

**Minutes of the Open Meeting Law Advisory Commission**  
**September 14, 2016**

Approved on March 8, 2017

**100 Cambridge Street, Room 2C 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; Senator Joan Lovely, Chair, 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; Juliana deHaan Rice, Deputy Chief, Government Bureau; Kevin Manganaro, Assistant Attorney General, Division of Open Government; Hanne Rush, Assistant Attorney General, Division of Open Government; Bongani T. Jeranyama, Paralegal, Division of Open Government.

**Others Present:** Tyler Carlton; John Hawkinson, Cambridge, MA; David Rosenberg, Norfolk, MA, Linda Segal, Wayland, MA

Call to Order and Election of Commission Chair

Meeting called to order by Joan B. Lovely at 1:30 p.m. After a brief introduction of the Commission members, Rep. Peter Kocot moved to nominate Sen. Joan Lovely as the Commission's Chair. Jeffrey Hull seconded the nomination. **A unanimous 5-0 vote confirmed Sen. Lovely as Commission Chair.**

Review and approval of draft minutes for July 7, 2015 Commission meeting

Sen. Lovely 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 Rep. Kocot. **By unanimous vote (5-0), the minutes were approved.**

Report from the Attorney General's Division of Open Government & Introduction of Jonathan Sclarsic

Sen. Lovely opened the floor to the Attorney General's Office to present an update and report to the Commission regarding the Open Meeting Law and the Division of Open Government.

Jonathan Sclarsic, the new Director of the Division of Open Government in the Attorney General's Office, introduced himself to the Commission and expressed his appreciation of the Commission members. Mr. Sclarsic explained that Former-Division Director Amy Nable departed to join the Massachusetts State Senate Counsel's Office.

Mr. Sclarsic clarified that the Division was under staffed early in year due to staff departures. However, new staff members would be hired soon. Mr. Sclarsic moved to present the 2015 Division annual report and 2016 update, which was submitted by Former-Director Nable on January 16, 2016. The Division report shows that 2015 was a busy year with 279 Open Meeting Law Complaints filed, 315 complaints resolved. The Division issued 200 determination letters, with 28 letters resolved by informal action.

Bob Ambrogi asked Mr. Sclarsic about 2015 numbers and to explain the results of the resolution letters. Mr. Sclarsic responded by stating that the Division had issued 98 violations with the Determination letters and 43 declination letters were issued. All resolution letters had a median resolution time of 78 days.

Mr. Sclarsic explained that there were consistent reasons for violations: 1) insufficient meeting notices; 2) deliberation outside of a properly posted meeting, including email deliberation; 3) failure to follow appropriate procedures for entering executive session; 4) insufficiently specific or inaccurate meeting minutes; and 5) failure to follow the requirements of the OML complaint process

After discussing the consequences of the orders, Mr. Sclarsic stated that there were three determinations that found intentional violations in 2015. Of the three, two have been resolved: The Towns of Hinsdale and Dudley paid fines via a settlement agreement, respectively. Additionally, in 2015, there were four requests for reconsideration of determinations. At the time of the meeting, there were two public bodies with pending request for review in Superior Court: Hull Board of Selectmen and Revere Retirement Board. Mr. Sclarsic explained that there have been numerous cases that have been resolved in the superior court and in favor of the Office: Stephen Kaplan v. AGO, John O'Rourke v. Martha Coakley, and Winchester v. AGO.

Moving the focus of the meeting to the educational work of the Division, Mr. Sclarsic stated that 1600 people attended Division trainings in 2015. The nine regional trainings provided by the Division had an attendance of more than 450 participants, including two trainings held jointly with state ethics commission. The Division also hosted six webinars and dozens of other smaller events and agency meetings.

In 2015, the Division also focused on increasing the amount of resources that are available on website. New resources included, but were not limited to: new FAQs, an update guide, more decisions available on Lexis platforms (decisions are searchable). Mr. Sclarsic described the new pending complaint lookup feature available on the Division's website as another example of government transparency. Mr. Sclarsic reiterated that the new decisions are available through the website within 48 hours of their publishing. Finally, Mr. Sclarsic spoke about the Division's continued commitment to being a public resource for Open Meeting Law questions: 1500 inquiries received by phone, email, or letter in 2015.

Mr. Ambrogi asked Mr. Sclarsic if a Lincoln-Sudbury hearing occurred? Mr. Sclarsic responded that the Division issued a determination for future and immediate compliance, and then upon further review changed the finding to non-intentional violation.

Sen. Lovely asked about meeting minutes in general. How are difficulties creating and maintaining meeting minutes being addressed? Who takes minutes? What is the responsibility of the public body? Mr. Sclarsic responded that meeting minutes are a common problem across public bodies because smaller communities have less staff support and other factors. However, Mr. Sclarsic explained that the requirements for meeting minutes are the same for all public bodies. He stated that for some public bodies, adjusting to the changes in the Open Meeting Law in 2010 has been more difficult than others. Nevertheless, the Division has tried to alleviate

confusion with training and educational materials for public bodies. No requirement from the OML by how minutes are filed and no publication requirement.

Mr. Hull inquired about the education portion. Specifically, asking about the mode of communicating training sessions to communities. Mr. Sclarsic responded by asking the Commission for their input on how to get them out. Currently the Division issues press releases, in addition to sending information to the Massachusetts Municipal Association and the Massachusetts Town Clerks Association, posting dates on the website, emailing and alerting stakeholders, and having the Attorney General's Policy and Government Team reach out to the state legislature. However, Mr. Sclarsic stated that the Division would welcome other suggestions and that the goal is to get more attendees.

Mr. Sclarsic then updated the Commission on the work of the Division in 2016. From January 1, 2016 until August 31, 2016, Mr. Sclarsic stated that the Division had received 140 Open Meeting Law Complaints, resolved 146 complaints, and issued 115 determinations, 12 informal decisions, and 25 declination letters. The median resolution time was 68 days, which was an improvement on 2015. Mr. Sclarsic noted that there had been 57 violations, including four intentional violation determinations: Wayland, Zoning Board of Appeals, Webster Board of Selectmen, Freetown Board of Selectmen. Additionally, at the time of the meeting, there were three pending appeals: Town of Hull, Revere Retirement Board, and West Bridgewater Board of Selectmen.

Additionally, Mr. Sclarsic identified that there had been a total of 900 inquiries by email, phone, and mail received by the Division in 2016 as of August 31, 2016. Mr. Sclarsic specified the staffing changes in the Division over the past year, including the arrival of himself as the Director, had an impact on some metrics. There were 250 people trained, with two regional trainings accumulating 80 attendants. The Division had already hosted two webinars in 2016, with four more webinars scheduled for 2016. Mr. Sclarsic also emphasized the new change in the webinar schedule. He stated the Division switched to offering webinars on a monthly basis with evening and morning webinars. Mr. Ambrogi questioned if the webinars were recorded? Mr. Sclarsic responded that the webinars are not recorded, but the Division does have multiple web videos that explain Open Meeting Law regulations.

Mr. Sclarsic moved to the Open Meeting Law Regulations and the idea of updating/modifying the regulations. Mr. Sclarsic indicated that the regulations were first put into place in 2010, and the last update took place in 2011. Mr. Sclarsic wants to evaluate the regulations for improvement, and is asking for recommendations or guidance from the Commission and public.

Sen. Lovely asked a question about what happens when someone violates executive session? Mr. Sclarsic responded that there is a procedure for executive session, and violations occur when public bodies fail to properly inform the public. Public bodies must post details in their meeting notices on the subject of executive session and the purpose of the executive session. Mr. Sclarsic identified that executive sessions can be difficult to navigate and that they are the subject of frequent complaints. Mr. Sclarsic also acknowledged that many public bodies enter into executive session in a proper purpose and then wade outside of the scope of the executive session purpose.

Mr. Ambrogi asked about violations by email. Mr. Sclarsic asserted that many complaints are from public body members themselves, often stemming from an email chain, and stating that a violation occurred. Mr. Sclarsic additionally noted that it is common for one public body member to email all public body members, and then for another public body member to respond that that is not allowed. Unfortunately, that type of email correspondence expresses an opinion; and therefore, is a violation. Nevertheless, Mr. Sclarsic expressed that there is a grey area: administrative emails vs. substantive discussion. Sen. Lovely asked if administrative emails are not a violation? Mr. Sclarsic answered: yes, administrative emails or correspondence outside of an open meeting, defined in the Open Meeting Law, do not violate the law because no opinion is reflected.

Sen. Lovely alluded to her time as a public body member in her hometown and the difficulties that can go with maintaining a balance between administrative/personal talk to business and public matters. Mr. Sclarsic reiterated that social interactions after a meeting is fine, but there can be no discussion about public body matters. Mr. Sclarsic also stated that the Division does not issue many intentional violations. Intentional violations are mainly only used because the Division had previously issued warnings and conduct was/is being repeated.

Mr. Hull asked if there is a litmus test for intentional violation if a practice is repeated practice and there was prior warning. Mr. Sclarsic explained that intentional is defined by the Attorney General's regulations. Mr. Hull asked if the repercussions for an intentional violation differed from an unintentional violation. Mr. Sclarsic responded that Yes – there is a maximum fine of \$1000 per violation, and a hearing by an Administrative Law Judge too. With that said, Mr. Sclarsic stated that the Division has settled all previous intentional cases.

Mr. Ambrogi asked about the current staffing in the Division and what vacancies need to be filled. Mr. Sclarsic answered that the Division has two Assistant Attorney Generals (AAG Kevin Manganaro and AAG Hanne Rush), and one Paralegal (Bongani Jeranyama). However, with Mr. Sclarsic's promotion to Division Director and the departure of Mr. Jeranyama to the Office's Community Engagement Division, the Division is currently looking for a new AAG and paralegal.

Sen. Lovely inquired about the hotline and how it is managed by the Division.? Mr. Sclarsic responded that hotline is managed by a member of the Division five days a week and that it is an important tool. Senator Lovely responded that having the hotline as a feedback tool is important.

### **Discussion of Commission's Role**

Mr. Ambrogi brought up the topic of the Commission's role in regards to legislation. Mr. Ambrogi stated that the Commission's role is clearly advisory, though it has authority to recommend legislation to the Attorney General, and that talking about regulations is the perfect advisory role. Rep. Kocot stated that upon reflection of the minutes from the past meetings, one item where the Commission may be helpful is with the budget. Rep. Kocot noted that in the past the Commission has discussed having the Attorney General's Office inform the Commission what its needs are in terms of budgeting. Rep. Kocot stated that as it relates to the state

Legislature, the Commission could be a helpful resource for the Senate and House budget conference. We are here to help for additional resources. Mr. Sclarsic expressed gratitude.

### **Policy for Public Records**

Mr. Sclarsic stated that the Commission is its own independent agency, and therefore must respond to records requests that arise. Mr. Sclarsic concluded that a member of the Commission should be responsible for the records. Rep. Kocot ask Mr. Sclarsic if it would it make more sense to have AG appointee to be doing that? Mr. Sclarsic states that the decision must be made by the Commission, but it is sensible to have a representative from the Attorney General's Office handle those issues.

Mr. Ambrogi: Recalls we discussed this quite a long time ago, recollection says we have procedure to forward any stuff to AGO. That's what I get the procedure to be, I forwarded it to AGO when I was chair.

Mr. Sclarsic: Continues to make sense, we can help with administrative support, but make sense for a designee. Law contemplates having a public records officer.

Formal motion: Sen. Lovely: election of secretary to assist handling public records requests

Rep. Kocot moves for Carrie Benedon to be secretary

Second RA

#### **All vote in favor of (5-0) Carrie Benedon secretary**

Mr. Ambrogi: What are the record retention rules?

Mr. Sclarsic: Rules shouldn't be any different, we will retain documents with records retention schedule.

### **Correspondences**

Mr. Sclarsic: two letters received, I can help with number 1, from the Pioneer Institute, we responded (AGO) explaining it is not our role to provide constitutional opinions, only enforcement

Mr. Hull: Did pioneer institute pursue any further?

Mr. Sclarsic: Not aware of any further communication regarding the request

Rep. Kocot: Chap 121, act 16, sec 20: Special commission will take up OML and its effect on the legislature

- Conference committee was opened, we learned a lot, folks came in and testified, we were exposed. In nexus to CORI w/Public Records Law
- Additional conversations arise as well – use by legislation as a topic
- Many processes are open, specific process for bills, well publicized, public hearings are open, when you look at other states, half and half under OML. We will look at other states
- Sen. Lovely: we thought strongly having this in the Public Records Law rewrite, many trained at local level are used to OML and Public Records Law. We will get stakeholders and public at the table
- Rep. Kocot: Our committee takes testimony, result of votes are public, never had a problem with information or process being opened

Sen. Lovely: Any questions? Next letter

Mr. Sclarsic: An individual has questions and suggestions to changes in regulations, from Montague

Rep. Kocot: Anyone from Montague? Very small town – in cases like this if you have local government and specific complaints that is unique to Montague

- Mr. Sclarsic: We have a complaint timeline set by regulations, looking at changes to make it more clear
  - o Form says public body must hold meeting within 14 business days, but laws allow public body to ask for extension of time for good cause – generally are good at offering extension
    - Only offer reasonable extension, try to work with public body
  - o Pick up phone if public body is not responding – pick up phone talk to chair, town manager, town clerk

Rep. Kocot: This person wants to change our regs? Is there a process?

Mr. Sclarsic: Informally, 5<sup>th</sup> most common violation – failure to follow Open Meeting Law complaint process

Rep. Kocot: We got lots of timeliness issues when revising the Public Records Law – fair time for community and person who wants the records. Does agency feel we need to tweak time constraints

Mr. Sclarsic: Only can talk from enforcement perspective, works generally well – initially try to make them aware of the process

Mr. Amborgi: The letter brings up what is a business day? Is there ambiguity with as raised in the Golrick letter?

Mr. Sclarsic: Any day not a weekend or legal holiday, just because town hall is closed, it is still a business day, no ambiguity

Mr. Amborgi: Maybe clean up regs in regards to this. Time table for regs?

Mr. Sclarsic: We will start soon, but not while we are down staff. But we will turn to it when we are at full capacity.

Mr. Hull: There is an intent to strike a balance, small communities don't have full time staff, there needs to be balance so they are not calling meetings simply to – some of these communities with individuals in multiple roles – regs need to be mindful of part time people

Mr. Sclarsic: We appreciate that and will be attentive. Some communities have large staff support, some towns with part time or volunteers

Mr. Hull: I have had experience, instances where individuals have used the Public Records Law to badger communities, request after request after request. Speaking for admin perspective it is frustrating

Mr. Sclarsic: We hear this, particularly from smaller communities, multiple complaints from one complainant. Always open to resolve conflicts that are beyond OML

Mr. Hull: Specifically talking about public record requests – we have multiple request from handful of individuals. Part of business, but is channeling

Mr. Sclarsic: Not our role to investigate public records requests, that lies with Supervisor of Records within the Secretary of the Commonwealth's Office

## **Status of Legislation Pertaining to the Open Meeting Law**

Mr. Sclarsic: I can defer to the legislative representatives. No actions taken to formally approving these bills

Rep. Kocot: 2751 in study, 2753 in study 2774, bill filed by MMA. Dealing with town meetings and Commission members present can talk about stuff they were concerned

Rep. Kocot: 2775 in study; 2816 and 3304 in study.

Sen. Lovely: That's the information I have, probably won't be acted on.

**Items not reasonably anticipated by the Chair 48 Hours in advance of the meeting:** None

## **Public Comment**

Seb. Lovely: Open to public comment

David Rosenberg – Norfolk

- Q: For OMLAC and DOG
  - o OMLAC: Bill 2816 remedies four problems, unintended consequences to the amendment
  - o Rep. Kocot: 44 communities in western mass don't have access to internet, some don't have cell access
    - Raises geographical and class issues
  - o Mr. Rosenberg: There are set of problems. Thoughts from the commission to address the problems. They are real
    - Rep. Kocot: Some others are with the public records law debate. Capabilities of communities: accessibility of town halls, how much are they open, Westhampton opened 2 hours a week, Middlefield, Montgomery still waiting for high speed internet. Remote participation: AGO has stuff on website, but tech capability varies greatly in the commonwealth. Boston and Norfolk have WiFi everywhere
    - Mr. Ambrogi: underscore internet access, Mr. Rosenberg's bill tries to enable public bodies to do business outside of open meeting but in open way. I've spoken to you in the past, not sure of a way other than the law provides. Our law is good now, years to come it will evolve, internet access is a huge problem: income, access to tech, geographical, class and number of factors. Partial deliberation excludes people from process.
  - o Mr. Rosenberg: I have no other solution to give. Do we agree that there is a problem?
    - Lots of people serve by day in a different way in private lives, than what the OML gives them. Different context, public – RA
  - o Mr. Rosenberg: checklists that are available?
    - Mr. Sclarsic: checklist on our website [mass.gov/ago/openmeeting](http://mass.gov/ago/openmeeting)
    - Checklist here for exec session, meeting notices, meeting minutes – step by step resources
  - o Mr. Rosenberg: Illegal deliberation via email? Often public body member? How else could you find out? If people or public are suspicious?

- Mr. Sclarsic: Cannot suggest, but public records requests have shown potential violations or by inference. However, it's among the most common complaint we don't find a violation
- Mr. Rosenberg: Do you issue advisory opinions? No issued advisory opinions? Will you ever do that?
    - Mr. Sclarsic: While our regulations allow for advisory opinions, we decided early on that we would provide guidance through formal determinations and our website, this has not changed. We respond to inquiries when we receive requests for advisory opinions.
  - John Hawkinson: Item 6 – records retention: year and a half to dispose of records. Because the volume of records are so low, not a lot to retain. It would be good to retain Commission agendas in perpetuity on the Commission's website.
    - Mr. Sclarsic: Minutes must be retained permanently, agenda do not, but minutes are published to the website.
  - Linda Segal, Wayland: Happy Mr. Sclarsic has returned to the department. Always cherished public comment, next time regulations are out that would be great for the public. Not speaking on behalf of Wayland. Interactions have been as a private citizen, it matters a lot thank you
    - Sen. Lovely: Thank you. Any other public commentary from the audience

### **Scheduling Next Commission Meeting**

Sen. Lovely: Semiannually or quarterly?

Mr. Ambrogio: Makes sense to have meeting in next 6 months, be more aware to what is going on here

Sen. Lovely: Schedule meeting around March, makes sense prior to House budget would be optimal. We will coordinate

Mr. Sclarsic: Any topics added to next agenda for March meeting – Sen. Lovely: send email 3 or 4 weeks in advance

Mr. Ambrogio: We will know new legislation that has been filed

Mr. Sclarsic: We will add that to the agenda – update from special legislation commission. Report time is December 2017 – add

### **Adjourn**

Sen. Lovely asked if there was any further business to be discussed by the Commission. Sen. Lovely moved to adjourn the meeting. **By unanimous vote (5-0), the meeting adjourned.**

### **List of Documents Used by the Commission during the Meeting**

1. OMLAC Meeting Notice for September 14, 2016
2. Minutes from OMLAC Meeting of July 7, 2015
3. Annual report from the Division of Open Government, regarding the Open Meeting Law and the activities of the Division of Open Government

4. July 15, 2015 letter from Pioneer Institute to Commission
5. August 2, 2016 letter from Peter Golrick to Commission
6. Legislation:
  - a. [H.2715](#): An Act to improve the Open Meeting Law
  - b. [H.2753](#): An Act relative to the Open Meeting Law
  - c. [H.2774](#): An Act to exempt the deliberation of public bodies at town meeting from the Open Meeting Law
  - d. [H.2775](#): An Act updating the Open Meeting Law
  - e. [H.2816](#): An Act to permit enhanced public access to deliberations of public bodies and to permit improved efficiency of public bodies
  - f. [H.3304](#): An Act relative to the Open Meeting Law

**Approved March 8, 2017**