

Minutes of the Open Meeting Law Advisory Commission

Thursday, March 7, 2024, 12:00PM

Minutes

Virtual Access Via Zoom

Members Present: Hanne Rush, Attorney General's designee (Chair); Robert Ambrogi, Massachusetts Newspaper Publishers Association Designee; Marc Strange, Massachusetts Municipal Association Designee, Representative Antonio Cabral, Chair on the joint Committee on State Administration and Regulatory Oversight, Senator Nick Collins, Chair of the Joint Committee on State Administration and Regulatory Oversight.

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, Assistant Attorney General, Matthew Lindberg, Paralegal, Natalie Reyes

Call to Order

Hanne Rush called the meeting to order at 12:01 pm.

Appointment of new OMLAC chair

Ms. Rush said that the first order of business was to appoint a new chair for the Commission. She asked for suggestions. Mr. Strange stated that he knew he was replacing the previous last chair and asked who chair before the previous chair was, Jeffrey Hull. Mr. Ambrogi said he believed Ms. Rush was the chair before Mr. Hull. Mr. Strange said he could do it but believed either Ms. Rush or Mr. Ambrogi should be chair. Mr. Ambrogi said he believed Ms. Rush was the previous chair and if she was, Mr. Ambrogi would be happy to be chair. Ms. Rush said she believed Mr. Ambrogi was chair before Mr. Hull, at the beginning of Covid. Mr. Ambrogi nominates Ms. Rush and Mr. Strange seconds. Roll call vote is taken. **Ambrogi – Yes, Strange – Yes, Representative Cabral – Yes, Senator Collins – Yes. Motion passed and Ms. Rush was elected new chair.**

Review and approval of draft minutes for March 16, 2024 Commission meeting

Ms. Rush said that the next order of business would be to approve the minutes of the March 16, 2023, Commission meeting. Ms. Rush asked if anyone had a chance to read the minutes and make any comments or corrections. With no comments or corrections offered, Senator Collins motioned to approve the minutes as submitted. Mr. Ambrogi seconded the motion. Vote by roll call. **Ambrogi – Yes, Strange – abstain, Representative Cabral – Yes, Senator Collins – Yes. Motion passed to approve the minutes.**

Report from the Attorney General's Division of Open Government

Ms. Rush 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 explained that the report is focused specifically on the activities related to open meeting law enforcement and open meeting law education during 2023.

Ms. Benedon said that during the 2023 calendar year, 368 open meeting law complaints were filed with the division of open government for review. Ms. Benedon explained that in addition to the complaints that are filed with the division of open government, many more complaints are filed with the public bodies in the Commonwealth but are not necessarily filed with our office for review. Ms. Benedon explained that any individual may file an open meeting law complaint. Complainants use the Attorney General's Open Meeting Law complaint form and the complaint is filed first directly with the public body that is alleged to have violated the open meeting law. The public body has an opportunity to respond to the complaint, to take remedial action that they believe may be appropriate or to otherwise respond. The public body sends the complaint and their response to our office, and then, if the complainant is not satisfied with the response, they can file the complaint with the division of open government for review. Ms. Benedon explained that typically in a year, about half of the complaints that the division knows are filed with public bodies end up getting filed with the division for further review.

Ms. Benedon states that in 2023, the Division once again issued a record number of Open Meeting Law determinations and stated that it was the third year in a row that the division issued a new record number of determinations. The division issued 244 determination letters which some resolved multiple complaints, and 32 declination letters. A total of 357 complaints were resolved through the determination and declination letters. Ms. Benedon said that the Division found a violation in about 55% of the complaints reviewed by the Division. She explained that the Division also tracks individual allegations, because some complaints are filed that include a few or even many separate allegations, and where the Division looked at each allegation separately, the Division found about 42% of the time. 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 there were two matters that had been filed in previous years that were resolved by superior court judges last year. The first involved the Swansea Board of Selectmen that stemmed from a determination that the Division issued in 2021 that related to timely approval of executive session meeting minutes. The Division found that the Swansea Board of Selectmen had failed to timely approve minutes of an executive session meeting, and found that this was an intentional violation, because that board has previously been found in violating for failing to timely approve executive session meeting minutes. The Superior Court found that the Open Meeting Law regulation, and specifically the requirements that executive session meeting minutes be timely approved is inconsistent with the text of the Open Meeting Law and that the Open Meeting Law does not, in fact, require executive session meeting minutes to be timely approved, but only to be created and regularly reviewed for potential public release. And so the Superior Court found that the Attorney General's regulation, requiring the timely approval of executive session meeting minutes is invalid, and therefore the Division should not have found a violation of the Open Meeting Law for failure to timely approve executive session minutes. The second matter in 2023 involved the Board of Selectmen of the Town of Hull, which dealt with the specificity required on meeting notices when meeting in executive session. The Court found that the Division should not have found a violation of the Open Meeting Law for failure to identify the bargaining unit and the litigation matter. The Court found that the public body had presented a plausible explanation for why including that detail may have compromised its bargaining or litigation positions.

Ms. Benedon said that the Division has continued to offer live webinar trainings on the Open Meeting Law. The Division directly trained about 1,300 people in the Commonwealth last year through different platforms including presenting 20 webinars last year, partnered with the

legislature's Joint Committee on State Administration and Regulatory Oversight, and also presented training to other groups.

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 and received and responded to about 1,600 inquiries.

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

Mc. Rush asked if members of the Commission have any questions or comments regarding the report read by Ms. Benedon. Representative Cabral asked whether the boards found of intentionally violating the Open Meeting Law were fined. Ms. Benedon explained that the Division did not recommend a civil penalty in either of those two cases. In the matter involving the Wayland School Committee, which had to do with meeting minutes that were insufficiently detailed, the Division recognized that there was no evidence of a particular intent to conceal information the public, but did acknowledge that despite prior warning, they still seem to not understand the obligation and the Division did not think it was a situation that warranted a civil penalty. The second matter which related to the timely or untimely approval of meeting minutes, the Division considered as a factor that all of the meeting minutes at issue had been approved before the complaint was filed with the public body.

Mr. Ambrogi asked whether the Division was planning to appeal the decision regarding the Swansea Superior Court decision, and what the implications of that decision were, and whether a change in the wording of the statute was needed if the public wants to see executive session minutes approved in a timely manner. Ms. Benedon stated that the Office decided not to appeal the ruling because there are multiple bills that are pending this session that would amend the language of the open meeting law specifically requiring the timely approval of both open and executive session minutes. Senator Collins said that it is something he is in favor of and asked what the recourse is in situations where the subcommittees are meeting on serious issues but do not have a quorum and are not obligated under the Open Meeting Law. Ms. Benedon explained that the Open Meeting law is very clear that subcommittees are their own public bodies and they are subject to the Open Meeting Law in all respects, so a designated subcommittee, regardless of whether that subcommittee includes a quorum of the full body, is still a public body. Ms. Benedon explained that if there is a seven-member committee and it creates a 3 member subcommittee, it is less than a quorum, but that subcommittee is its own public body even though there is only 3 members and they should be posting notice and keeping meeting minutes. She also explained that sometimes some of the State boards and commissions schedule a meeting and then unexpectedly don't have a quorum show up, and decide to discuss matters anyway, in that case the provisions of the Open Meeting Law don't apply because the Open Meeting Law defines meeting as a deliberation that occurs and deliberation is defined as communication between and among the quorum. Therefore, if a quorum does not show up, it is not a meeting that is subject to the Open Meeting Law, and so there isn't an obligation to maintain minutes.

Senator Collins then asked if, looking at legislation, it would make sense to say that a meeting should not take place if there is no quorum. He noted that the guidance from the Attorney General's Office says that they recommend to reschedule the meeting, but asked it is would make sense for them to add some language to say that a subcommittee should cancel the meeting. He noted that it seems like a bit of a loophole that they might want to close. Ms. Benedon said that it's probably a policy consideration that would be best addressed through legislation and if there is a change in legislation, the Division would then enforce the law.

Mr. Strange asked about the case decided by the superior court that dealt with the executive session and the lack of specificity. He asked whether what the reason was for not including the bargaining unit or litigation. Ms. Benedon explained that the public body had asserted that they did not want to reveal that they were engaging in negotiations with one of their town's unions because if the other unions in the town knew that they were renegotiating with one union, then all the other unions would also want to seek renegotiation of some of their terms and so they said that their harm to their negotiating position would be from negotiating with one, and then having every other union wanting to open up negotiations. Ms. Benedon stated that the Division initially rejected that as a reasonable basis for believing that harm would result because of a lack of explanation as to why that would harm the particular negotiation that was the subject of the executive session, but the court accepted the broader harm to the town at large.

Ms. Rush asked if the Commission members had any additional questions or comments for Ms. Benedon.

Pending legislation pertaining to Open Meeting Law

Ms. Rush said the next item on the agenda was legislative updates and status of bills filed and asked if there was anyone prepared to discuss them in any substantive way.

Representative Cabral states that all the bills are on an extension until July 1st and the intention of the committee is to report out one piece of legislation, taking all those in consideration, and the various themes of all those that have been filed and that are in extension. The committee's intention is to report out one that the committee thinks needs to be done and adopted by the legislature and before the temporary rules expire in March 2025. Representative Cabral gave some background on the Municipal Empowerment Act and his opinion on it and his belief that it weakens the Open Meeting Law and his disappointment that the committee was not approached or talked to or asked to chime in on these issues before anything was filed. He stated that last session, they did a lot of extensive work with many meetings with the Attorney General's Office and put it out by the Committee on the last session and it was adopted by the House but there is now a bill being filed that would actually undo those changes, undo the present law and weaken the presence of law. One of those provisions that would be undone would be regarding meeting minutes and how much time a public body has to put those minutes together and improve those minutes and make them available to the public.

Representative Cabral said that the intention is to put out a version that is very similar to the one that actually was adopted by the House last session.

Mr. Ambrogi thanks Representative Cabral and Senator Collins on their work and stated he is a part of the Mass Newspaper Publishers Association and they are part of a coalition of open government disability rights advocates and others who are advocating for a hybrid solution to the Open Meeting Law and hope that there will be both in person and zoom or video options for citizens to attend government meetings. And is concerned with the Municipal Empowerment Act that Governor Healey filed which would not mandate hybrid meetings and would leave it to local municipalities on how they want to handle the matters and believes that would be taking a step backward and hopes for a hybrid approach.

Representative Cabral commented that he believed that during the pandemic it was appropriate to have a hybrid approach but now that the pandemic is over, he believes they need to go back and reestablish OML in a way that is as transparent as it can be and doesn't believe it is appropriate to

make the pandemic rules permanent. They were established to give some flexibility because of the situation, but believes that every community should at some point be able to do hybrid meetings. He mentioned that the legislature and their joint committees hold hybrid meetings and it's had fantastic participation. The meetings have doubled in time because of the participation that takes place during the hybrid meetings and believes it's the case for other local and state bodies. But he hopes that the version that finally gets adopted will be reflective of the spirit of transparency.

Senator Collins said that some of the concerns of the municipalities may be able to get mitigated. Some of the challenges they have been hearing about is on access to infrastructure to be able to do this at the municipal level, but believes there is funding to get them the equipment that not all municipalities are budgeted for. The other thing he believes should be considered is to establish codes of conduct or standards of conduct with respect to the virtual management. And while there are more people attending meetings, he says they want to make sure that it's not limiting back and forth discussions where it's appropriate. He states he believes its something that will need to be monitored and work together with the Attorney General's Office if they decide to move a bill forward.

Public Comment

Ms. Rush asked if there were any other comments.

Corey Spalding gave a comment. She said that she was an accidental whistleblower who inadvertently exposed fraud by school boards and reported it and her child was being retaliated against it. She claims that her representative was fully aware of the fraud and embezzlement, and she believes he helped craft one of the bills listed on our agenda, which she believes would make it more difficult for people like her. She said that her representative stated they would close all the loopholes to prevent any citizen from getting public records and she is now unable to get any, not even her daughter's school records or the residency investigation. She claimed that her daughter is being denied her right to free public education because she exposed this fraud. So, she wants to know whether there is a forum to allow a discussion for open meetings and allow a citizen to make a statement. She expressed a desire to provide sworn testimony for the record to show that there is public corruption because there is a representative who is crafting bills and wanting to pass a law when he knows that he is just covering up fraud, abuse and civil rights violations. Representative Cabral suggested that if she wants, she can provide testimony at a public hearing and suggested checking the notice and legislative website to see how to submit a testimony. He also suggested that she contact the Inspector General of the Commonwealth for her concerns with investigating fraud, waste and abuse. Corey Spaulding explained that she had and that she talked to an array of people, including the FBI, about the corruption and fraud and everyone is aware, and it is all a conspiracy. Senator Collins suggested she look up the Committee on State Administration and Regulatory Oversight.

Patrick Higgins gave a comment that he agrees with Mr. Ambrosi about the dual availability to meetings and explained that because he lives in Alabama, the only way he can watch meeting is on either live zooms or recording.

Adjourn

Senator Collins made a motion to close the meeting. Representative Cabral seconded. Ms. Rush took a roll call vote. Robert Ambrosi – Yes; Marc Strange – Yes; Representative Cabral – Yes; Senator Collins – Yes; Hanne Rush – Yes.

Ms. Rush reminded everyone that the Commission usually meets every 6 months, and the Division of Open Government usually reaches out to the members individually to figure out the best time for everyone and would probably be around September.

The meeting concluded at 12:55 pm.

Documents used

1. OMLAC Meeting Notice for March 7, 2024
2. Draft Minutes for OMLAC Meeting of March 16, 2023
3. 2023 Annual Report to the Open Meeting Law Advisory Commission