

**Minutes of the Open Meeting Law Advisory Commission
March 8, 2017, 2:00PM**

Approved on August 2, 2017

100 Cambridge Street, Room C of the Leverett Saltonstall Building, Boston, MA 02114

Members Present: Robert Ambrogi, Massachusetts Newspaper Publishers Association designee; Carrie Benedon, Attorney General's designee; Jeffrey Hull, Massachusetts Municipal Association designee; Representative Peter Kocot, Chair of the Joint Committee on State Administration and Regulatory Oversight

Member Absent: Walter Timilty, Chair of the Joint Committee on State Administration and Regulatory Oversight

Attorney General's Staff Present: Jonathan Sclarsic, Assistant Attorney General, Director, Division of Open Government; KerryAnne Kilcoyne, Assistant Attorney General, Division of Open Government; Kevin Manganaro, Assistant Attorney General, Division of Open Government; Hanne Rush, Assistant Attorney General, Division of Open Government; Kaitlin Maher, Paralegal, Division of Open Government.

Others Present: Ryan Arego, Office of Representative Peter Kocot; John Hawkinson, Cambridge, MA; David Rosenberg, Norfolk, MA

Call to Order and Election of Commission Chair

Meeting called to order by Carrie Benedon at 2:10p.m. After a brief introduction of the Commission members, Robert Ambrogi moved to nominate Carrie Benedon as the Commission's Chair. Rep. Peter Kocot seconded the nomination. Carrie Benedon reminded the Commission that she is also the secretary and she accepted the nomination. **A unanimous 3-0 vote confirmed Carrie Benedon as Commission Chair**, as Jeffrey Hull had not yet arrived. Rep. Kocot recommended the Commission members introduce themselves, and each member mentioned his or her name and role.

Review and approval of draft minutes for September 14, 2016 Commission meeting

Carrie Benedon thanked the Division of Open Government for preparing the minutes of the last OMLAC meeting and motioned to approve the minutes. The motion was seconded by Robert Ambrogi. **By unanimous vote (3-0), the minutes were approved.**

Report from the Attorney General's Division of Open Government

Ms. Benedon opened the floor to the Attorney General's Office to present an update and report to the Commission regarding the Open Meeting Law (OML) and the Division of Open Government.

Jonathan Sclarsic, the Director of the Division of Open Government in the Attorney General's Office, introduced the members of the Division. Mr. Sclarsic explained that the Division has

hired a new paralegal, Kaitlin (Kadie) Maher, who will be interacting with the Commission to schedule meetings. Mr. Sclarsic introduced KerryAnne Kilcoyne, who joined the Division as an Assistant Attorney General. Mr. Sclarsic reintroduced Assistant Attorneys General Hanne Rush and Kevin Mangano, who have both been with the Division.

Mr. Sclarsic moved to present the 2016 Division annual report and 2017 update, which was submitted to the Commission by mail and email in January, 2017. Mr. Sclarsic said the Division is required to submit a report to the Commission each year outlining statistics of the complaints reviewed and their outcomes. Mr. Sclarsic said the Division was under-staffed until recently and that he was on a rotation with the District Attorney's Office earlier in 2016. The Division now has a full staff.

Mr. Sclarsic said the Division received a record 295 complaints in 2016, and there were more complaints filed with public bodies that were not submitted to the Division for further review. The Division resolved a total of 253 complaints, including 176 determinations and 31 declinations. Some determinations resolved more than one case. Of those 176 determinations, in 93 cases, the Division found no violation of the Open Meeting Law. In 83 cases, the Division found that the public body had violated the Law.

Mr. Sclarsic explained that the most frequent violations found in 2016 were: 1) insufficiently detailed meeting notices; 2) failure to follow appropriate procedures for entering executive session; 3) inaccurate or insufficiently detailed meeting notices; 4) deliberation outside of a properly posted meeting; and 5) failure to follow the requirements of the Open Meeting Law complaint process.

Jeff Hull arrived.

The most frequent action ordered by the Division in 2016 was immediate and future compliance with the OML. Immediate and future compliance is used to both warn the public body and offer specific guidance. If a public body is subsequently found in violation after receiving guidance through a determination, the violation could be considered intentional. In some cases, the Division ordered public bodies to create or amend meeting minutes. The Division also ordered attendance at trainings, either webinars or regional in-person trainings. The least frequent order in 2016 was paying a fine. The largest fine ordered was \$5,000.

Mr. Sclarsic said that of the 83 violations found, 4 were found to be intentional. The Division collected \$4,250 in fines which went into the Commonwealth's General Fund. That total included fees ordered in 2016 and one remaining from 2015.

Mr. Sclarsic explained that most intentional violations were found because the public body had already been found in violation of the OML, and then subsequently violated the OML. In those cases, the Division would elevate the violation to intentional. Most were because we found violation and then subsequent violation. For example, a public body was instructed to not discuss items at a meeting that were not properly posted on a meeting notice. The public body repeated the violation, a complaint was filed, and the public body was found in violation.

Representative Kocot asked whether the public bodies found in intentional violation of the OML were municipal or state public bodies. Mr. Sclarsic said that in all cases involved a town or city public body, not a state, regional, or county public body.

Mr. Sclarsic continued his overview of the report. He said that often, the Division will order a combination of actions if a public body is found in violation of the OML. After ordering immediate or future compliance, if the Division thinks there is a misunderstanding of the law, an attorney will order mandatory training.

Representative Kocot asked whether over the past five years, public bodies have exhibited patterns of behavior in OML violations. Mr. Sclarsic said overall, they have not. The Division may work with a public body who has received five determinations of violations, but the violations could be different in nature. Where the Division sees ongoing problems, it is inclined to order training. The Webster Board of Selectmen was found to have intentionally violated the OML because they entered into executive session for improper purposes. Each time they repeated the same violation, the fine increased. Mr. Sclarsic asked Assistant Attorney General Hanne Rush to confirm the facts of the determinations. Ms. Rush confirmed them.

Mr. Ambrogio asked about the standards the Division uses to determine the dollar amount of the fines ordered. Mr. Sclarsic said there may be a mitigating reason. The Division reaches out to the public body to resolve the case because the Division can only recommend a fine; it has to go through a hearing. Through a settlement, the Division resolves the case. For some determinations, the Division lowers the fine ordered, depending on the resources of the community. Mr. Ambrogio asked whether, if he were to read a determination that orders a fine, the process for setting the fine amount would be explained. Mr. Sclarsic said that if the Division ordered less than a \$1,000 fine, it would initially be \$500. Mr. Sclarsic said the settlement agreements are all public records.

Rep. Kocot asked whether the Division works with towns to improve their practices if particular patterns of violation emerge. Rep. Kocot also asked whether the Division has dialogues with the Town Counsel for these communities. Mr. Sclarsic said the Division often works with Town Counsel, but not every public body works with its Town Counsel to respond to complaints. Often by the time the Division has ordered a fine, Town Counsel is involved. Mr. Sclarsic said the first step in the investigation process is to contact the town counsel. Part of resolving the case is discussing how the public body can improve its compliance. Mr. Sclarsic said the Division looks at where the problem areas are for scheduling the regional trainings.

Following the discussion about intentional violations, Mr. Sclarsic provided an overview of the declinations issued in 2016. Complainants are required to submit OML complaints within thirty days of the alleged violation date, so if the complaint is untimely, the Division declines to review it. On the other end, the complainant usually has 90 days to after the alleged violation date to file the complaint for further review with the Division. If it is outside the 90 days, the Division declines to review it, unless good cause is demonstrated.

Mr. Sclarsic said that public bodies have the right to appeal decisions. The Division had two actions in the superior court, including one request from the West Bridgewater Board of

Selectmen, where the Judge upheld the Division's determination but the Board is again appealing, and one request from the Fall River City Council, which is pending. The Division also has several ongoing appeals from 2015. The Hull Board of Selectmen and Town Manager appeal is awaiting briefing and the Revere Retirement Board appeal is under advisement.

Mr. Ambrogi asked whether there are memorandum opinions on the West Bridgewater appeal. Mr. Sclarsic said he will forward the materials to the Commission. The West Bridgewater concerns a Purpose 2 executive session and whether or not the Board could discuss employee competence.

Mr. Sclarsic transitioned to discussing the Division's educational initiatives. The Division offers both regional and webinar trainings. The Division received positive feedback on the trainings, despite being under-staffed in 2016. In 2016, the Division trained more than 670 people through 7 regional trainings, 6 webinars, and 8 other training events. The Division now hosts webinars on a monthly basis. Mr. Sclarsic explained that the Division often receives invitations from associations, such as the Massachusetts Town Clerks Association and the Massachusetts Municipal Association, to speak to a large group.

Mr. Sclarsic said the Division continues to have guidance materials available on the website, as well as the "attorney of the day" hotline. The Division's hotline received more than 1,450 inquiries in 2016, including questions from complainants, legal counsel, and public body members. Mr. Sclarsic said he is certain that many violations of the OML were avoided because of the hotline.

Mr. Ambrogi inquired about how many of the 83 determinations of violations issued concerned deliberation outside of a posted meeting. Mr. Sclarsic said that it probably was no more than 10 or 15 determinations, and most often the violation is in the form of emailing. Typically, the Division orders immediate and future compliance with the OML in those cases. Mr. Sclarsic said sometimes, a public body member sends an email without thinking of the Open Meeting Law implications.

Mr. Sclarsic transitioned to discussing the Division's current initiatives. He said that the next week, March 13-17, was Sunshine Week, and the Division wanted to do its part supporting transparency. The Division expected to release new materials, and was waiting for a final sendoff. The Division was planning to add new FAQs to the website, including both new categories and new topics. The new FAQs would reflect questions the Division receives frequently. The Division also intended to release a new checklist. The Division was still considering a regulations review. The regulations were first promulgated in 2010 as an emergency and were most recently updated in 2011. Mr. Sclarsic said the Division would communicate with and seek input from the Commission should the Division begin a regulations review.

Mr. Sclarsic said that the previous evening, the Division debuted a new OML training presentation that was more visually appealing, along with a more detailed handout. In addition to the March 7 training in Fall River, the Division schedule 5 more regional trainings for the spring. Two attorneys would present each training. Mr. Sclarsic read the schedule of the trainings, which

was included in the meeting packet. Mr. Sclarsic said that in the fall, the Division will try to capture other parts of the state for its trainings. Mr. Sclarsic asked the Commission members to promote the trainings.

Mr. Sclarsic said that in addition to the regional trainings, the Division expects to host 12 webinars in 2017, one for each month. Participants register for the webinars and then the Division sends out a link for participants to access the webinar, hear attorneys, and ask questions in real time. The webinar schedule was also in the meeting packet.

Mr. Sclarsic said the Division started a monthly newsletter to highlight new educational materials, guidance, and training opportunities. The Division encourages state-wide associations and other stakeholder groups who receive the newsletter to share it with their members. Mr. Ambrogi asked how people interested in the newsletter can register. Mr. Sclarsic responded that the Division will consider having an opt-in option on the website.

Ms. Benedon introduced Jeffrey Hull, who had joined the meeting during Mr. Sclarsic's presentation.

Status of bills pertaining to the Open Meeting Law filed in the Legislature

Rep. Kocot began a legislative update. Rep. Kocot said that bills were gradually percolating to the Committee on State Administration and Regulatory Oversight. The Committee was required by the Massachusetts Constitution to hold a public hearing about public safety, and that was held the previous week with the Governor. The Committee would be scheduling other hearings, grouping them by issue.

Rep. Kocot said the Committee intends to start hearings within the upcoming weeks, and he would update the Commission on the OML bills when they are scheduled for hearings. Rep. Kocot said that the OML bills filed by Rep. Antonio Cabral (HD3313), Rep. Peter Kocot (HD3444), Rep. Jeffrey Roy (H1704), and Rep. Bradford Hill (H1669) would likely be scheduled for the same day.

Public Comment

Ms. Benedon opened the floor to public comment.

David Rosenberg from Norfolk posed a question to the Division of Open Government. Mr. Rosenberg asked whether guidance was given to the Town of Brookline regarding what information the Finance Committee could share with the community. Mr. Rosenberg also asked whether the guidance is available to other people, and whether the Division has any intention to make the guidance more available to the public.

Mr. Sclarsic explained that any guidance the Division gives would be made available upon request, and he expects the Division's Sunshine Week materials will include guidance about online deliberation. Mr. Sclarsic asked Assistant Attorney General Kevin Manganaro to relay the guidance he had given to the Town of Brookline. Mr. Manganaro said that he spoke with the

Brookline Town Moderator, who had asked whether members of a committee could participate in a listserv. Mr. Manganaro said he had advised the Town Moderator that deliberation among a quorum of public body members cannot be done through means other than through a publicly posted meeting. If a particular member decided to use the listserv, that would be permissible, but if a quorum is participating, that would not be permissible under the OML. Mr. Manganaro said he would discuss this issue further with Mr. Rosenberg following the meeting, and explain how to submit a public records request to see the guidance in writing.

Ms. Benedon asked whether there was any additional public comment.

Items not reasonably anticipated by the Chair 48 Hours in advance of the meeting

Ms. Benedon any whether there were any items not reasonably anticipated for discussion.

Rep. Kocot explained that as the legislative schedule progresses, particularly towards the budget season, Wednesdays will be busy for him. Rep. Kocot explained that representatives typically have a caucus at 1:00PM, so afternoons are difficult for him. Rep. Kocot said the Senate also caucuses on Wednesdays, so Senator Timilty may also be busy. Rep. Kocot said since afternoons tend to be busy, 11:00AM would be more convenient.

Scheduling Next Commission Meeting

Ms. Benedon recommended that the Commission transition to discuss scheduling for the next Commission meeting. Ms. Benedon said that at the previous meeting, the Commission discussed changing the meeting schedule to quarterly. Ms. Benedon asked whether there is any upcoming anticipated business, such as the regulation review.

Mr. Sclarsic said he would notify the Commission if the regulation review is approved.

Ms. Benedon asked whether Mr. Sclarsic anticipates the regulation review would be in the next three months. Mr. Sclarsic said that if the Attorney General makes a decision to move forward with the regulation review, it would likely be in the next few weeks. Ms. Benedon asked about the timeline for feedback, and whether Mr. Sclarsic anticipates the regulations would be ready for the Commission's feedback in the next 3 months. Mr. Sclarsic explained that the Division is required to offer proposed regulations, and then announce a comment period. Mr. Sclarsic said once the Division has drafted regulations, it will share them with the Commission for feedback. Ms. Benedon recommended that the Commission schedule a brief meeting in a few months, and then meet for the regular meeting in 6 months. Ms. Benedon further recommended leaving the date to be determined.

Ms. Benedon asked if there was any further business to be discussed by the Commission. Mr. Ambrogi moved to adjourn the meeting. Rep. Kocot seconded the motion. **By unanimous vote (5-0), the meeting adjourned.**

List of Documents Used by the Commission during the Meeting

1. OMLAC Meeting Notice for March 8, 2017
2. Minutes from OMLAC Meeting of September 14, 2016
3. Annual report from the Division of Open Government, regarding the Open Meeting Law and the activities of the Division of Open Government
4. Legislation:
 - a. [H.1704](#): An Act to permit enhanced public access to deliberations of public bodies and to permit improved efficiency of public bodies (Representative Jeffrey Roy)
 - b. [H.1669](#): An Act Relative to the Open Meeting Law (Representative Bradford Hill)
5. Open Meeting Law Regional Training and Webinar Training Schedules