

Minutes of the Open Meeting Law Advisory Commission
February 23, 2012
One Ashburton Place, 21st Floor, Boston, MA

Members present: Peter Hechenbleikner, Chair, Massachusetts Municipal Association designee; Robert Ambrogi, Massachusetts Newspaper Publisher's Association designee; Loretta Lillios; Attorney General's designee; Sen. Kenneth Donnelly, Chairman of the Joint Committee on State Administration and Regulatory Oversight.

Members absent: Rep. Peter Kocot, Chairman of the Joint Committee on State Administration and Regulatory Oversight.

Attorney General's Staff Present: Amy Nable, Assistant Attorney General, Director, Division of Open Government; Philip Mantyla, Paralegal, Division of Open Government.

Others present: Katie McCue, Massachusetts Municipal Association; David Rosenberg, Norfolk Town Meeting Technology Committee, Norfolk, MA; Brigid Kennedy-Pfister, Sen. Kenneth Donnelly's Office; Rob Caridad, Goulston & Storrs.

Chair Peter Hechenbleikner opened the meeting at 3:00PM.

Review and Approval of Draft Minutes from December 1, 2011

Robert Ambrogi moves to adopt the minutes from December 1, 2011, seconded by Loretta Lillios. **With unanimous consent, minutes approved.**

Report from the Attorney General's Division of Open Government, Regarding the Open Meeting Law and the Activities of the Division of Open Government

Amy Nable provided the report on behalf of the Division of Open Government (the "Division").

Ms. Nable reported that the Division has been very busy since the last Commission meeting, issuing 17 determinations and declining to investigate four complaints, two of which were untimely and two of which were concerning Town Meeting.

Sen. Kenneth Donnelly entered the meeting at 3:02PM.

Ms. Nable continued with her report. The Division closed out 22 cases where the complainant filed a complaint with the public body but failed to follow up with a complaint to the Division.

Currently, the Division has 139 open complaints, 51 of which were filed since the last Commission meeting.

The Division has conducted three trainings since the last Commission meeting. The Division has four trainings upcoming in March and April, including a "train the trainers" event that is in partnership with the Massachusetts Bar Association. The "train the trainers" event is targeted to attorneys who provide Open Meeting Law training to public bodies. The training will be held in Boston and will be available via webcast as well. The event is scheduled for March 21, 2012.

Peter Hechenbleikner asked if there was a certification for those who attend the training. Ms. Nable replied that the Division will only provide a certificate of attendance.

Ms. Nable then turned it over to Philip Mantyla to provide an update on the number and the types of inquiries the Division received since the last Commission meeting.

Mr. Mantyla reported that since the last Commission meeting on December 1, 2011, the number one type of question that the Division received was regarding remote participation. This has consistently been the number one type of question that the Division has received since they started tracking. Soon after remote participation was authorized, the Division received numerous calls asking whether remote participation was authorized or whether a member may participate remotely in meetings. However, those types of questions have tapered off and the Division is now receiving more procedural questions. For example, whether remote participation may be restricted, or whether certain circumstances fit within the acceptable reasons for remote participation.

Questions regarding the definition of a public body have been the second most frequent question received by the Division since the last Commission meeting. The Division has seen a spike in the number of these types of questions. While some of these questions are fairly straight forward, a handful of questions require additional research.

Holding steady at number three are questions regarding what is an appropriate purpose for entering into executive session.

Questions regarding the definition of a meeting have dropped from second to the fourth most frequent questions the Division has received. Questions include: may less than a quorum of a public body discuss matters outside of a properly posted meeting? And must a particular gathering take place in a properly posted meeting?

Questions regarding the specificity of meeting notice topics have replaced questions regarding acceptable email communication and is now the fifth most frequent question. These types of questions include: how specific must open and executive session topics be on a meeting notice?

In regards to the Division's website, Ms. Nable reported that the Division posted an updated Open Meeting Law Guide on February 10, 2012. The Division did tweet about it and it was re-tweeted nine times. The Guide has had more than 900 unique page views since the updated version went live. The Division also plans to create and post a web-based training in March. The training will be streaming, not downloadable, and posted in segments, due to technological restrictions. As far as using the Division's website to post regulations, the Division did post notice of the "Knowing or Knowingly" draft regulations in two locations on the website.

Mr. Hechenbleikner stated that he was interested in whether it would be appropriate for the Division's website to be used for sharing information from different communities as to what they are doing in regards to the Open Meeting Law. For example, he has been receiving many questions about who has adopted remote participation. It may be helpful for many folks to know who has adopted remote participation and what their regulations look like. If the Division cannot use its website for this purpose, another option may be the Massachusetts Municipal Association's (the "MMA") website. He envisions a website providing information about what other communities or organizations are doing to adhere to the Open Meeting Law. Mr. Hechenbleikner asked if this is a proper use of the Division's website?

Ms. Nable replied that the MMA's website may be the better place for this because of the Division's limited resources. One reason why municipalities or public bodies were not required to notify the Division of adoption of remote participation was because of the added administrative burden on the Division's small staff. It would not be feasible for the Division to track this type of information. Mr. Hechenbleikner stated that this could be helpful and he may follow up with the MMA on this.

In regards to the "train the trainers" event, Mr. Hechenbleikner felt that this is an excellent opportunity. He wanted to know if this is something that can be repeated annually. Ms. Nable replied this is something that the Division would like to do on an annual basis. Mr. Hechenbleikner reiterated that this

is a great idea and further evidence of the Attorney General's interest in getting people trained on the requirements of the Open Meeting Law.

Robert Ambrogi thanked the Division for providing the Commission with the annual report. Mr. Ambrogi asked if the report is posted on the Division's website. Ms. Nable stated that it is.

Mr. Ambrogi inquired about the status of the hearings on two cases where the Division found that there were intentional violations. Ms. Nable stated that the Division is in the process of settlement negotiations. If an agreement cannot be reached, the Division will move forward with the hearings.

Status of Bills Pertaining to the Open Meeting Law Currently Pending in the Legislature

Peter Hechenbleikner stated that Brigid Kennedy-Pfister from Sen. Kenneth Donnelly's office has provided a written update on the status of Open Meeting Law bills currently pending in the legislature.

Ms. Kennedy-Pfister reported that all bills are in the same status as previously reported. House Docket 04135: *An Act to Enhance Technology in Civic Engagement* was recently filed as a bill. This bill is currently in the House Committee on Rules and will likely be referred to the Joint Committee on State Administration and Regulatory Oversight.

Discussion on Public Comments Received by the Division of Open Government in Response to the Amendment to 940 CMR 29.02 – the Definition of “Knowing or Knowingly”

Peter Hechenbleikner asked Amy Nable to provide a report on the public comments received in response to the proposed amended to 940 CMR 29.02 that would define “knowing or knowingly.”

Ms. Nable stated that the public comment period closed on January 19, 2012. The Division received six written comments and had three individuals testify at the public hearing on January 19, 2012. The Division received comments from Common Cause, the Massachusetts Newspapers Publishers Association (the MNPA), the MMA, two local officials, one past complainant, and a member of the independent media.

The MMA and local officials who commented were supportive of efforts to clarify the standard for intent. The MMA asked the Division to clarify the section of the regulation that states a violation is knowing if the public body had previously received an opinion from a court or the Attorney General's office. The MMA stated that this provision should only apply to decisions directed to that body, and also did not want to be bound by decisions currently under appeal. The local officials also wanted more guidance about how broadly the Division would interpret receipt of a prior determination.

Common Cause stated that this regulation would create a strict definition of the term which would hinder the Division's ability to find intentional violations. They suggested broader definition of “knowing or knowingly” as is used in other legal contexts. The MNPA stated that the Division should consider the issue on a case-by-case basis. They suggested that the Division provide guidelines and examples rather than define the term.

Ms. Nable reported that the Division revised the language and it is currently being reviewed internally. The Division will likely re-post this regulation for public comment.

Robert Ambrogi asked what prompted the Attorney General to define “knowing or knowingly?” Ms. Nable stated that this was based largely on the feedback the Division received from various public bodies. Many public bodies have expressed interest in receiving clear guidance on what is considered an intentional violation.

Discussion on the Implementation of Remote Participation by Public Bodies

Peter Hechenbleikner asked Philip Mantyla to explain some of the questions the Division has received in regards to remote participation.

Mr. Mantyla indicated that the majority of the questions have focused on whether remote participation has been authorized. However, lately the Division has been receiving questions that are more procedural in nature. As was reported earlier, the most frequent question the Division receives is whether a municipality can adopt restrictions on remote participation, such as the appropriate distance for which a member can participate remotely under the geographic distance purpose.

Amy Nable stated she has pulled some newspaper articles that report on certain towns and their involvement with remote participation:

- In Shirley, MA, the Board of Selectmen adopted the practice and the Boston Globe reported that at least one Selectman and an Assessor have already indicated they will take advantage of the new option while out of state in coming months.
- Remote participation has been adopted in Andover, MA. However, the Board of Selectmen included a condition that remote participation should be at no cost to the Town.
- Weston, MA adopted the practice, stating that it is beneficial to all involved. However, it was indicated that it is not a necessity, but more of a courtesy if someone cannot be physically present but still wants to participate.
- In Franklin, MA, the Town Administrator as the Chief Executive Officer declined to adopt remote participation at this time. He indicated that he would rather see the person speaking rather than just hear his or her voice. However, a majority of the Town Council spoke in favor of adopting remote participation and the Town Administrator agreed to consider the issue further.
- The Oxford, MA Board of Selectmen also declined to adopt remote participation. One member stated that he would rather talk face-to-face with other members. Another member felt that the cost to adopt remote participation could be high and wanted to see how the practice worked in other communities before adopting the practice.

Robert Ambrogi asked whether the Andover Board of Selectmen specifically stated who should bear the cost. Ms. Nable replied that she was not sure. Mr. Hechenbleikner stated that this information is something that a database like the one he described earlier could capture.

Discussion on the Use of Electronic Devices, Such as iPads, Text Messaging, and Web Chat, during Open Meetings

Peter Hechenbleikner stated that the Attorney General has asked the Commission to consider the use of electronic devices by members of public bodies during meetings.

Amy Nable stated that the Division has seen a number of questions regarding the use of technology in public meetings. The Division is working on a frequently asked question to address this subject. Ms. Nable stated, it is not proper to use electronic devices to deliberate outside of a posted meeting. But the question has arisen on how widely are these devices being used during public meetings and to what extent should these devices be permitted.

Sen. Kenneth Donnelly stated that in the Senate, during hearings, Senators are asked to turn off their cell phones because they could be lobbied while deliberating on a bill. If members of the public are not given access to public records that a member of a public body has access to, then members of public bodies are circumventing the Open Meeting Law. However, if these text messages or other communications are being made available to the public, then the practice may be appropriate.

Ms. Nable indicated it had come up that during a meeting of a public body, a member showed a cell phone picture and there was a question whether this picture was a document used by the public body and if so, how do you retain the document?

Mr. Hechenbleikner stated that a lot of things are presented electronically during meetings. It is possible to email the documents to make a record of it. Also with presentations using PowerPoint or other electronic media, many times there is no paper copy.

Sen. Donnelly stated that if you are deliberating on a law and someone secretly texts you and gives you reasons why you should not vote, that is different. Members of public bodies need to ensure that all this information is being put out there. He personally does not have a problem with the use of electronics during meetings as long as all the information is made public.

Robert Ambrogi pointed out that there are archival rules on what to do with public information. If a public body uses electronics as a way to have questions submitted from members of the public and these questions are read and discussed on the record during the meeting, this could be appropriate. What he does not want to see is private conversations via text messaging during meetings.

Loretta Lillios stated to the extent that there is a conversation via text messaging and this record is not in possession of the town, it makes it difficult to retrieve the record and retain it.

Mr. Hechenbleikner stated that he is concerned with the following issues:

- a member of a public body texting or emailing with someone who is not in attendance in a meeting; and
- a member of a public body texting another member and the text message not being released.

But, there is a huge convenience to downloading reports or minutes during the meeting and going paperless. It is something that the Division must grapple with as more and more municipalities are going paperless.

Mr. Ambrogi stated that he doesn't think the rules governing technology during the meeting would be any different than the rules outside of a meeting. If you send a private text message, you are violating the Open Meeting Law. However, if you have an iPad and pull up an article, that is no different than bringing the article in.

When asked by Mr. Hechenbleikner if the Division has defined what a document used by a public body is, Ms. Nable replied that it is something the Division is currently considering. She indicated that the Division does have a pending complaint regarding the definition of documents used during meetings.

Mr. Hechenbleikner stated that he doesn't have a problem with members of public bodies receiving an email or text message and then reading it into the record. But, if the email or message is secret, that is an issue.

Ms. Nable reported that the Division plans on drafting a frequently asked question on this and many other topics soon after the "train the trainers" event.

Items Not Reasonably Anticipated by the Chair 48 Hours in Advance of the Meeting

Peter Hechenbleikner asked if anyone in the audience would like to address the Commission.

David Rosenberg stated that the issue of members of public bodies exchanging text messages during meetings is irrelevant. It would be the same as a member slipping a note to another member during a meeting. Both are done secretly and members of the public do not know what is going on. Mr.

Rosenberg then asked Amy Nable whether the train the trainers program is open to the public or only to attorneys. Ms. Nable stated that the training is open to any member of the public but is tailored to those who are providing training to public bodies. Mr. Rosenberg asked Ms. Nable if the new version of the Open Meeting Law guide includes change bars so people know what has been changed. Ms. Nable replied that the Division did not highlight the changes but the main update to the guide is the inclusion of the remote participation regulations. Mr. Rosenberg also indicated that the search function on the Open Meeting Law determination lookup database is not very useful. Ms. Nable indicated that because of limited resources, the Division is unable to provide a more advanced search function at this time.

Katie McCue stated that the MMA would be willing to track the adoption and use of remote participation by municipalities. The MMA could put an advertisement in the Beacon, seeking information from cities and towns. Ms. McCue indicated that the MMA does monthly updates on the Open Meeting Law and offered to help the Division by providing information.

Mr. Hechenbleikner thanked Ms. Nable, Jonathan Sclarsic, and Loretta Lillios for their participation at the MMA's annual conference. They did an excellent job.

Scheduling Next Meeting

Peter Hechenbleikner stated that he is inclined to set a schedule for the year but would like to work around the legislative schedule.

Loretta Lillios stated that given the extent of the agenda and the time they are finishing today, she would like to continue to meet quarterly. Mr. Hechenbleikner agreed, noting they can always meet more frequently if necessary.

Mr. Hechenbleikner suggested scheduling the next meeting sometime in May.

Sen. Kenneth Donnelly agreed but indicated that August might be tough. He also stated that he would prefer scheduling meetings in the morning. That would make it easier for him to attend.

It was agreed upon that the next meetings would be held in May and September.

Meeting adjourned by Peter Hechenbleikner at 3:50PM

List of Documents Used by the Commission at the Meeting

1. Meeting agenda for February 23, 2012
2. Draft minutes for December 1, 2011
3. Division of Open Government update
4. Status of bills pending in the legislature regarding the Open Meeting Law