

**Minutes of the Open Meeting Law Advisory Commission
Monday, June 18, 2018, 1:00PM**

Approved on May 14, 2019

100 Cambridge Street, Room C of the Leverett Saltonstall Building, Boston, MA 02108

Members Present: Robert Ambrogi, Massachusetts Newspaper Publishers Association designee; Carrie Benedon (OMLAC Chair), Attorney General's designee; Representative Jennifer Benson, Chair of the Joint Committee on State Administration and Regulatory Oversight; Senator Walter Timilty, Chair of the Joint Committee on State Administration and Regulatory Oversight

Attorney General's Staff Present: Juliana Rice, Deputy Bureau Chief of the Government Bureau; Jonathan Sclarsic, Assistant Attorney General, Director, Division of Open Government; KerryAnne Kilcoyne, Assistant Attorney General, Division of Open Government; Kaitlin Maher, Paralegal, Division of Open Government; Anton Tikhomirov, Legal Intern, Division of Open Government

Others Present: John Hawkinson, Resident of Cambridge; Jay O'Brien, Office of Senator Walter Timilty; Rachael Pauly, Office of Senator Walter Timilty; David Rosenberg, Resident of Norfolk

Call to Order

Assistant Attorney General Carrie Benedon called the meeting to order at 1:02PM. Ms. Benedon, Representative Jennifer Benson, and Senator Walter Timilty introduced themselves to those present.

Introduction of new Director of the Division of Open Government, Assistant Attorney General Carrie Benedon, effective July 9, 2018

Ms. Benedon said she will take over as Director of the Division on July 9, 2018. Ms. Benedon said that Jonathan Sclarsic has led the Division competently and is departing for the Harvard Kennedy School Masters in Public Administration program. John Hawkinson asked if there was any information yet about the Attorney General's new designee to the OMLAC. Carrie Benedon said no, not as of this time.

Review and approval of draft minutes for January 23, 2018 Commission meeting

Rep. Benson moved to approve the minutes and Sen. Timilty seconded the motion. **By unanimous vote (3-0), the minutes were approved.** (Robert Ambrogi had not yet arrived.)

Report from the Attorney General's Division of Open Government

Ms. Benedon invited Division Director and Assistant Attorney General Jonathan Sclarsic to give the Division's report. Mr. Sclarsic said it is his last report and he thinks he has been to every meeting since the Commission was created, except for maybe when he was on rotation at the

DA's office. The Division submits an annual report each January, and also gives updates during mid-year meetings.

Mr. Sclarsic said the Division had received 244 complaints in 2018 and resolved 133 complaints. All determinations and declinations are posted on the website. Of the 79 determinations issued in 2018 so far, the Division found in 44 that the public body did not violate the OML, and in 35 that they did violate the OML. The Division continues to see complaints about the same issues, many of which are about whether the public body convened in executive session for proper purposes and convening procedures. The Division has also received a lot of complaints about meeting notices with insufficient detail, notices that don't list all anticipated items, and about deliberation outside of meetings, especially deliberation over email. The orders issued are predominantly "immediate and future compliance," which is when the Division provides guidance on complying with the OML in the future. An "immediate and future compliance" order is also a warning that a future violation of the same nature could be intentional, accompanied with a fine. Additionally, the Division has ordered the release of minutes and emails, and attendance at trainings.

Mr. Sclarsic said that the Division continues to conduct regional and webinar trainings. The regional trainings this spring were in Monson, Leominster, Sudbury, Reading, and Barnstable, and the Division has hosted monthly webinars and conducted trainings at associations' events and conferences. So far in 2018, the Division has trained about 500 people. The Division continues to staff a hotline, through which the Division responds to OML-related inquiries.

Mr. Sclarsic said that the revised regulations took effect in October and the implementation seems to be going well. The Division has seen complaints filed with public bodies about timely approval of minutes, based on the regulations' standard. Overall the regulations have offered more clarity, and has helped the Division resolve complaints. One of the new components (mediation) is meant to address numerous complaints filed by the same individuals. The Division has appointed an external mediator to mediate between the Natick School Committee and a complainant. The mediation will be paid for by the town.

Mr. Sclarsic said the Division continues to monitor court cases related to the OML. The Boelter decision has been of interest to people. The Division offer guidance about the Boelter decision through the Division's trainings, hotline, and an FAQ on the website. The Boelter case involved a Board conducting its evaluation of the Town Administrator. Each individual submitted their own evaluations to the Chair, which was compiled into one aggregated evaluation by the Chair and redistributed to the members. The Court said that was not permissible under the OML. It was probably ok for the Chair to accept the evaluations and aggregate them, but the Court said the Chair cannot redistribute it until the meeting. The Court said if the Board had made it public, on a website, then it could've distributed it to the members. The Division has published guidance about this on the OML website and has added a cover letter to each determination impacted by Boelter.

Mr. Sclarsic said he was in the Appeals Court last month for a case about a Retirement Board and purpose 3. The Division was making the case for a more limited interpretation of the litigation exception. The Division has argued that receiving advice from counsel is not on its own

enough to justify an executive session--one of the ten purposes has to apply for a public body to convene an executive session.

Mr. Sclarsic said that the Division has received a favorable finding in the Fall River appeal, where the Division said that if a parent body is present at a subcommittee's meeting, the parent body has to be in the audience and can only participate by open participation. The court agreed. Mr. Sclarsic said that the Division will also be in court tomorrow for another Fall River appeal, about the 14-business day period for public bodies responding to complaints. An administrative judge agreed with the Division's determination, and the Council appealed the judge's finding. In the Hull case, the Court remanded it back to the Division.

Mr. Sclarsic said the Division will be scheduling the fall regional trainings soon, which will be conducted under the new director.

Mr. Sclarsic said that the Division's other time is spent on Public Records Law Enforcement.

Ms. Benedon asked if the Commission has any questions about Mr. Sclarsic's report.

Mr. Sclarsic said Mr. Ambrogi missed the announcement about Mr. Sclarsic leaving, so he repeated that he will be leaving for Harvard Kennedy School in July. Mr. Sclarsic said he has been with the Division since its start in 2010, and that it has been a pleasure coming before the Commission over the years. Mr. Sclarsic said the Commission and Division have a great relationship.

Sen. Timilty asked if the regional trainings generate more awareness of the Open Meeting Law. Mr. Sclarsic said that absolutely, the regional trainings are helpful in that regard. It's sometimes a double-edge sword, because when more people learn about it, more people file complaints. But the Division has always received positive feedback and always receives requests for more trainings.

Ms. Benedon said that Mr. Ambrogi arrived during Mr. Sclarsic's report. Mr. Ambrogi introduced himself, and explained that he had some car trouble on the way over.

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

Ms. Benedon asked if the legislators have anything to report about the bills pending in the Legislature (H.4206, H.899, H.1669, H.1687, H.1704, H.2414, H.2675, H.3355, S.1767). Rep. Benson said H.4206 was reported out of Committee favorably. That was filed by the former Chair of the Joint Committee, Rep. Peter Kocot. The rest were reviewed by the Committee.

Correspondence received by the Commission

The Attorney General's Office received an email from Paul Hamblen of Sudbury on March 19, 2018, which was addressed to the Attorney General and the Commission. The email was distributed for informational purposes to the members, to be discussed at this meeting. Ms. Benedon said her take was that this email was meant for the Division, because the Commission

is not tasked with promulgating regulations. Ms. Benedon asked if Mr. Sclarsic could report on whether the Division responded to the email. Mr. Sclarsic said he did respond to the correspondence in March, and he explained that purpose 4 is statutory, not regulatory. Ms. Benedon said that given that the Division responded, she does not think the Commission needs to respond further. Mr. Ambrogi said he agrees.

Public comment

David Rosenberg from Norfolk, MA addressed the Commission about H.1704: Mr. Rosenberg said that he has been attending OMLAC meetings since 2011 and offered comments throughout the years. Mr. Rosenberg said that the OML is well-intentioned but there are still problems. A bill that was filed to address some of the problems (H.1704) was referred to study, and he is anxious to work with the OMLAC, Commission, Committee, or anyone else who wants to work on the bill. The OML prohibits discussion among a quorum with a constituency on an Internet forum. People are not able to have a public discussion on public matters over the Internet. Another problem is that a lot of people are unable to attend meetings in person because of geography, vacation, winter, they're elderly, or don't have a car. Mr. Rosenberg said that if there were some mechanism by which those members of the public could monitor the business of public bodies and even participate remotely, that would increase engagement of the public. Another issue with the OML is that because members of the public body can only communicate at a noticed meeting, the public body might meet once a month for a couple hours. The volunteers want to do the work of that public body between meetings. When they're limited to a narrow meeting window, that decreases the efficiency of that public body. Mr. Rosenberg said that an Internet forum would increase transparency and public engagement in the government process. Mr. Rosenberg said that lastly, there's the issue that public bodies face when they need to meet a deadline, for example, a report is due by a deadline. They may have thought their work was finished before the deadline, but if a development arises, the members of the public body are faced with options: they could ignore the development, ignore the deadline, or have another meeting. Mr. Rosenberg said he has reasons to expect they violate the OML and have email deliberations over email because they're trying to expeditiously fulfill their responsibility. They consider an OML violation the lesser of evils. If there were some mechanism by which they could deliberate conveniently, in a way that the public had full access to, that would be better. The OML provides an incentive to keep the emails secret because they do not want to risk showing a violation of the OML. Mr. Rosenberg said he would like to work with the Commission, Committee, and Division to figure out a way to improve the OML to address these issues.

Ms. Benedon asked Mr. Rosenberg whether some of the problems he discussed could be addressed within the confines of the existing OML, or whether they need a legislative fix. For example, individual members can do work outside of meetings, but they can't share that work with other members until a posted meeting. Is that true or is that not the issue?

Mr. Rosenberg said he requested advisory opinions from the Division and the Division said it doesn't issue advisory opinions. Mr. Rosenberg said pieces of what he described are possible under existing law. For example, some public bodies are videotaped by broadcast TV, so people can monitor meetings remotely. While little pieces can be accomplished under OML as it stands,

not all these issues can be resolved without amending the OML. Mr. Rosenberg said that otherwise the Division would have to take a broader interpretation of what the OML permits.

Mr. Ambrogi said that the Massachusetts Newspaper Publishers Association has historically opposed this amendment. Over this past legislative session, though, the Massachusetts Newspaper Publishers Association has come around to the idea that public body business can be done transparently under Mr. Rosenberg's proposed changes to the OML. Mr. Ambrogi said he met with Mr. Rosenberg and Rep. Roy, the sponsor of the bill, and that there was another meeting scheduled for last week but he had to cancel it. Mr. Ambrogi said his concern is that he thinks final votes should take place during a posted, open meeting. If work is done in between meetings, he hopes it's done in a very transparent way that is accessible to people.

Mr. Rosenberg said that as Mr. Ambrogi alluded to, H.1704 makes a distinction between a meeting and a Public Internet Discussion. At a Public Internet Discussion, no votes can be taken. He envisions it to be ongoing, 24/7, so he does not know what a quorum would look like. The way the way the bill is written, a quorum would not need to participate for the Public Internet Discussion to take place. A full archive would have to be maintained and accessible. That's the current bill but he is open to anything that would resolve these problems. Mr. Rosenberg did have a conversation with Mr. Sclarsic and Gabe Viator and they had some suggestions for the bill after it was filed. Mr. Rosenberg said he would like to work with the Division for the next filing to make it the best bill possible.

Mr. Hawkinson addressed the Commission: Mr. Hawkinson asked whether the Division could speak more about the Boelter decision. He said there's language in Boelter that suggests a public body can publish materials to the web at the same time it distributes it to the members. Mr. Hawkinson said he cannot locate where it says that in the statute. He asked the Commission and Division to engage in a conversation about what that means.

Ms. Benedon said that is something the Commission can consider for the next meeting.

Mr. Hawkinson asked whether the Division had any thoughts about it at the moment.

Mr. Sclarsic said the SJC offered guidance that isn't directly found in the statute so it's hard for the Division to offer what exactly it means. The Division will probably interpret it narrowly. If a public body member were to disclose to a website meeting materials at the same time as the materials are distributed to the members, that probably would not be a violation. That's probably the extent of the Division's interpretation on that issue.

Mr. Ambrogi said the Newspaper Association filed an amicus brief in the case. The Newspaper Association was a little taken aback by the language in the decision because there isn't a legislative basis. Mr. Ambrogi said the Commission will have to think about what it means and how to apply it, and that legislation clarifying/addressing that would be helpful.

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

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

Ms. Benedon asked if Commission members had any items to discuss that were not reasonably anticipated by the Chair 48 hours in advance of the meeting. Sen. Timilty said he did not.

Election of new chair

Ms. Benedon said that as she will be taking over as Director of the Division, she will be resigning from the Commission, and so it is appropriate to elect a new chair.

Rep. Benson said that since one member is missing and the Attorney General will be designating a new member, she proposed tabling the election of the new chair until the Commission is fully present. Sen. Timilty seconded that proposal and Ms. Benedon concurred.

Schedule next meeting

Ms. Benedon moved on to scheduling the next meeting, noting that the Commission usually meets a couple times a year, and proposed scheduling the next meeting in six months.

Mr. Ambrogi said that since six months brings the Commission to December, he proposed scheduling the meeting later than that because the bills will not be filed until January.

Ms. Benedon agreed, and said that the Division sends its annual report to the Commission at the beginning of the year so January or February would be best.

Adjourn

Ms. Benedon said she would entertain motions for adjournment. Sen. Timilty motioned to adjourn the meeting. Mr. Ambrogi seconded the motion. **With all in favor (4-0), Ms. Benedon adjourned the meeting.**

List of Documents Used by the Commission during the Meeting

1. OMLAC Meeting Notice for June 18, 2018
2. Draft Minutes from OMLAC Meeting of January 23, 2018
3. H.4206, An Act to exempt the deliberation of public bodies at town meeting from the Open Meeting Law (Representative Peter Kocot and Representative Michelle DuBois)
4. Correspondence: March 19, 2018 email from Paul Hambelton (Sudbury) to Commission Members