



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

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To the Open Meeting Law Advisory Commission:

On behalf of the Attorney General and in accordance with the Open Meeting Law (the “OML”), G.L. c. 30A, § 19(d), I submit the following report to the Commission summarizing the activities of the Division of Open Government (the Division) from January 1, 2021, through December 31, 2021.¹

Presently, the Division consists of the Director, three Assistant Attorneys General, and a paralegal. The Division’s responsibilities include reviewing, investigating, and resolving OML complaints; creating and disseminating educational materials about the OML; providing training on the OML; promulgating regulations; and responding to general inquiries about the OML from members of public bodies, municipal attorneys, members of the public, and the press. In addition to the Division’s responsibilities regarding the OML, the Division bears certain enforcement responsibilities under the Public Records Law and also has represented the Attorney General in litigation in other matters involving government transparency. This report is limited to the Division’s activities relating to the OML.

This past year was, again, a remarkable year for the Division. Throughout the year, the Division acted proactively and responsively to provide guidance on implementation of the Governor’s Executive Order Suspending Certain Provisions of the Open Meeting Law, which for the first time enabled public bodies to hold public meetings fully remotely and presented novel concerns and challenges regarding access, transparency, equity, and limitations of technology. In May and June 2021, as the expiration date of the Executive Order approached, the Division advocated for legislation to extend certain provisions adopted during the state of emergency, to enable public bodies to continue to carry out their work in an efficient, safe way without compromising transparency, access, and engagement. The Division testified before the Legislature in June 2021 to identify both concerns and recommendations regarding bills under consideration. The Division again issued updated guidance after Chapter 20 of the Acts of 2021, An Act Relative to Extending Certain COVID-19 Measures Adopted During the State of Emergency, was signed into law on June 16, 2021.

¹ G.L. c. 30A, § 19(d) provides that “[t]he attorney general shall, not later than January 31, file annually with the [Open Meeting Law Advisory] commission a report providing information on the enforcement of the open meeting law during the preceding calendar year.”

In addition to the significant efforts devoted to implementing the Executive Order and then the Act Extending Certain COVID-19 Measures, the Division continued its core work of reviewing, investigating, and resolving Open Meeting Law complaints as well as providing training and outreach to the public. The Division offered an increased schedule of trainings on the OML's requirements to people throughout the Commonwealth, and maintained its OML hotline through which the Division responded to thousands of phone and email inquiries regarding the requirements of the Open Meeting Law.

Complaints

As required by G.L. c. 30A, § 19(d),² the Attorney General's Office reports to the Commission that, during 2021, **406** OML complaints were filed with the Division for review. Many more Open Meeting Law complaints were filed with public bodies in the Commonwealth but not filed with the Division for further review, likely because either the complainant is satisfied by the public body's response and remedial action taken, or because the complainant understands that the issues raised do not fall within the scope of the Open Meeting Law. In total, the Division has record of 730 complaints filed in 2021.

In 2021, the Division resolved a total of **350** complaints through determination and declination letters. By comparison, in recent years the Division resolved 253 complaints (2016), 249 complaints (2017), 235 complaints (2018), 351 complaints (2019), and 259 complaints (2020). In addition to the complaints that were resolved through determination and declination letters, 33 complaints were withdrawn by the complainant after having been filed with the Division.

In 2021, the Division issued **202** determination letters (resolving 304 complaints) and **29** declination letters (resolving 46 complaints), for a total of 231 determinations and declinations resolving 350 complaints. By comparison, in 2020 the Division issued a total of 195 determination and declination letters, and in 2019 the Division issued a total of 191 determination and declination letters. Overall, the Division found a violation on approximately 50% of complaints reviewed. Furthermore, many complaints allege multiple separate violations of the OML. In 2019, the Division began tracking the number of separate alleged violations included in each OML complaint. When considering each alleged violation separately, the Division found a violation approximately 38% of the time.

² "The report shall include but not be limited to:

- (1) The number of open meeting law complaints received by the attorney general;
- (2) The number of hearings convened as the result of open meeting law complaints by the attorney general;
- (3) A summary of the determinations of violations made by the attorney general;
- (4) A summary of the orders issued as the result of the determination of open meeting law enforcement actions;
- (5) An accounting of the fines obtained by the attorney general as the result of open meeting law enforcement actions;
- (6) The number of actions filed in superior court seeking relief from an order of the attorney general; and
- (7) Any additional information relevant to the administration and enforcement of the open meeting law that the attorney general deems appropriate."

The most frequent type of complaints for which violations were found were: 1) insufficiently specific meeting notice; 2) failure to release meeting minutes; 3) meetings not accessible to the public; 4) deliberation outside of a posted meeting; and 5) response procedures to a prior Open Meeting Law complaint.

The remedial actions most frequently ordered by the Division were: 1) immediate and future compliance with the OML; 2) creation or approval of open session minutes, 3) release or revision of executive session minutes, and 4) attendance at a training on the OML or review of all or part of the Attorney General's online training video series.

Out of 112 determinations finding a violation of the OML in 2021, the Division issued 5 determinations finding an intentional violation. Those determinations are as follows:

- OML 2021-45 (Great Barrington Housing Authority Board of Commissioners): The Board convened in executive session for an improper purpose, namely, to discuss the evaluation process for its Executive Director as well as to discuss the Executive Director's professional competence. We identified the one member of the Board who specifically objected to the improper executive session and left the meeting. Because the Division had issued to the Board a determination just one year earlier explaining that these were not permissible topics for discussion in executive session, and because the one Board member expressly warned the others that the executive session was improper, we found the violation of the Open Meeting Law was intentional.
- OML 2021-91: (Woburn Public Library Board of Trustees): In a determination that found numerous violations of the Open Meeting Law, one category of violations was found to be intentional. A quorum of the Board held two "secret" meetings which were not posted to the public, and, moreover, were held without notifying two particular members of the Board who were known to disagree with the majority on a particular issue of great public interest, namely, layoffs of library staff. During these two meetings, the participating Board members authorized paying a public relations firm and hiring legal counsel to represent the Board. There is no more basic requirement of the Open Meeting Law than that meetings of public bodies be open to the public; therefore, we found that even if these two meetings were not held with specific intent to violate the Open Meeting Law, then at the very least they were undertaken with deliberate ignorance of the Law's requirements.
- OML 2021-131 (Ashland Select Board): The Board violated the Open Meeting Law by posting a meeting notice that included the topic "Affordable Housing Trust – Appointment(s) and Membership," without listing the specific individuals who were being considered for appointment to the Housing Trust. We found this violation to be intentional because over the past few years, the Board had twice been expressly warned that to the extent it is aware of the identities of individuals being considered for appointment, the Open Meeting Law requires that those individuals' names be included on the meeting notice.
- OML 2021-169 (Swansea Board of Selectmen): The Board violated the Open Meeting Law by failing to timely approve executive session meeting minutes. Because the Board had been found in violation of the Open Meeting Law less than two years earlier for failing to timely to timely approve executive session meeting

minutes, and at that time we specifically explained the Board's obligations with regard to timely approval of executive session meeting minutes, we found the violation was intentional.

- OML 2021-179 (Malden City Council) (2 complaints): Among a series of emails that were exchanged outside of posted meetings, we found that three Councilors sent emails that constituted impermissible deliberation. Specifically, one email stated a Councilor's position that she would not be supporting the license renewal of a business that was up for renewal; one email conveyed a Councilor's opinions on increasing green space in the city as well as purchasing land to expand green space; and a series of emails by two Councilors conveyed their views on how to move forward on a particular zoning matter. Although we acknowledged that the three Councilors may have sincerely misunderstood the requirements of the Law and in particular what constitutes a matter within the body's jurisdiction, we had recently found the Council in violation of the Law and explained these particular issues, and therefore find the violation was intentional.

Following a 2020 determination finding an intentional violation of the Open Meeting Law by the Melrose School Committee for posting an insufficiently specific meeting notice (OML 2020-154), in 2021 the Division reached a settlement with the Committee that included, among other things, the Committee's payment of a \$100 civil penalty.

As for the 29 declinations issued in 2021, the most frequent reasons for declining to review a complaint were that: 1) the complaint did not allege a violation of the OML; and 2) the complaint was not timely filed with the public body.

Challenges to Division Determinations

No public bodies filed actions in Superior Court during 2020 seeking judicial review of a Division determination. One matter that was filed in 2018 remains pending in Superior Court, and efforts are underway to resolve this matter:

Board of Selectmen of the Town of Hull and the Town Manager of the Town of Hull v. Maura Healey, Plymouth Superior Court, Civil Action No. 1883CV01227 (appeal of OML 2018-139): The Division found that the public body violated the OML when it failed to publicly identify the collective bargaining unit with which it would be negotiating and the party with whom it was involved in litigation before entering into executive session to discuss those matters, and failed to demonstrate that its negotiating or litigating position would be harmed by disclosing such information. The Board sought review of that determination in Superior Court, which remanded the matter to the Division for further consideration and to allow the Board the opportunity to submit additional information. Thereafter, the Division again determined that the Board violated the OML, and the Board again sought review in Superior Court.

Mediation

The Attorney General's 2017 amendments to the OML regulations allow a public body to

request mediation if a complainant files five or more complaints with the same public body or within the same municipality within 12 months. No mediations took place in 2021. One mediation was requested in 2021 and was scheduled for early 2022, but did not proceed.

Education

Our office's primary goal in enforcing the OML remains ensuring compliance with the law. To help individuals who are subject to the OML comply with its requirements, the Division has continued to devote significant time and resources to education and training. During 2021, the Division directly trained more than **800** people on the law's requirements. The Division continued to host its live, interactive webinars one to two times per month, which continued to attract large attendance levels. The Division hosted **16** webinars in 2021, at varying times of day, during both daytime and evening hours. Finally, the Division provided training on the Open Meeting Law to trustees of boards of public higher education as part of their mandatory training curriculum, to various state boards and commissions as well as other organizations, and presented at MCLE seminars. The Division has continued to maintain a robust website containing updated OML guidance and educational materials, as well as a searchable database containing all of the Division's determination and declination letters.

In 2021, the Division continued sending monthly newsletters to state-wide associations and interested parties. At the end of 2021, the Division had approximately 950 newsletter subscribers, many of whom are contacts at associations who then forward the update to their mailing lists. The newsletters provide updates on OML training opportunities, Commission meetings, Division news, and a monthly guidance spotlight.

Finally, the Division continues to offer guidance to members of the public, public bodies, attorneys, and the press through our telephone and email hotline. In 2021, the Division received and responded to more than 1,800 inquiries by telephone and email.

The Division continues to receive a significant volume of complaints and requests for guidance, which we believe reflects greater awareness of the Open Meeting Law. We will continue to promote good government through fair and consistent enforcement of the OML, coupled with vigorous educational outreach, as we seek to improve adherence to the Law's requirements. We look forward to continuing to work with you to further this goal during 2022.

Sincerely,



Carrie Benedon
Assistant Attorney General
Director, Division of Open Government

cc: Maura Healey, Attorney General