

## OPEN MEETING LAW 2015 RECAP

### *Prepared for the 2016 Massachusetts Municipal Association Annual Meeting*

Nearly five years after the enactment of the “new” Open Meeting Law (“OML”), the Attorney General’s Division of Open Government (“Division”), through the issuance of opinions on particular complaints, continues to refine our understanding of the law and implementation thereof. Review of these opinions highlights nuances in how the Division interprets the OML and can assist boards in avoiding violations. While the Division’s resolution of a complaint applies only to the particular governmental body against which the complaint was lodged, it sets a precedent for resolution of similar complaints that may not appear in the OML or Division regulations adopted thereunder. The database of Division determinations is available on the Attorney General’s website at <http://www.oml.ago.state.ma.us/Search.aspx?section=1> and may be searched by municipality, date or keywords. Below are some notable decisions from 2015 of which governmental bodies and their staff should be aware.

Executive Session: Single Item Meeting Notice – On occasion, a board may schedule a special meeting for the purpose of addressing a single issue in executive session. As always, the OML, specifically G.L. c.30A, §21, requires the governmental body to begin the meeting in open session and then vote by roll call to enter executive session. The Division has determined, however, that in such a case, a board must include an item for the open session portion of the meeting, even if the only action to be taken is voting to enter executive session. The Division reasoned, “Listing ‘open session’ on the meeting notice is the only means by which members of the public are informed that a public body will, in fact, hold an open meeting that they are permitted to attend.” OML 2015-177, OML 2015-87. Therefore, to avoid a potential violation of the OML, if a board intends to hold a meeting only for the purpose of addressing an executive session matter, the meeting notice must first list the open session in a form similar to the following, “1. Open Session for Purpose of Voting to Enter Executive Session.”

Executive Session Minutes: Collective Bargaining Strategy – A board may, pursuant to G.L. c.30A, §21(a)(3), enter executive session for the purpose of discussing strategy with regard to collective bargaining contract negotiations, but only so long as an open session “may have a detrimental effect on the bargaining position of the public body.” The records of an executive session, including minutes, must typically be released when the purpose of the session is completed. Some public bodies have argued that the minutes, which may contain negotiating strategies, have a continuing need to be withheld as potentially affecting future negotiations. The Division has agreed that such minutes may be withheld for a period, but that “such minutes may not be withheld indefinitely.” OML 2015-62. The Division held that at some point the basis for withholding these minutes, i.e., that release would be “detrimental” for future negotiations, must expire. At this time, no appellate court has ruled on the application of the exemption and the ability to withhold permanently executive session minutes concerning collective bargaining strategy. Importantly, however, other exemptions from disclosure under the Public Records Law may still apply and be asserted in response to a request for such minutes.

Approval of Contracts Negotiated in Executive Session: Union v. Non-union – The OML authorizes boards to meet in executive session to discuss strategy and/or conduct contract negotiations for both collective bargaining and nonunion personnel contracts. The Division interprets the OML requirements for approval of such contracts differently, however. The Division has held that a collective bargaining contract may be approved by vote in executive session, provided that the board announces its approval at its first opportunity and “promptly” makes the final contract available as a public record. For contracts with nonunion personnel, however, the Division takes the position that the OML does not allow a board to vote in executive session to approve the contract. OML 2015-50

In effect, therefore, it is the Division’s position that a vote in executive session to approve a contract with non-union personnel violates the OML. As with any unintentional violation of the OML, the Division recognizes that a board may independently cure such a violation by taking “independent, deliberative action” in open session. This requirement may not be met merely by ratifying the prior vote, but only by engaging in a full and fair discussion at a properly posted meeting for which the matter appears on the meeting notice of the provisions and/or issues that resulted in the final contract.

Other Common Issues – Multiple-member bodies remain challenged by the highly technical requirements of the OML, and the Division therefore continues to issue determinations emphasizing its interpretation of the basic requirements of the OML. The following matters may therefore be of assistance to public bodies:

- Meeting notices and documents to be discussed at the meeting prepared by non-board members may be distributed in advance, provided that there is no sharing of opinions between a quorum of the members. OML 2015-54
- Meeting minutes, including executive session minutes, must contain sufficient detail regarding the discussion so that a member of the public not in attendance can understand what was discussed. OML 2015-49
- A meeting notice must contain the date and time of the meeting and also a record of the date and time that it was *posted*. OML 2015-90
- If a meeting notice is updated, the notice must include the time and date the updated notice was posted and indicate the portion of the notice that is “new.” OML 2015-43
- The attorney-client privilege does not provide an independent basis for an executive session; a board may meet privately with legal counsel, but only in accordance with one of the ten executive session purposes in G.L. c.30A, §21. OML 2015-120
- The board chair is required to notify the public that a meeting is being recorded, whether by a verbal announcement or a sign on the door to the meeting room. OML 2015-147

Should you have any questions concerning the Open Meeting Law, please contact Attorney Lauren F. Goldberg or Attorney Brian W. Riley by e-mail at [lgoldberg@k-plaw.com](mailto:lgoldberg@k-plaw.com) or [briley@k-plaw.com](mailto:briley@k-plaw.com) or by phone at 617.556.0007.

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