

Open Meeting Law Update – January, 2018

The July 1, 2010 amendments to the Open Meeting Law (“OML”), G.L. c.30A, §§18-25, consolidated enforcement in the office of the Attorney General. The Division of Open Government, created to carry out this mandate, has issued regulations, FAQs and other types of less formal guidance, but has most consistently communicated its interpretation of the law through issuance of determinations on OML complaints. Two notable 2017 Division determinations are summarized below. Additionally, we review an important Superior Court decision from late 2017 rejecting the Division’s position that an agenda item and motion to executive session to discuss collective bargaining and litigation strategy were not sufficiently specific.

OML 2017-188, Lincoln Sudbury School Committee (December 11, 2017) - Individual Evaluations Submitted to Chair for Preparation of Consolidated Evaluation Not “Automatically” Public under OML

It had long been the case that evaluative materials prepared by individual board members and then provided to the chair or purposes of preparing a consolidated evaluation were not considered to be subject to mandatory disclosure under the Public Records Law. However, the Division appeared to take the position that G.L. c.30A, §22(e) required disclosure of all individual evaluations, even if not utilized during an open meeting. Taking the position that the OML language at issue concerned records used at a public meeting did nothing to the public records status of records not used at an open meeting, many municipal entities continued to follow the established practice.

In OML 2017-188, Lincoln Sudbury School Committee (December 11, 2017), the Division considered whether the regional school district committee violated the OML when it failed to provide a local reporter with copies of all written evaluations of the school superintendent submitted by individual committee members that were used to compile a composite evaluation, but not discussed in an open meeting. In its determination, the Division appears to have revised its earlier position to be consistent with the established practice, clarifying that individual and composite evaluations would be subject to disclosure under the OML only when such records are used by a public body during an open meeting. This formal determination confirms that multiple-member bodies may continue to use a consolidated evaluation process to balance the importance of public discussion of employee performance with the privacy rights of the employee.

OML 2017-178 (Andover School Committee, November 21, 2017) - Assessment of Whether to Initiate Litigation is a Valid Topic for Executive Session under Purpose 3

In this determination, the Division reviewed whether G.L. c. 30A §21(a)(3) (“Purpose 3”) could be used by a school committee to assess whether to bring litigation in response to what it perceived as harassing public records requests. While no lawsuit was ultimately filed, the committee requested the Supervisor of Public Records to relieve it from its obligation to provide records to the requester on the basis that the requests were frivolous and

designed to intimidate and harass. The requester's husband filed an OML complaint, alleging that the executive session was improper, as neither he nor his wife had threatened litigation against the committee or the school department.

Finding that the discussion in executive session was proper under Purpose 3, the Division credited the committee's arguments that the session was to assess possible litigation by the committee to challenge the requests, and that had it publicly identified the possible litigation it planned to discuss, such detail would have undermined its litigating position by alerting the requester who had pending requests with the committee. This conclusion is consistent with prior Division determinations, wherein the Division concluded that use of executive session to assess whether to initiate litigation is appropriate so long as the body has a good faith basis to believe that its litigation position might be compromised by discussing the issue in open session See, e.g., OML 2017-176. In other words, the fact that public body has not been threatened with litigation is not the only measure by which the Attorney General will review the appropriateness of the use of executive session under Purpose 3. *This important decision confirms that a public body retains the right to privately analyze the risks of litigation, whether such litigation is brought by or against the public body.*

Board of Selectmen of the Town of Hull, et al. v. Healey, Plymouth Superior Court (December 22, 2017) - Superior Court Overrules Division Determination that Vote to Enter Executive Session for Strategy with Respect to Collective Bargaining and Litigation Violated OML

In this case, the Plymouth Superior Court disagreed with the Division's determination that the Hull board of selectmen failed to provide sufficient detail in its motion to enter executive session under Purpose 3. While it is possible that this decision may be appealed, it is nevertheless significant in that it indicates that the court will not completely defer to the Division's interpretations of the OML where the court concludes that those interpretations are contrary to the plain language of the law.

In this case, the chair learned of a litigation update on the morning of a meeting, and immediately before the meeting was informed by the town manager of a collective bargaining update. The board voted to enter executive session under Purpose 3 for several specific purposes, and, although not on the agenda, for collective bargaining and consideration of a claim by an individual who had threatened suit. The chair declared that an open meeting would have a detrimental effect on the board's litigating and collective bargaining positions and also cited the attorney client privilege.

A local news reporter filed a complaint alleging that the board violated the OML by failing to disclose the name or identifying details of the union and the possible litigation, and by "routinely" citing the attorney-client privilege as a reason for executive session. The board argued that disclosing details about the union negotiations would reveal collective bargaining strategy, adversely impacting those and other collective bargaining efforts. The board argued further that disclosure of details as to the possible litigation adversely impact the town where it was negotiating with the involved parties, and further that it would impede the actions being taken by the town to protect the public interest by minimizing or eliminating other potential liabilities.

While the Division generally defers to the public body's assessment of whether disclosure would so compromise the executive session, here it did not. The Division concluded that while it would be a "political inconvenience" to discuss the issues in open session, the board did not allege specific facts to "demonstrate a reasonable basis" for

its claims about the negative impacts on its collective bargaining and litigation strategy. The Division concluded further that while identifying the individual at issue in the possible litigation would have alerted him and other interested parties to the fact that the matter was being discussed, thereby encouraging others to come forward as claimants or to pursue his or their claims more aggressively, such a result was not detrimental to the board's litigating strategy, but was instead merely a consequence of its status as a public entity.

The town appealed the Division's determination, and the Plymouth Superior Court vacated the Division's decision, holding that the Division misapplied the OML. ***The court concluded that the OML does not require that the board adduce details evidencing a specific detrimental impact on the board's negotiating or litigating position to satisfy the requirements of the statute. In so deciding, the court stated, in the collective bargaining context, "the Attorney General's role was not to supplant the Board's judgment but to determine whether there was a reasonable basis for the Board to have reached the conclusion that it did."*** The court made clear, however, that it agreed with the Attorney General's view that a public body should adduce specific facts of a detrimental impact in cases like these where such evidence is available, and that such evidence is relevant to whether the board complied with the OML.

The court reached the same conclusion with respect to board's discussion of litigation strategy. ***Finding that the board had asserted sufficient reasons for non-disclosure, the court continued, stating that the OML is not intended to deny public bodies the ability to engage in strategic planning to avoid further litigation from the same or other parties, and the attendant costs to the town. The court concluded that the Division's position that the board was prohibited from considering such damage to the town, "undercuts the statutory exception and, in fact, may render it meaningless."*** The case was ultimately remanded back to the Attorney General's office for further review of the facts underlying the board's decision in light of the court's decision, and may still be appealed.

Should you have any questions about OML determinations or their implications, please contact Attorneys Michele E. Randazzo (mrandazzo@k-plaw.com) or Brian W. Riley (briley@k-plaw.com), or any of the attorneys in our Government Information and Access Group at 617.556.0007.

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