

Minutes of the Open Meeting Law Advisory Commission
Thursday, March 16, 2023, 2:00PM
Minutes
Virtual Access Via Zoom

Members Present: Jeffrey Hull, Massachusetts Municipal Association Designee (Chair); Robert Ambrogi, Massachusetts Newspaper Publishers Association Designee; Hanne Rush, Attorney General's designee; Senator Nick Collins (connection lost at approximately 2:29 pm).

Attorney General's Staff Present: Anne Sterman, Deputy Bureau Chief of the Government Bureau; Carrie Benedon, Assistant Attorney General, Director, Division of Open Government; Kerry Kilcoyne, Assistant Attorney General; Elizabeth Carnes Flynn, Assistant Attorney General.

Call to Order

Jeffrey Hull called the meeting to order at 2:01 pm.

Review and approval of draft minutes for August 2, 2022, Commission meeting

Mr. Hull said that the first order of business would be to approve the minutes of the August 2, 2022 Commission meeting. Mr. Hull asked if anyone had a chance to read the minutes and make any comments or corrections. With no comments or corrections offered, Mr. Ambrogi motioned to approve the minutes as submitted. Ms. Rush seconded the motion. Vote by roll call. **Ambrogi – Yes, Hull – Yes, Senator Collins was not a member at the August 2, 2022 meeting and abstained, Hull - Yes.**

Report from the Attorney General's Division of Open Government

Mr. Hull said the next order of business would be the annual report from the Division of Open Government (DOG). DOG Director Carrie Benedon introduced herself and the team to the Commission and said that she would discuss the highlights of each section of the report.

Ms. Benedon said that the Division had issued a record number of Open Meeting Law determinations and resolved a total of 371 Open Meeting Law complaints through 241 Determination letters, which is 20% more Determination letters issues than the next highest year since the Division's creation. Ms. Benedon reviewed the number of complaints received, filed, and resolved. Ms. Benedon said that the Division found a violation in about 52% of the complaints reviewed by the Division. Ms. Benedon described the most common violations found and the number of intentional violations found and explained the reasons for finding intentional violations.

Ms. Benedon said that the Division has continued to offer live webinar trainings on the Open Meeting Law. Ms. Benedon stated that we have seen a 40% increase in the attendance of the webinars. We also presented trainings to other groups, including the Annual Meeting of the Town Clerk's Association, as well as other groups and MCLE presentations.

Ms. Benedon stated the Division continues to update our website with frequently asked questions and new training materials, and other resources.

Ms. Benedon said that the Attorney General's Office is continuing to offer a hotline service, which is staffed by rotating members of the team.

Ms. Benedon concluded the report from the Division of Open Government.

Mr. Hull asked if members of the Commission have any questions or comments regarding the report read by Ms. Benedon. Mr. Ambrogi asked whether cities and towns had technical issues that they faced in holding meetings in compliance with the emergency law in place. Ms. Benedon said the Division saw fewer issues with that in 2022, than in 2021 and 2020 as the public bodies became more savvy and some violations of that type were administrative errors or oversight of some kind. Technical issues with sound or video seemed less common than in the past years. Ms. Rush asked if the Division has seen a trend into what the public bodies prefer. Ms. Benedon stated that although that is not something we track, we are seeing more meetings back in person, many with a remote access option. But would be unable to give a more detailed report on that. Mr. Hull commented that in Wilmington, participation via Zoom has been helpful. Mr. Hull asked if the types of issues in the complaints are the same as previous years. Ms. Benedon said that there is similarity to the issues in the complaints.

Mr. Ambrogi asked if the Commission members have any additional questions or comments. Mr. Ambrogi asked with the new Attorney General, if there would be any changes. For the time being, the Division's work is continuing as in the past and if there will be any different approaches, that will remain to be seen.

Pending legislation pertaining to Open Meeting Law

Mr. Hull asked Senator Collins if he would like to provide an update on pending legislation. Senator Collins' staff member stated that Senator Collins lost his connection and would try to reconnect (Senator Collins did not rejoin the meeting).

While waiting for Senator Collings to reconnect, Mr. Hull asked if any members of the commission had any comments or questions. Mr. Ambrogi commented that as representative of the Mass Newspaper Publishers Association and in that role has been working with a coalition of groups to push for an extension of remote meeting, not purely remote but a hybrid approach where there is some capacity for physical face to face but also virtual. Ms. Rush said that as a mother of small children, she was able to now participate more with the virtual meetings.

Mr. Hull asked if anyone from the Division or any legislative delegates could provide an update on the legislation, Ms. Benedon stated she would need to defer to the legislature and any representatives that might be present at the meeting on that issue.

There was no response so Mr. Hull proceeded to public comment.

Public Comment

Mr. Hull asked if there were any members of the public who wanted to give a comment. Christine Tosti commented about feeling strongly about virtual meetings especially for people who have neuro-divergent disabilities.

David Rosenberg commented that he is an advocate for Bills S.2002 & H.3109 an amendment to the Open Meeting Law that would allow members of public bodies to have discussions on the internet, most likely text discussions, that could continue for longer periods of time and that the public would have full access to it because there would be a requirement that a transcript be kept, so that the public could monitor it fully. He believes it is a way that combines both greater transparency of the activities of public bodies and also greater efficiency for members of public bodies.

Cindy Christiansen commented on enforcement in respect with town meetings. She stated that they've had issue with the reluctance to determine that a violation has occurred during town meetings, in particular with virtual meetings, which has allowed committees to deliberate in secret during the period of town meeting and doesn't think it's the intent of the law but it is something that is happening in her community.

Ellen with Cambridge Redevelopment Authority stated that having a quorum present at hybrid meetings is an issue. Several members feel uncomfortable being in public and it would be an issue to meet the requirement of a quorum and not having hybrid meetings available.

Ms. Rush pointed out that there were questions in the chat.

Chris McCue Potts stated that she has found some confusion with the overlap of the Open Meeting Law and Public Records Law with regard to the time limit for requesting records with Open Meeting Law and Public Records. She stated it can be confusing to the general public. Also with regard to redactions, such as what falls within the Public Records law and what falls under Open Meeting Law. She wonders if there is a process that could be put in place to make it more consistent and clear to the public. Mr. Hull asked Ms. Benedon to what degree there are communications between DOG and the Secretary of Public Records office. Ms. Benedon states we do speak to the office as needed and to make sure there is consistency and clarity. There are some areas of overlap and depending on how the member of the public made the request for minutes impacts what the enforcement avenue would be. Both ensure that there is consistency and clarity with regard to the respective roles, so that no one is overstepping. Ms. McCue Potts gave an example that someone could request open meeting law copies of executive session minutes, get those minutes and find out that the entire document has been redacted. Then the requestor must appeal to the public records division about the redactions. Which in turn produced a bit of confusion about who is to study the redactions and who determines whether there was an open meeting law violation if everything is redacted and for how long the redactions are allowed to be in place. If the public record law allows for full redactions of executive session minutes to be in place forever, then it conflicts with the aim of transparency under the Open Meeting Law. Robert Ambrogi responded that under the Open Meeting Law, once the reason for holding the meeting in executive session no longer exists, those records are supposed to be made public. Ms. McCue Potts then asked when the Open Meeting Law clock starts in that case, and when is it then considered untimely.

Mr. Rosenberg commented that he has encountered two instances of public bodies that were referred to as working groups that were composed of less than a quorum of the full body and took the position that their working groups were not subject to the Open Meeting Law because the purpose of the working group was a discussion of those people and weren't reporting anything back to the full public body. He asked whether there is some determination, letter or something that makes rules for whether working groups of a public body are separately required to meet the requirement of the Open Meeting Law. Director Benedon stated that the Division of Open Government has issued a number of determinations and letters addressing the issue of working groups and subcommittees. She clarified

that the Open Meeting Law specifies that subcommittees are subject to the open meeting law and that there are a number of determination letters on their website that do address when something is a work group and when something is a subcommittee and how we analyze whether a group is subject to the Open Meeting Law.

Mr. Ambrogi commented that the Commission is not a lawmaking body and under the law can provide advice to the Attorney General's office but that the two legislators who sit on the commission will hear a number of different bills that are going to be addressing the issue of what the Open Meeting Law should look like going forward. There is a bill that Mr. Ambrogi's organization has been endorsing which creates a structure for hybrid meetings and would provide special accommodations for people with disabilities, but it would require some physical meeting, not the full quorum present physically but would allow that those attending remotely count toward the quorum, as well as the ability of members of the public to attend in person if they do not have digital access. He would encourage people who are interested to follow the legislation and let the legislature know their feelings on the issue.

Ms. Tosti stated that as a voting member of the state committee that she is on, she gets unnerved at executive session and not understanding why they are being called in the first place. Particularly, when it comes with matters of firing anyone, to do some sort of diversity, equity, and inclusion work with any state body or state entity. She does not believe issues relating to diversity, equity and inclusion should ever be held in executive session because that's where you want any member of the public to really see, hear and be present, for what a public body discusses with such important content. Mr. Hull clarified that based on his knowledge the allowances for executive session are limited in the options for conduction business in executive session. In regard to employment, the ability to do preliminary interviews can be done in an executive session but when it comes to appointing someone or doing final interviews they need to be conducted in a public session.

Mr. Hull asked if there were any other comments or questions.

Schedule next meeting

Mr. Hull suggested scheduling a timeframe for the next meeting. The previous meeting was August and another six months would be September. He mentioned that in the past, they would come up with a general timeframe and then the staff from Division of Open Government sent out some dates the closer to that month they got and then go from there. Mr. Rush and Mr. Ambrogi agreed.

Mr. Hull moved to adjourn. Ms. Rush pointed out that there are continuing chat conversations. Mr. Hull read some comments or questions from the chat. First question was asking about what would happen given the upcoming expiration of the legislation. Mr. Hull clarified that his understanding was that if no action was taken by the legislature, then we would revert to the previous law which provided a very limited ability to have people participate remotely. Mr. Ambrogi agreed and stated that he believed there was a good chance that action would be taken by legislature before March 31st to extend it and are talking about extending it until 2025, and would be surprised if it did not happen.

Mr. Hull read another comment suggesting to Dr. Benedon that they would like to see the Division shift its emphasis from showing public bodies how to avoid violations of the Open Meeting Law to how to be more transparent.

Mr. Hull asked how the comments and questions from the chat need to be addressed in the minutes. Mr. Ambrogi stated that he did not believe they had previously addressed it. Ms. Rush also agreed that this was something new.

Another question asked if there will be a discussion about the recent SJC decision and its impact on the Open Meeting Law. Mr. Hull suggested that since it was not on the agenda, that it might be something to discuss in the future. Ms. Rush agreed and suggested to wait a few months since it is a new decision and put it as a topic on the next meeting.

Another question asked was what percentage of all Open Meeting Law complaints are addressed by attorneys hired by public bodies. Director Benedon stated that it is not information she has available.

A couple comments gave suggestions of how the Commission could include the chat comments in the meetings, such as saving them and posting them with the minutes.

Adjourn

Mr. Hull suggested that if there were no more comment or questions, they move to adjourn. Ms. Rush moved to adjourn. Mr. Ambrogi seconded the motion. All three Commission members vote by roll call. Hanne Rush – Yes, Robert Ambrogi – Yes. Senator Collins not present. Jeff Hull – Yes. **The meeting concluded at 3:02 pm.**

Documents used

1. OMLAC Meeting Notice for March 16, 2023
2. Draft Minutes for OMLAC Meeting of August 2, 2022
3. 2022 Annual Report to the Open Meeting Law Advisory Commission

March 16, 2023 Open Meeting Law Advisory Commission Chat

00:39:36 ellen: Unfortunately, I arrived late to this meeting. Have you touched on the status of whether the Act Relative to Extending Certain State of Emergency Accommodations, will be extended past the expiration date of which March 31, 2023

00:42:00 Natalie Arellano: Hi Ellen, that topic has not come up on the meeting. The only topics that have been discussed so far have been a motion to approve the previous minutes, and the Annual report.

00:46:38 David Rosenberg: Bills S.2002 & H.3109 are refiles of "An Act to permit enhanced public access to deliberations of public bodies and to permit improved efficiency of public bodies." from the previous session.

00:48:43 ellen: The issue for us is that we have a board of 5 people. A quorum for them to be present physically, means that 3 need to be present. Many of them are not ready to meet in public given Covid has not disappeared.

00:50:28 Heather Tenney: I run a statewide board of scientists and we get MUCH better participation remotely and I find members are better prepared as they can use their hour plus travel time to prepare.

00:52:08 Heather Tenney: We have not yet tried a hybrid meeting, but I believe our technology (the owl) will make it harder for remote participants to hear well versus fully remote

00:56:42 Chris McCue Potts: I would like to comment

00:57:01 Natalie Arellano: Hi Chris, raise your hand if you can

00:57:45 Marjorie Weinberger - MAPC: Will there be a discussion about the recent SJC decision in Kolenda and its impact on the OML?

01:09:42 Cammy Kaynor: Suggestion to Director Benedon; When I have attended OML trainings in the past, they largely consisted of communications about the requirements of the law and what NOT to do. Basically a road map for how to avoid violations. Very little emphasis was placed on how to be more transparent and accountable to the public - steering public bodies towards the heart of the intention of the law rather than focusing on how not to get caught. I would love to see a shift in emphasis towards ways to increase transparency in OML trainings. (Perhaps this has already been addressed).

01:10:24 Kaari Tari: What will happen after March 31st given the expiration of the legislation?

01:13:34 Chris McCue Potts: Question about DOG data: What % of OML complaints are addressed by attorneys hired by public bodies?

01:13:46 John Hawkinson: I would strongly encourage the OMLAC to append the recording of the chat (which Zoom preserves) to the minutes.

March 16, 2023 Open Meeting Law Advisory Commission Chat

01:13:57 David Rosenberg: I notice that this Zoom meeting is setup so that participants can't save the chat. Could you turn on the ability to save the chat and consider doing that for future meetings.

01:14:30 Heather Tenney: In my board's minutes, we include the chat at the end for the record