staff meeting of a school or library.

The General Court (state legislature) and its committees and subcommittees are excluded from the open meeting law, as is the Governor's Council. Other state agencies in the executive branch, such as the Department of Social Services and the Department of Mental Health, are not covered. State agencies, such as the Board of Registration in Medicine, are covered by the law, but since much of their work is adjudicatory, they may declare in advance that certain meetings, devoted exclusively to adjudicatory decisions, are closed. Public authorities and charter schools that are receiving public funds are under the law.

Here are some indicators of when the law applies:

- The body is established by local ordinance, bylaw, or state law.
- The body can draw on public funds or has regulatory powers.
- The body is a subcommittee selected and delegated by a governmental body that is covered by the open meeting.

Here are considerations that incline toward exclusion of a board from the law:

- The body is established by will or bequest of an individual.
- The body is a group appointed by a single administrator, i.e., a superintendent or police chief, to advise on matters that are administrative responsibilities.
- The body has its own rules of governance established by pre-existing state law.

If there is a question whether the law applies, ask it. The best place for citizens to inquire is the county district attorney's office (see appendix), or at the state level,

the Attorney General's office. Members of local boards can consult town counsel to see if they are under the jurisdiction of the open meeting law. Chances are, they are.

Even if the law does not apply, some boards voluntarily adopt the standards of the open meeting law. Other governmental bodies, such as committees of the General Court, have their own rules that govern public access. The public is not necessarily excluded from their deliberations.

Notice Requirements

Notice of all meetings, giving time, place, and name of the board, must be posted in a central public location at least 48 hours before the time of the meeting. (Sundays and holidays do not count.) Any change in the time or place of a meeting requires 48 hours' advance notice.

All notices of meetings at the local level (including meetings of regional school committees and school councils) must be filed with the city or town clerk and posted in a given location. Usually the posting place is a bulletin board in the town hall, or somewhere near the town clerk's office, preferably in a building that is open on Saturdays.

Annual or semiannual schedules of meetings are acceptable as long as changes are posted 48 hours in advance of the meeting. Meetings may not begin in advance of the hour of scheduled notice, and may not be postponed or adjourned to another date without proper notice. In the case of emergencies- that is, sudden, unexpected occurrences that require immediate action by the body-notice may be less than 48 hours. But as soon as an emergency meeting is scheduled, notice must be posted. Although not required by law, it would be appropriate to notify the press and other observers of an emergency meeting.

Notice requirements under the open meeting law are different from those for certain public hearings. Many hearings mandated under state law, such as site assignments by the board of health, or wetlands hearings by the conservation commission, must be advertised in the local newspaper. The number of advertisements required and the time of publication vary according to the specific requirements of state law for each type of activity.

Meetings Open to Any Person

Any person means every person and particularly the press. If the meeting room is too small, and provisions are not made for all observers to listen in another room, the meeting is in violation of the law. Meetings that are described as open for an individual but not for the press are not open meetings. Both sound recording and videotaping are permitted, but these operations should not disrupt the meeting.

Handicapped access to open meetings has been established by a ruling of the Attorney General. All meetings need to be wheelchair accessible and, with advance notice, sign language interpretation must be provided.

Local boards should consider any person when choosing a meeting time and place. They should try not to meet at remote locations or in private homes. They should not prolong a meeting, delaying action on controversial matters until everyone else has left.

An open meeting does not mean open to comments and participation by the public. A working meeting is for the participation of committee members. A hearing format provides an opportunity for others to say something. Participation of observers is governed by the committee's rules, customs, and ultimately its chairperson.

Exceptional Meetings

Any meeting at which a simple majority of the members are present to deliberate must be open to the public. There are other sorts of meetings that can be excepted.

Members of a public body who meet by chance or on social occasions are not in violation of the open meeting law. Field trips, and presumably conventions and workshops, are also exempt. However, no chance or social meeting may be used to circumvent the requirement to discuss and deliberate at a public meeting.

Closed cracker-barrel sessions, when a school committee or library board gets together with staff for a free exchange of views, are not permitted. The law, however, does not prohibit members of a governmental body from attending or sponsoring social occasions for public employees. It does proscribe the holding of closed sessions organized for the exchange of information.

Deliberation is considered to be any discussion that advances members of a board toward a decision on a governmental matter, Hence, closed, no-quorum meetings or roundabout phone calls to discuss a concern of the board are not proper. Members of the board should be mindful that these conversations can be a way for one member to unduly influence the outcome of a discussion. The deliberation and the decision can be altogether different when considered by members together. Although it is difficult to prove that such closed deliberations have taken place, many such complaints have been upheld. These complaints, which come from the public, the press, and board members themselves, occur when decisions are made without public discussion.

Occasionally a mayor or town manager calls members of governing boards to attend a closed or unposted meeting with him/her. Such meetings can be illegal under the open meeting law. Other arrangements, such as the mayor's inviting only one member of each governing body, or the board's putting the executive and

his/her concern on its agenda, are preferable.

Minutes and Other Public Records

The open meeting law requires that boards keep accurate minutes of meetings, and that the minutes of meetings held in open session be available to the public. Minutes are open to the public as soon as they are prepared, even if the board has not reviewed or approved them.

At the very least, the minutes should contain the time, date, members present, subjects discussed, and votes taken. Some boards make a taped record of meetings. These recordings of open sessions are also part of the public record, and hence should be available for any person to hear. Recordings do not substitute for minutes. There needs to be a written record, formally adopted. (For information on minutes of closed sessions, see Records of Closed Sessions.)

The only part of the open meeting law that deals with public documents is the requirement to keep minutes. All materials used at an open meeting, such as reports, correspondence, and budgets, are generally public information, but these come under the jurisdiction of the public records law. (See Massachusetts General Laws, Chapter 4, Section 7 and Chapter 66, Section 10.) Even if the documents are preliminary, they are still part of the public record; if they are distributed, they do not have to be handed back.

In addition to materials used in open session, there are many agreements and contracts negotiated in closed session which, when acted upon, become part of the public record. Agreements to purchase real estate and union contracts fall into this category.

In general, all governmental documents are public, with certain exceptions. Those exceptions are:

1. material implicitly or explicitly exempted by law
2. material relating solely to internal operation of the governmental unit
3. personal information including certain personnel and medical files
4. memos relating to policy positions that are being developed
5. working notes of an individual
6. investigatory information related to law enforcement
7. trade secrets and commercial or financial information submitted with a promise of confidentiality
8. real estate appraisals for potential purchase or litigation
9. lists of persons with gun permits
10. library circulation records that include borrowers' names

The keeper of the records, whether a town clerk or a board chairperson, must provide the public document for inspection to any person who so requests. The

keeper must respond to requests made either verbally or by mail, and provide copies of the document. A nominal fee (20¢ per page) can be charged. It is helpful if the requester knows the titles of the documents and the specific information needed, but the keeper is obliged to assist in specifying the documents needed. The keeper has 10 days in which to respond to a request; a delay beyond this time is assumed to be a refusal.

If the request is refused, the requester can bring a complaint to the Supervisor of Public Records, Office of the Secretary of the Commonwealth, One Ashburton Place, Boston 02108, (617) 727-2832. The Office of the Supervisor enforces the public records law. The attorneys there can answer telephone inquiries and then make an investigation to determine whether the material requested is part of the public record. If it is, the board will be ordered to provide it. If the person who is keeper of the records refuses or fails to comply, the Supervisor may notify the Attorney General, who may take whatever measures necessary to insure compliance. The town clerk must keep a record of where all local public documents are kept.

Voting

Secret ballots are not allowed at open meetings. As a practical matter of accountability, many official actions of a public body need a roll call vote in which each member's vote is recorded. All votes, whether by roll call or by number, must be recorded in the minutes. Every vote taken in closed session must be by roll call. Often a. board will discuss a matter in closed session, then go into open session to vote it in order to publicly validate the action taken. Straw votes by paper ballot have been declared illegal, even at informal sessions.

The Process for Using Executive Session

The open meeting law requires that in order to hold an executive (closed) session, a public body must first meet in an open, posted session; then a quorum of the members must vote by roll call to go into executive session. As a courtesy to the press and public, the meeting notice often states that a motion to go into executive session will be considered. At the time of a vote to close a meeting, the presiding officer must state whether the board will reconvene the meeting in open session. In this way, a decision to close the meeting cannot be used to eliminate the public from subsequent deliberations on topics that are not subject to executive session.

These requirements are often ignored by a chairperson who declares the meeting closed rather than calling for a motion and a roll call vote. Such violations have been sometimes declared *nil nisi;* that is, doing no appreciable harm to the outcome. However, they do serve to erode public confidence in the board. Taking the time to propose, discuss, and vote on a motion for executive session will validate the work of the public body.

At the time of the vote to close the meeting, the chairperson must also give a reason for using executive session. The reason must be one of the nine allowed by the law (see below), and it must be related to the matter to be discussed. If the reason is invalid, the board can be charged with fraudulent use of executive session.

As a matter of practice, votes to go into executive session are usually unanimous. Strenuous objection on the part of even one member is sometimes enough to keep a meeting open. If closing the session is controversial, it can lead either to leaks to the press by the dissenter, or to charges of holding a fraudulent executive session. A member of a board who believes that an executive session is unwarranted can bring a complaint directly to the district attorney.

Reasons for Executive Session

When voting to close a session, the board must give one of a list of specific reasons for doing so. Local boards have nine possible reasons for choosing executive session; state and county boards have only the first seven reasons and a narrower collective bargaining exemption that does not include bargaining with non-union employees. The reason for these differences is that amendments to the law governing cities and towns were not consistently applied to the state and country chapters (Chapter 30A, Sections IIA, IIA-1/2, 11B, and IIC; and Chapter 34, Section 9, respectively).

Here is the list of exemptions that applies to local governmental bodies:

1. to consider reputation, character, and health, but not the professional competence, of a particular individual
2. to consider dismissal or discipline of an employee or public official
3. to consider strategy relating to collective bargaining or litigation if the board will be disadvantaged by open deliberations, and to conduct negotiations of contracts with union and non-union employees
4. to consider deployment of security measures
5. to consider charges of criminal misconduct
6. to consider purchase, lease, or value of real property, if the board will be disadvantaged by open deliberations
7. to comply with other laws, both federal and state
8. to screen candidates for employment if an open meeting will have a detrimental effect in obtaining qualified candidates
9. to conduct mediation of disputes with other parties.

It is important to keep in mind two general purposes for executive session: first, to protect the rights of individuals who are under scrutiny, and second, to allow public bodies to negotiate labor contracts, purchase real estate, recruit applicants for a position, or respond to legal actions when they would be handicapped by open proceedings. Given the intent of the law, boards would not be required to

include as part of the reason for closing the session the name of the individual being discussed or the parcel of land being considered for purchase. However, the board might be challenged to show that it would be at a disadvantage in a bargaining situation, or to specify what kind of legal action or what other law is involved.

Other Laws

The state's Privacy Act, sometimes in combination with the Public Records Law and the Fair Information Practices Act, is occasionally used as a reason to close a meeting. The Privacy Act (Chapter 214, Section IB) states simply that a person shall have a right against unreasonable, substantial, or serious interference with his privacy. The Public Records Law (Chapter 4, Section 7, Subsection 26) defines certain kinds of information as confidential. This includes medical records, some personnel files, and any other material the disclosure of which may constitute an invasion of privacy. This has been defined by the courts to include marital status, welfare payments, medical condition, family disputes, and reputation. The Fair Information Practices Act (Chapter 66A) regulates the use of personal information gathered by governmental agencies. It limits its use and gives the subject person the right to review and correct the record.

Housing authorities make frequent use of this combination of laws to hold closed sessions to discuss the eligibility of potential tenants or problems with existing tenants.

Other state laws can be used as a reason for executive session. For instance, the statute that describes the procedure for dismissing a teacher has been used to close a meeting, despite the request on the part of the employee that the dismissal proceeding be held in open session.

Closed Meetings as an Option Not a Requirement

The nine reasons that may be used for executive session should not be considered imperatives to close. Even in some cases when a public body has a reason to close a meeting, it may deliberate the matter in open session. Agreements to purchase park property have been worked out publicly because the board wanted to promote public comprehension and support. Some decisions related to collective bargaining that could be considered in closed session may be handled in open session, possibly strengthening the committee's bargaining position through greater public understanding.

Public officials should keep in mind that the burden of proof rests on them to demonstrate that one of these reasons does indeed apply when using executive session.

Records of Executive Sessions

Aboard operating in executive session must keep minutes of the proceedings. These minutes should be similar in nature to the minutes of open session, except that all votes in executive session must be by roll call. (The record of the reason for closed session and the roll call to close the session are part of the open minutes.)

The minutes of executive sessions may remain closed to the public as long as the reason for closing the meeting remains valid. If the reason no longer applies, the committee must vote to release them to the public. They may do so spontaneously or upon request. When minutes of a closed session are released to the public, other information used at that session do not necessarily become public. Personnel files, for instance, are always confidential.

If there is a question whether withholding these minutes is still valid, it can be answered by one of the attorneys in the Public Records Division, Office of the Secretary of the Commonwealth, Room 1709, One Ashburton Place, Boston 02108, (617) 727-2832. The attorney will decide if these records should be released, and has the power to order the governmental body to do so. (See Minutes and Other Public Records.)

When to Complain About Violations

Those who are concerned about open meeting law violations must make an immediate decision about whether to take legal steps. It will take the district attorney or Attorney General at least two weeks to determine whether a violation has occurred, decide whether a suit will be necessary, and prepare the papers to be filed. In order for a court to invalidate actions that were improperly taken, the suit must be filed within 21 days of such action becoming public. Moreover, since the ongoing work of the governmental body may be enjoined or delayed, the complainant should act as swiftly as possible.

Here are some of the situations that should prompt an immediate, formal complaint: potential violations relating to an issue of great consequence, a pattern of excluding the public, inadequate records, inadequate bookkeeping, and when the clout of a public prosecutor or the courts is needed to settle the issue. When the situation is serious, it is better to complain repeatedly than to store up a list of potential violations.

There are many minor violations of the open meeting law that do not fit the profile above. The concerned citizen can often correct these sporadic oversights by a verbal inquiry or a short note to the committee chairperson.

Heading Off Trouble

At the inception of each new governmental body or each new session of an existing board, the open meeting law should be mentioned as part of the rules of operation. The city or town clerk must present every member with a copy of the law, and each must sign a receipt for it. If this is not done, board members should inquire about the application of the law. Signed copies of these receipts are public documents and should be available -t the town clerk's office for public inspection. A copy of the law can be obtained from the Public Records Division, Room 1701, One Ashburton Place, Boston 02108, (617) 727-2832. Be sure to specify which law is needed. Chapter 39, Sections 23A, 23B, and 23C applies to cities and towns.

Public boards can consult town counsel or the district attorney before deliberating on sensitive matters that may merit executive session. Several district attorneys publish open meeting guidelines. The most complete of these explanations of the law is the one prepared by the District Attorney of Middlesex County (see appendix).

Scrupulous attention to the notice requirements will help build public trust. The person responsible for the notice board should make copies of the notices and post them immediately. Then the original copies should be time stamped and filed as part of the public record. The notice board should be checked to see that meeting notices have not been prematurely removed. A locked notice board is a good way to ensure against this.

Members of the press and public will certainly be checking the notice board. They can also ask to see the file of the original notices, and signed receipts of the law, inquire in advance of any crucial action whether a certain board is covered by the law or elects to abide by it, and seek advice from the district attorney.

Where Problems Arise

Administrative duties are harder to perform in the open than policy making and legislation. Small boards with administrative responsibilities, very little controversy among members, and a modicum of group loyalty are the ones most likely to run afoul of the open meeting law. When the law was first implemented 20 years ago, there was outright obstruction on the part of some of these groups. By now, most of them have learned to operate under the law, and many welcome the increased public attention

Sometimes governmental bodies have very compelling reasons of their own to violate the open meeting law. There have been cases of serious malfeasance and conflict of interest that have come to light through the enforcement of this law.

Enforcement and Sanctions

A frequent method of resolving open meeting complaints is a negotiated

settlement. This takes the form of an agreement between the body in question and the district attorney. Usually the board agrees to stop whatever action is in question and agrees not to do it again, in exchange for no blame or further prosecution. For open meeting law zealots this may seem an unsatisfactory solution because there is no established wrongdoing; it is a kind of no-fault enforcement.

The district attorney also has the option of issuing an opinion letter that states the findings in a specific case. If the law has been violated, the remedies are also laid out. The offending body will be required to conform to the law, may be enjoined from acting upon decisions taken improperly, and may be required to repeat deliberations and decisions in properly open session.

If a board seems unlikely to come to agreement or to comply with orders, the enforcement official can file suit in court.

An alternative method of taking legal action is a three-citizen suit. Any three registered voters may bring suit directly before a court. Such an action means hiring an attorney to bring the case. Hence these suits are often sponsored by a public union or other institutional interest. They are also used by groups of citizens who have reason to believe that the district attorney will not take their view of the case. Only when there is a real difference in the interpretation of the law and the will to test the difference does the case get to court.

If a court finds that a violation has occurred, it may void the action of the public body, providing the suit was filed within 21 days of the time that the alleged violation was made public. Regardless of when the suit is filed, the court can order that the law not be violated in that way again and has the power to fine and to assign court costs to the offending body. The fine can be up to $1,000 for each meeting in violation of the law. Public bodies have been ordered to pay attorney's fees for complaints against them.

Implementing the Letter and Spirit

Twenty years of experience with the open meeting law in Massachusetts have established it as the way of doing the public's business. In this period, amendments to the law have expanded the exemptions, and refined its operation somewhat more stringently. Amendments have established the rights of individuals who are the subject of a closed meeting, the requirement to have roll call votes in executive session, and the requirement to release minutes of executive sessions when the reason for closing the session is no longer valid. Case law, on the other hand, has narrowed its application while consistently upholding its purpose and requirement that the governmental body supply the burden of proof.

Violations of the open meeting law are frequent, but the opportunities for

violation are infinitely greater. Over the past 20 years, a number of public bodies formerly operating in a dim limbo have been exposed to the sunshine of required open meetings. Many public officials strongly prefer the standard of openness prescribed by the law to the ambiguity they previously suffered. For the most prominent governmental bodies, the law has imposed a consistent standard of operation. Some officials argue that the law is inconvenient and stifling, saying that it has taken decision making away from public boards and driven it down to a bureaucratic level of government where it can be kept confidential. Others maintain that the requirements of the law have enhanced public understanding. Public officials who understand the law in detail and know how to use it do not find it onerous.

The open meeting law and the public information act have been a tremendous asset for citizens, the press, and civic organizations. These laws not only empower the public, but also increase understanding of government. However, the benefits of increased accountability of public officials and public information only accrue when the public is watching. Observation of public meetings should be part of what local organizations do. Friends of the library should attend meetings of the library trustees; environmental groups should watch conservation commissions and boards of health; parent-teacher organizations should attend school committee meetings. Members of the press and observers from the League of Women Voters continue to monitor many governmental meetings.

The open meeting law is an important instrument of informed citizen participation in government. This statute is sometimes ignored and misunderstood, but where it is consistently employed it works well. Its fullest implementation depends not on government but on the active involvement of citizens.