

Minutes of the Open Meeting Law Advisory Commission
October 25, 2010
One Ashburton, Place, Boston, 21st Floor
Approved on November 29, 2010.

Members present: Robert Ambrogi, Loretta Lillios, Peter Hechenbleikner

Members absent: Sen. Brian Joyce, Rep. Steve Walsh

Others present: Britte McBride, Director, Division of Open Government, Attorney General's Office; Jonathan Sclarsic, Assistant Attorney General, Attorney General's Office, Josh Harrell from Rep. Steve Walsh's office (Joshua.harrell@mahouse.gov)

Chair Loretta Lillios opened the meeting at 9:14am

Approval of Minutes of 9-10-10

Peter Hechenbleikner moves to approve minutes from the September 10, 2010 meeting, seconded by Robert Ambrogi. **With unanimous consent, minutes approved.**

Report from Britte McBride, Director of the Division of Open Government

The Attorney General's Open Meeting Law regulations, 940 CMR 29.00-09 were finalized on October 1, 2010. The Division of Open Government overhauled website with the updated regulations, and added a frequently asked questions (FAQ) section. We will continue to update the FAQs on the website.

The Division of Open Government has resolved 8 Open Meeting Law cases and advisory opinion requests in the last six weeks. There are currently 25 open complaints with the Division, and 149 open inquiries, which are requests to the Division other than complaints.

For educational activities, the Division presented at the Massachusetts Councils on Aging on Sept. 29th, at the Fall Conference of the Massachusetts Clerks Association; the Massachusetts Association of Planning Directors; the Massachusetts Municipal Association's Finance Committee Association, and have significant presentations coming up, including the Massachusetts Association of School Committees and the Western Massachusetts Assessors Association, as well as being on a program at the Massachusetts Municipal Association Annual Meeting in January. The Division is trying to get out as much as possible, and looking to speak to groups of 30 or larger.

Questions:

Are there questions that are so fact specific that they are difficult to answer as an advisory?

McBride: Yes, the office is making an effort to assist public bodies to avoid there being a violation, but some questions are very fact specific; sometimes there needs to be a complaint before we can answer the question

How do letters signed by someone other than Division member work?

McBride: Sometimes we have help from the Government Bureau, and another attorney in the Government Bureau may sign a decision letter.

Can you categorize the complaints you are getting?

McBride: They are all over the board; from the release of executive session minutes to whether meetings were adequately posted; whether a body is subject to the Open Meeting law. There are also lots of inquiries – evaluations of town administrators or superintendents, and what is the appropriate way to conduct that evaluation, which is a larger consideration for the division. We have received many inquiries about the complaint process and we are updating our Open Meeting Law guide. We also receive questions as to what constitutes a meeting.

Have you designated any cases for a hearing, and have you thought about how to conduct a hearing?

McBride: We have a couple of complaints which may be appropriate for a hearing, but are still investigating. We have given some consideration to how to conduct the hearing. We need to make that process open and available, and we determined from the outset that the hearings would be brought to the geographic region where the public body is seated.

Discussion of Regulations, 940 CMR 29.00-29.09

Ms. Lillios: Are there aspects of the adopted regulations that you would like the Commission to focus on?

McBride: Not yet, given that they have only been finalized for a few weeks, but we are interested in hearing from the Commission where updates need to be made as time goes on and the regulations are utilized. We have gotten some feedback from stakeholders. Remote participation is something we could use feedback on.

Mr. Hechenbleikner: The new method of posting notices to a website is a relief to local governments

Mr. Ambrogi: The Division did a terrific job with the regulations.

Remote Participation

Ms. Lillios: There is a memorandum with a summary of comments on remote participation distributed this morning, which focuses on section 20(d) of the statute authorizing the Attorney General to allow remote participation. In its request for public comment, the Attorney General had issued 8 questions for individuals to speak to. I suggest that the Commission focus on the 8 areas. [Opens to the Commission to comment]

Mr. Ambrogi: The Attorney General should authorize remote participation. Board members are volunteers with busy lives, and it may not always make be easy for them to be present. Technology exists to accommodate. This needs to be done in a way that the public who are in attendance are able to follow the participation of the remote member, to hear the person. In an age of cheap video conferencing, there is no reason not to require that it be done by video, but that may be asking too much. Citizens should not lose their ability to see members of the body.

Mr. Hechenbleikner: The threshold for technology should be as low as possible; and people participating should be able to hear, preferably see, but at least hear the member's participation.

Ms. Lillios: The Attorney General should authorize remote participation in some circumstances. The public and remote member should be able to hear what is going on. The Attorney General should consider that there should be some limits on the number of times it should be authorized for a member or a body. Especially with the local bodies, there is an element of physically convening that is the essence of local government.

Mr. Hechenbleikner: There could be an Americans with Disabilities Act issue; there could be someone with a disability not able to physically attend, and placing limits could be a problem. Bottom line, if the Attorney General thinks there should be some limits, they should be as broad as possible, but require the community to adopt a policy. There should be a local decision whether to place limits.

Mr. Ambrogi: I Agree there should be limits of some kind. I would prefer a limit of the number of members of Board overall can participate remotely. I wouldn't want to see a rule where nobody shows up in person.

Ms. McBride: The Open Meeting Law statute does require a quorum to be physically present, even if remote participation is authorized.

Mr. Hechenbleikner: People should be physically present at the meeting if they are able, and remote participation should be the exception.

Mr. Ambrogi: Would it make sense to have a good cause requirement? And still leave it up to local public bodies?

Ms. Lillios: The statute indicates that Attorney General may authorize remote participation. Will the Attorney General give specific permission for remote participation on a case-by-case basis?

Ms. McBride: These are questions we are considering, but a regulation will be a one-size-fit all with some discretion woven in. We have heard from all sides in the comments, some want strict regulations and others want local discretion.

Ms. Lillios: If you take requests for remote participation, it may not be practical, and you may not be able to get to each request in a timely manner.

Mr. Hechenbleikner: We are a much more mobile society, we do have the technology. Everyone can get a speaker phone. Some communities are struggling to get volunteers, and if you are disqualified for some reason such as disability, this would help. A speakerphone may not work in some situations; there might be a need for videoconferencing, particularly where you have to view exhibits or plans, such as with a planning board

Ms. Lillios: Is there consensus that we would encourage the Attorney General to authorize remote participation, with some limitations, but leaving to the local bodies some discretion as when to implement it; so encouraging the Attorney General to create some limits, though allow remote participation with good cause. Perhaps some statement from the Attorney General recognizing that there is value to physically convening.

Mr. Ambrogi: Remote participation should be done by regulation. I am wondering whether the regulation should direct local public bodies to enact their own procedures. I don't think one size fits all will work. I do think regulations need to spell out the core requirements. The technology has to match the situation, and has to be such that it is at least audible to everyone in the room.

Mr. Hechenbleikner: Do we want every public body within a community to have their own regulations, or have one policy for the whole community, whether adopted by town administrator or selectmen?

Ms. Lillios: Not sure something we can ask an executive body to do, might be too ambitious. From having enforced the Open Meeting Law, District Attorneys would always encourage the bodies to adopt policies with respect to releasing minutes; this might be unrealistic to develop a policy.

Mr. Hechenbleikner: Maybe a regulation that the chief executive can establish a policy for the community. Different in each community, but the chief executive could be a board or a person.

Mr. Ambrogi: What if we say that you have to come up with a local policy if you want to use remote participation? It does not need to be complicated. If we say it's optional, why not set some requirements to do that?

Ms. McBride: We may want to have a fuller conversation at future meetings.

Mr. Hechenbleikner: On the issue of chairman being physically present, sometimes the vice-chairman fills in. Does that mean whoever is chairing the meeting need to be physically present to allow remote participation, or does it have to be the actual chair?

McBride: That is a question for interpretation, and we would seek the Commission's perspective on this. It seems reasonable that the person chairing the meeting be physically present.

Mr. Hechenbleikner: On the issue of voting during a meeting where a member of the body participates remotely, it seems that voting by the people who participate remotely and those who are physically present should be roll call votes.

Agreed to by Ms. Lillios and Mr. Ambrogi.

Ms. McBride: We will probably have some internal discussion and start to get a sense of where we stand as an office, but I do not imagine that we will draft and promulgate a new regulation before the next meeting of the Commission.

Mr. Harrell: Some of the small issues could be cleaned up with simple definitions in the regulations. I have similar concerns. Representative Walsh will share his thoughts on this.

Public Body Discussion

Ms. McBride: There are still some questions as to which entities are public bodies, such as some Ad hoc committees, and whether the entity is clearly a construct of government or whether it is brought into being in part by the municipality or whether it is a private entity. One of the common questions is cable access television boards. We are in the process of developing a test which we will prepare as an advisory which we will post on the website, and will provide to municipalities and attorneys.

Ms. Lillios: This is a fact intensive question, giving people factors to apply.

Mr. Sclarsic: We are still developing a legal test for the definition of a public body. Right now it considers a number of factors, including how the body is constituted, how the body functions, and whether it serves a public purpose. We hope to apply this test in resolving cases and continue to tweak it, and eventually produce something more user-friendly which we can publish.

Ms. McBride: It is something we are still testing to see if it does work.

Mr. Hechenbleikner: Is there a list of things that may require legislative clarification?

Ms. McBride: There are things that we have come across. The revisions to the Open Meeting Law are new, so our position is that we are using what we have been given. We

are not quite at the point where we say something doesn't work well because of the statute. We are still looking at our own interpretations.

Mr. Hechenbleikner: With quasi-judicial bodies, there is a concern that a quasi-judicial body is exempt from the Open Meeting Law. This is a concern for many local boards.

Ms. McBride: This is something we worked on last week. We have maintained the status quo prior to July 1.

Mr. Hechenbleikner: I noticed the new FAQ on quasi-judicial bodies on the website.

Mr. Sclarsic: Our office now interprets the quasi-judicial exception to the definition of a meeting found in G.L. c. 30A, § 18 to only apply to state public bodies. The reason is that G.L. c. 30A, § 1 defines adjudicatory proceeding as a proceeding of an agency, and it defines agency as a state entity. Therefore the exception to the definition of meeting for quasi-judicial bodies meeting solely for the purpose of making a decision following an adjudicatory proceeding will only apply to state public bodies, and not local public bodies.

Mr. Ambrogi: Will minutes of the Open Meeting Law Advisory Commission will be on website?

Sclarsic: Yes, once approved.

Discussion of Legislative Amendments

Mr. Ambrogi: The deadline for filing bills is first weekend in January. One thing I noticed is a pure typo in the law; and some things I would like to see discussed.

Ms. Lillios: Perhaps submit those for the agenda item, give an opportunity to think of ahead of time

Ms. McBride: Submit to chair, and figuring out what the next notice posting should contain.

Mr. Harrell: Rep. Walsh would be happy to file legislation suggested by the Commission.

Scheduling Next Meeting

Mr. Hechenbleikner: At what point would staff have follow-up on the items we discussed?

McBride: A month to six-weeks for the public body test, also we will have a better sense of the discussion within the office.

Mr. Ambrogi: I am concerned about legislative filing deadline.

Next meeting scheduled for 9:30 a.m., Monday the 29th of November.

Meeting adjourned by Loretta Lillios at 10:39am.

List of Documents used by the Commission at the Meeting:

1. Meeting Agenda for the October 25, 1010
2. Draft minutes for September 10, 2010 OMLAC meeting
3. Summary of Public Comments on Remote participation, provided by Britte McBride