

Minutes of the Open Meeting Law Advisory Commission
April 8, 2015
100 Cambridge Street, Room 2D, Boston, MA

Members present: Jeffrey Hull, Massachusetts Municipal Association designee; Robert Ambrogi, Massachusetts Newspaper Publishers Association designee; Senator Joan Lovely, Chair of the Joint Committee on State Administration and Regulatory Oversight; Loretta Lillios, Attorney General's designee; Representative Peter Kocot, Chair 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; Kevin Manganaro, Assistant Attorney General, Division of Open Government; Jonathan Sclarsic, Assistant Attorney General, Division of Open Government; Juliana deHaan Rice, Deputy Chief, Government Bureau; Benjamin Meshoulam, Senior Policy Advisor, Executive Bureau; Mallory Morales, Paralegal, Division of Open Government.

Others present: Grace Harrington, Chief of Staff, Office of Senator Joan Lovely; John Hawkinson, Cambridge, MA; David Rosenberg, Norfolk, MA.

Introduction of new members and election of new chair

Amy Nable called the meeting to order at 10:01 AM. Ms. Nable explained that Maureen Valente, now the State Deputy Treasurer, and Senator Kenneth Donnelly were no longer members of the Commission. She introduced the new Massachusetts Municipal Association designee, Jeffrey Hull of Wilmington and recognized Senator Joan Lovely as the new Chair of the Joint Committee on State Administration and Regulatory Oversight. Since Ms. Valente was the Chair, Ms. Nable suggested that the first order of business should be to elect a new Chair.

Ms. Lillios explained that typically, the Chair is re-elected annually and rotates to each member. She asked if there were any volunteers. Hearing none, Ms. Lillios then volunteered to serve as chair for the OMLAC. The motion was seconded by Mr. Ambrogi and Mr. Hull. **By unanimous vote (4-0), Ms. Lillios was elected Chair of the Commission.**

Review and approval of draft minutes from June 12, 2014

Ms. Lillios noted that the last OMLAC meeting was in June and that the minutes needed to be approved. She informed Mr. Hull that although he is unable to attest to the minutes' accuracy, he is welcome to vote to adopt them as the official record. Mr. Ambrogi moved to approve the draft minutes from June 12, 2014. Representative Kocot seconded the motion. **By unanimous vote (4-0), the minutes were approved.**

Annual report from the Attorney General's Division of Open Government, regarding the Open Meeting Law and the activities of the Division of Open Government

Ms. Lillios explained that the statute mandates the Division of Open Government to provide the Commission with an annual report.

Ms. Nable stated that while the Division generally provides the Commission with quarterly statistics at each meeting, a separate report was not prepared in addition to the annual report that was sent to the Commission in January. She will, however, provide updated statistics during her summary of that report. Ms. Nable then introduced new Assistant Attorney General, Kevin

Manganaro and proceeded to summarize from the report. She noted that in the last year, the Division responded to more than 1,500 inquires via email and telephone. On average, the Division receives more than a dozen calls each week. In the last year, the Division received 222 new Open Meeting Law complaints and resolved 277 complaints. Of those 277 complaints, 155 were resolved by decisions letters. Currently, the division has 70 open cases and has issued 44 decisions this year. About half of the complaints resolved last year involved violations, which occurred in ways similar to the prior year: insufficient notices; deliberation outside of an open meeting, including email; failure to follow the proper procedures for entering executive session; failure to properly follow the complaint process. Ms. Nable added that in 15 instances, the Division did not order any additional relief, finding that the public body had taken the appropriate remedial action. She commented that this trend was a step in the right direction.

Last year, three matters were referred to hearing, all of which were resolved through settlement. The Division also saw its first appeals filed in Superior Court: *John P. O'Rourke v. Martha Coakley*, which was dismissed in January; and the *Town of Winchester v. Attorney General* which is still pending. In addition, two new appeals were filed in 2015: *Board of Selectmen of the Town of Hull v. Maura Healey* and *Steven K. Kaplan v. Office of the Attorney General*. Ms. Nable updated the Commission on the Division's training efforts. In 2014, the Division trained almost 1,000 people. Trainings are regularly scheduled, with 4 regional training events in the fall and 4 in the spring. The Division also updated its Open Meeting Law Guide in March to include information on the new statute concerning the local commission on disability, the exemption from the definition of deliberation for certain communications about rescheduling a Town Meeting, and to highlight recent guidance in Attorney General decisions.

Mr. Ambrogi asked if Ms. Nable could summarize the matters currently in Superior Court. Ms. Nable stated that the *Winchester* determination involved attorney-client communications in executive session, finding that it was inappropriate to discuss general legal compliance in executive session. In *Hull*, the issue concerns the level of detail required in a meeting notice when meeting in executive session to discuss litigation or collective bargaining. In *Kaplan*, the complainant was dissatisfied with the order issued by the Division.

Mr. Abrogi asked what the Division ordered. Mr. Manganaro explained that in the *Kaplan* case, an individual was terminated by the school district and some of the discussion occurred in executive session. The Division ordered the release of minutes. The individual, however, requested reinstatement.

Representative Kocot asked the Division to comment on two concerns of his: To what extent do small towns indicate their inability to comply with the statute due to lack of resources, either in staffing or technology?; How are certain, repeat individuals who are using the law as respite for other political issues being addressed?

Ms. Nable noted that the Town of Hinsdale has asserted in response to our recent finding of an intentional violation that its repeated failure to provide minutes in a timely fashion was due to a lack of resources. She stated that the Division took this into account when recommending an appropriate penalty for these violations, but that there was no sliding scale for compliance with the law. She mentioned that the Division does try to work with public bodies and complainants to ensure compliance. Ms. Nable also acknowledged Representative Kocot's concerns about

repeat complainants. She stated that the Division has the discretion to decline complaints that are clearly frivolous but, overall, the Division is concerned with the possibility of violation rather than a complainant's motives. She added that the Division is sympathetic to the issue and is giving thought to possible solutions.

Representative Kocot asked Ms. Nable whether an inability to comply with the law was mostly a matter of resources or mindset. He wondered whether this problem could be solved if the Commonwealth were able to provide resources to smaller towns.

Ms. Nable answered that it varies with each community. Some towns don't have the staff available. At a recent training in Northampton, officials mentioned that they would love to be more active online but only 80% of citizens have reliable internet access. Ms. Lillios asked Ms. Nable to repeat that statistic and Ms. Nable corrected herself, clarifying that 80% did not have reliable internet access; the number with access to broadband is actually 20%.

Ms. Lillios asked whether the Division had addressed the issue of multiple complaints in any recent letters. Ms. Nable said the Division has declined to review some complaints where there is no Open Meeting Law issue but hasn't specifically referred to any complaints as frivolous. Mr. Ambrogi commented that it is the Division's responsibility to screen complaints for validity since the frequency of complaints from an individual is not indicative of whether the complaints are substantive.

Mr. Hull asked Ms. Nable to talk further about the trainings available online. Ms. Nable replied that all trainings are free and open to the public. She mentioned that in addition to instructional YouTube videos on the Attorney General's website, the Division conducts webinars on a quarterly basis. These webinars have proven to be popular, with 50 registrants for next week's training. Mr. Hull asked how far in advance regional trainings are scheduled and how the Division decides where to go. Ms. Nable said that the Division tries to hit all areas of the state each year. Often, trainings occur where towns have extended invitations to host.

Mr. Ambrogi asked whether the new Attorney General would change the way the Division operates or enforces the law. Ms. Nable stated that there were no plans for structural changes but that the Attorney General is committed to transparency and sympathetic to the concerns of small towns subject to the law. Generally, the Attorney General appears to agree with many of the positions of the previous Attorney General. Mr. Hull asked if the Governor's proposed budget has any effect on future business. Mr. Meshoulum responded that with the budget in draft form, it is too early to know.

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

Ms. Lillios stated that since the Commission has a statutory obligation to review issues concerning the Open Meeting Law, it has found that requesting information about pending legislation is helpful.

Ms. Nable stated that the Division is aware of three bills, all of which are with the Joint Committee on State Administration and Regulatory Oversight and two of which are sponsored by Representative Kocot.

Representative Kocot asked whether the Attorney General could provide testimony at the time of the hearing on these bills and sit with the Representative and his colleagues to discuss them. Mr. Meshoulam said that the Office is always happy to talk about these issues. He stated that generally, the Office focuses its feedback on whether laws are enforceable or ambiguous rather than policy considerations. Representative Kocot explained that it is particularly helpful to have agency involvement and recalled when members of the State Ethics Commission came out to Western Massachusetts when the ethics law was revised. Representative Kocot said that H.2774 is a logical solution to instances where members of a public body need to offer information to the public at Town Meetings. He said that this exemption would allow for common sense solutions that currently conflict with statute.

Mr. Ambrogi added to the record that he does believe the Commission should make recommendations and it is appropriate to look at pending legislation. He stated that he was concerned about any legislation that curtails public access. While he does not have a problem with H.2774, he will be testifying against the other two bills on the agenda on behalf of the Massachusetts Newspaper Publishers Association. Ms. Lillios agreed that allowing substantive discussion at Town Meeting is helpful. She then asked if anybody had comments on H.2775.

Mr. Ambrogi stated that he does not see the need to add any more exemptions to the law and that discussion of real estate should take place in a public forum. He also stated that volunteer bodies still discuss important issues and he is concerned that the language of the bill will allow public bodies to circumvent the employee search and screening process. Mr. Ambrogi further stated that after hearing Ms. Nable talk about internet access, he is concerned that allowing deliberation to occur outside of a traditional meeting would disenfranchise the poor and elderly.

Representative Kocot announced that he had to leave but reminded the Commission that hearings were scheduled for the first week of May. Representative Kocot left the meeting at 10:35 AM.

Correspondence received-David Rosenberg e-mail dated Friday, April 3, 2015

Ms. Lillios moved to the next topic, concerning Mr. Rosenberg's email. She thanked Mr. Rosenberg for his continued interest in the Open Meeting Law and invited him to briefly frame the issue at hand.

Mr. Rosenberg thanked the Commission. Mr. Rosenberg said that he has been coming to these meetings since 2011 and has been looking for solutions to existing problems. Particularly of concern is a public body's inability to deliberate online.

Senator Lovely arrived at 10:38 AM. Ms. Lillios paused Mr. Rosenberg's remarks to welcome Senator Lovely and direct her to item 5 on the agenda.

Mr. Rosenberg continued, acknowledging Mr. Ambrogi's previously stated concern about disenfranchising the public, but he suggested that there are more people unable to attend meetings in person than there are people who do not have internet access. Mr. Rosenberg expressed his concern for efficiency and the Open Meeting Law, particularly for volunteer or part-time members of public bodies. Mr. Rosenberg voiced his concern that prohibitions under

the law motivate public bodies to hide their online deliberations, rather than disclose them to the public. Online discussion would also facilitate deliberations that needed to occur over longer time spans. He stated that H.2816 makes a strong distinction between a meeting and a discussion where no formal action can be taken.

Ms. Lillios thanked Mr. Rosenberg and added that the Attorney General's Office conducted research on how other jurisdictions address online deliberation, but that there was no single approach. Mr. Ambrogi added that he believes allowing for online communication would be unprecedented. Mr. Sclarsic stated that a few states addressed this issue but, generally speaking, this type of proposal has not been adopted anywhere. Ms. Lillios admitted that she shared Mr. Ambrogi's concerns about accessibility and Mr. Rosenberg's concerns about efficiency but believes that there would be no net benefit for communities. Mr. Ambrogi emphasized that there is no distinction between a meeting where votes are taken and a discussion without votes, since the public has a right to see how a decision is reached. Ms. Lillios agreed that deliberation is defined clearly in the statute and asked if Mr. Rosenberg has anything else to add.

Mr. Rosenberg added that the advantage of internet communication is that it would automatically archive and anybody could have access to transcripts. Lastly, broadband would not be necessary since a listserv could be a perfectly adequate forum. Mr. Ambrogi responded that the accessibility matter is not just about broadband but internet savviness and the proposal requires a degree of computer literacy. Ms. Lillios also stated that the record of the discourse would not necessarily satisfy the requirements for minutes.

Public Comment

Ms. Lillios asked if there is any public comment.

Mr. Hawkinson commented that section 4 of H.2775, which proposes video and audio to replace minutes, would not be sufficient. He stated that he finds minutes to be useful summaries and helpful to search specific topics. Ms. Lillios said that she is hesitant to offer an opinion on that section without more details but agreed that minutes are accessible for the public and public bodies due to the level of detail included. Mr. Ambrogi agreed video or audio recordings, while a great supplement to the minutes, would only further inhibit public access if they were to replace minutes. Senator Lovely noted that she was looking forward to commenting after the bill is heard.

Items not reasonably anticipated by the Chair 48 hours in advance

No Items

Schedule next meeting

Ms. Lillios asked the Division to schedule a meeting in June or July. Ms. Nable agreed.

Adjourn

Ms. Lillios moved to adjourn the meeting. **By unanimous vote (4-0), the meeting adjourned at 10:45 AM.**

List of Documents Used by the Commission at the Meeting

1. Meeting Notice for April 8, 2015
2. Draft Meeting Minutes for June 12, 2014
3. Division of Open Government Annual Report
4. H.2774: *An Act to exempt the deliberation of public bodies at town meeting from the Open Meeting Law*
5. H. 2775: *An Act updating the Open Meeting Law*
6. H. 2816: *An Act to permit enhanced public access to deliberation of public bodies and to permit improved efficiency of public bodies*
7. David Rosenberg e-mail dated April 3, 2015