

Minutes of the Open Meeting Law Advisory Commission
September 10, 2013
100 Cambridge Street, Room 2A, Boston, MA

Members present: Robert Ambrogi, Chair, Massachusetts Newspaper Publishers' Association designee; Loretta Lillios, Attorney General's designee; Rep. Peter Kocot, Chairman of the Joint Committee on State Administration and Regulatory Oversight; and Maureen Valente, Massachusetts Municipal Association designee

Members absent: Sen. Kenneth Donnelly, 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; Jonathan Sclarsic, Assistant Attorney General, Division of Open Government; Hanne Rush, Assistant Attorney General, Division of Open Government; Mark Higgins, Assistant Attorney General, Division of Open Government; and Laurie Zivkovich, Legal Analyst, Division of Open Government

Others present: Matthew L. Hartman, Esq., Legal Counsel, Office of Senator Kenneth Donnelly; David Rosenberg, Norfolk, MA; Joanna Baker, Brookline, MA; Daniel Lieber, Wakefield, MA; and Liz Bugbee, Legislative Aide, Office of Representative Dan Winslow

Chair Robert Ambrogi called the meeting to order at 10:02 AM.

Review and Approval of Draft Meeting Minutes from June 18, 2013

Ms. Lillios moved to adopt the draft meeting minutes from June 18, 2013, seconded by Ms. Valente. There was no discussion. **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

Ms. Nable introduced Mark Higgins, a new Assistant Attorney General in the Division of Open Government, and she provided the following report on behalf of the Division:

An FAQ (Frequently Asked Question) on collective bargaining was finalized and posted on the Attorney General's website in July. The FAQ provides guidance on the approval of collective bargaining agreements with unions in executive session. The public can now subscribe on the Division's main webpage to an RSS feed for automatic notifications whenever FAQs are updated and Commission meeting notices are posted. Since the last Commission meeting in June, the Division has issued 54 determinations, declined to review 6 complaints, and closed 27 cases where the complainant filed with the public body but did not follow up with a complaint to the Attorney General. The Division currently has 129 open complaints, 65 of which were received since the last Commission meeting. This fall the Division will offer three regional trainings in connection with the Massachusetts Department of Higher Education, a "Train the Trainers" session for attorneys, and three other events hosted by other organizations in September, October and November. The Division has responded to more than 515 inquiries by phone and email since the last meeting, and the top five categories of questions received are Executive Sessions – Proper/Improper Purposes, Notice – General Procedures, Meetings – Definition of, Meetings

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(miscellaneous, such as days, times, changes of locations, procedures), and Notice – Agenda. Ms. Nable requested that the Commission let her know if this information is no longer useful as the categories tend to be the same each time, only varying in order.

Representative Kocot inquired whether despite trainings there are chronic issues with certain towns and boards and, if so, which ones. Ms. Nable commented that with the turnover in public body membership, the Division has found that one training is not enough. Some bodies have more complaints against them than others, which is not necessarily because of a lack of understanding, and some communities have more active followers. She referenced the Town of Wayland and Mr. George Harris. Representative Kocot inquired about outreach to smaller communities. Ms. Nable reviewed the Spring 2013 regional trainings conducted in Western Massachusetts and the Division's intention to cover the entire state through regional trainings. Representative Kocot requested that Ms. Nable advise him of funding obstacles.

Mr. Ambrogi inquired about the weight of FAQs. Ms. Nable explained that they are not akin to regulations; they are guidance like the Open Meeting Law Guide. They are more flexible than regulations and can change if the Division's analysis changes. Mr. Ambrogi inquired if the Attorney General herself reviews and endorses the determinations. Ms. Nable said they are administrative decisions which Assistant Attorneys General have authority to issue, and they are approved decisions of the Attorney General's office.

Status of Bills Pertaining to the Open Meeting Law Recently Filed in the Legislature

Ms. Nable reported that there are six bills filed in the Legislature. Representative Kocot noted that most of the bills are before his committee. He reviewed the hearing schedule and encouraged anyone with comments to send the comments or attend the hearings.

Continued Discussion of Online Forums: Report on Other States' Approaches to Technology and Open Meetings

Mr. Sclarsic provided the Commission with an informational packet pertaining to opinions of Attorneys General from various states. He summarized that at its last meeting the Commission requested the Division to look at electronic communication and online forums in other states. The Division did not do a comprehensive review of all 50 states, it did not find any state that has a written law establishing procedures, and it does not endorse any of the other states' approaches. Mr. Sclarsic reported that Arizona, Florida, Utah, North Carolina, West Virginia and Oregon all allow electronic calls, but they still require notice and an anchor location for the public to access. He reviewed Arizona and Florida opinions, and noted that the Oregon Quick Reference Guide is somewhat representative of other states, although he did not find guidance on what "other electronic means" includes. He also noted that a number of states, like Massachusetts, allow some form of electronic communication but always require a physical presence.

Discussion followed. Representative Kocot asked about tracking the author of comments. Mr. Sclarsic noted that this issue is part of the Arizona opinion. Mr. Ambrogi asked how online edits and tracking were achieved in the Arizona opinion, if it was something similar to Google Docs. Mr. Sclarsic said that the opinion did not explain how it was done. Mr. Sclarsic also noted that

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while the states had varying definitions of technology, they all had a common requirement of having an anchor meeting. All of the states mentioned, except Arizona, do not allow serial communication. Mr. Ambrogi asked how many municipalities in Massachusetts have adopted remote participation. Ms. Nable replied that the Division does not track this, although the MMA might keep that information. Ms. Valente inquired about public participation. Mr. Sclarsic noted that Arizona allowed the public to witness but not to comment. Florida allowed interactive access. Ms. Valente commented that none of the reported states seemed further ahead than Massachusetts on this issue. Mr. Sclarsic reiterated that no state had procedures for electronic communications written into its laws. Ms. Nable clarified that the Division did not conduct a 50 state survey. Mr. Ambrogi said that he is part of a listserv, and, after asking around, no one has said that their state has laws such as what has been proposed to the Commission by the public. The Arizona opinion seemingly comes closest to Mr. Rosenberg's proposal.

Public Comment

Mr. Lieber asked about opinions in other states regarding the allowance of intercommunity or interbody communication outside of a posted meeting. Mr. Sclarsic referenced an opinion under which Facebook and email deliberations are still a violation. While he wasn't looking specifically for listservs, Mr. Sclarsic did not see anything about them in his research. Mr. Lieber asked if there is anything that the Attorney General's Office is looking for from the Commission about boundaries and limits in terms of what is and what is not allowed. He also stated that he would like an FAQ on the issue. Ms. Nable stated that the approach will be to issue determinations on individual complaints as they arise and not through the issuance of an FAQ on technology and deliberation. Mr. Ambrogi and Representative Kocot requested that Mr. Lieber clarify his request. Mr. Lieber said that there are groupings not open to the public, and their discussions likely are violations of the Open Meeting Law. There should be further guidance on what is and is not appropriate or on how to figure it out because the decisions issued by the Division are very narrow. Something that is part of the public should be visible, and online forums involving multiple member discussions should be public. Mr. Lieber commented on multiple members of public bodies having access to the same listserv. In the case of the MMA, virtually all members have access. Ms. Lillios commented on the definition of "deliberation" in the statute and the requirement for a quorum in order for there to be a deliberation. Mr. Lieber commented that it is hard to know when the quorum requirement is met. He stated that with listservs, it may be clear who posts, but it is not clear who reads. He is not aware of listservs that keep accurate records of when members join or leave. If it is public business, then the information should be made public. Ms. Lillios stated that while the scenarios raised by Mr. Lieber are very interesting, it is very difficult to create a hard and fast rule that would apply to all potential situations that could arise without fact finding. Mr. Lieber, citing the MMA and MASC, said they are real and not hypothetical situations. He again requested guidance from the Attorney General's Office, the Commission or the Legislature on where public bodies and their members should be allowed to communicate and what notice should occur. Mr. Ambrogi said he tends to agree with Ms. Lillios. Ms. Nable said whether or not there is a deliberation is a fact specific analysis which requires looking at such things as to whom was the communication directed, who had access, and was there an open or closed group. Mr. Ambrogi asked if there are any cases dealing with blogs. Mr. Rosenberg said there was a request for an advisory opinion. Ms. Nable reiterated that the approach of the Division is to

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address the issues through individual complaints. Mr. Rosenberg said that he appreciates the research done by the Division, and he requested Mr. Sclarsic to review which states permit electronic communication with and without an anchor meeting. Mr. Sclarsic reviewed the states and the common requirement of an anchor meeting. A separate question was whether a quorum must be present. Mr. Rosenberg commented that he has submitted three requests for an advisory opinion, and the Division will not address them. He commented on H. 2908. His view is that it addresses the issues and, if passed, listservs would become much clearer. Mr. Ambrogi stated that this is interesting discussion and, as discussed at every meeting, he continues to be concerned with the issue of access. There still are many without internet access or an understanding on how to use the internet. He does not support excluding a part of the population. Representative Kocot added that there are entire towns in Massachusetts without high speed internet access.

Ms. Baker commented that internet access is offered by public libraries and suggested the idea of public safety offices installing a few computers for 24/7 access. She suggested at the last meeting of the Commission that a lot of graphics are not needed, and librarians are on board with the idea. Seniors, those working during off hours, single moms and other who cannot physically attend public meetings already are disenfranchised. If an online forum is publicly noted with a beginning and ending date, everyone should be allowed to go online. Ms. Valente asked if this would be a local option or general legislation. She is concerned with unfunded mandates. Mr. Rosenberg stated that there are no mandates; it just would be allowed. Ms. Valente still has concerns. Mr. Rosenberg stated that if H. 2908 passes and public bodies know that there is internet inaccessibility, they can choose not to have public internet discussions. He noted that he is not a member of the legislature and cannot offer changes. Representative Kocot discussed the legislative process and home rule petitions. Ms. Lillios stated that there is a real distinction between trying to enhance the public's ability to access versus the public participating. As to access, cable television broadcasts give wide access, and she is not sure that all towns have public libraries. The ability to participate is completely distinct, and it doesn't seem to be addressed in the current legislation. To the extent there is divergence, she does not think, in her role on the Commission, that a vote by the Commission would be helpful to the Attorney General. Mr. Ambrogi added that public bodies can stream over the internet.

Representative Kocot left the meeting at 11:10 am.

Mr. Rosenberg commented on efficiency and efficiently sharing with the public information of public bodies. There are several motivations for public internet discussions: increased efficiency, complete transparency and public access. Mr. Lieber urged the Commission to make a formal recommendation to the Attorney General as to how to move forward with this issue; what is then done with that recommendation is a separate matter. H. 2908 is the best version that he has seen, and the Open Meeting Law needs to be tweaked to make clear what is and is not acceptable. Ms. Baker said that she can address her Board of Selectmen only once a month on one topic for no more than three minutes. They are waiting for her to report to them. Mr. Ambrogi said that he is not entirely clear what the issue is. The Commission can focus on whether or not it supports H. 2908, but he is not sure it can do anything more broad than that. Ms. Nable reviewed the charge of the Commission under the Open Meeting Law, noting that the Commission is limited to things within the direct control of the Attorney General. Changes to

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the statute need to be directed to the Legislature. Mr. Ambrogi noted that the Commission has not taken formal positions or achieved a consensus on bills.

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

There were no items.

Schedule Next Meeting

The Commission discussed holding the next meeting in the first or second week of February 2014, after the hearings on the pending bills and the preparation of the annual report. The specific date is to be determined.

Ms. Valente moved to adjourn the meeting, seconded by Ms. Lillios. **With unanimous consent, the meeting adjourned at 11:21 AM.**

List of Documents Used by the Commission at the Meeting

1. Meeting Notice for September 20, 2013, Revised
2. Draft Meeting Minutes for June 18, 2013
3. Division of Open Government Update for OMLAC – September 10, 2013
4. H. 2786: *An Act To Improve The Open Meeting Law*
5. H. 2843: *An Act To Exempt The Deliberation Of Public Bodies At Town Meeting From The Open Meeting Law*
6. H. 2908: *An Act To Enhance Technology In Civic Engagement*
7. H. 2817: *An Act Relative to the Open Meeting Law*
8. S. 975: *An Act Further Regulating Town Meeting Notices*
9. H. 2867: *An Act Relative to the Use of Audio or Video Recordings as Minutes of Public Bodies*
10. Packet distributed at meeting: State of Arizona Attorney General Opinion No. I08-008 dated September 29, 2008; A Quick Reference Guide to Oregon's Public Meeting Laws; Florida Attorney General Advisory Legal Opinion No AGO-2001-66 dated September 19, 2001; and Florida Attorney General Advisory Legal Opinion No. AGO-98-28 dated April 6, 1998

Approved: February 12, 2014