

Minutes of the Open Meeting Law Advisory Commission  
December 1, 2011  
100 Cambridge Street, 2<sup>nd</sup> Floor, Boston, MA

Members present: Loretta Lillios; Robert Ambrogio; Peter Hechenbleikner; Sen. Kenneth Donnelly.

Members absent: Rep. Peter Kocot.

Attorney General's staff present: Amy Nable, Assistant Attorney General, Director, Division of Open Government; Jonathan Sclarsic, Assistant Attorney General, Division of Open Government; Philip Mantyla, Paralegal, Division of Open Government.

Others present: David Rosenberg, Norfolk Town Meeting Technology Committee, Norfolk, MA; Katie Sagarin, Massachusetts Municipal Association; Andres Navedo, Foxborough, MA.

**Chair Loretta Lillios opened the meeting at 3:00PM**

Review and Approval of Draft Minutes from September 8, 2011

Peter Hechenbleikner moves to adopt the minutes from September 8, 2011, seconded by Robert Ambrogio. **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 noted that a handout has been distributed that outlines the Division's report.

Since the last Commission meeting, the Division has issued 14 determinations. Additionally, the Division declined to review six complaints, often because the complaints were untimely, the allegations were not Open Meeting Law related, or there was a parallel legal proceeding taking place. The Division closed out 16 cases where the complainant filed a complaint with the public body but failed to follow up with a complaint to the Division, possibly because the issue was resolved at the local level.

Currently, the Division has 115 open complaints, 24 of which were filed since the last Commission meeting.

The Division recently retained an administrative law judge to hear cases in which the Division finds an intentional violation of the Open Meeting Law. The Division has retained the services of Judge Kenneth Laurence, a retired judge from the Appeals Court.

The Division has conducted five trainings since the last Commission meeting. The Division has three upcoming trainings. Additionally, the Division is working on recording a training that will be posted on its website.

The Division received 650 inquiries by phone and email since the last Commission meeting. The Division has 21 inquiries that are still open. However, this number may have fallen as the Division recently resolved a few inquiries.

Per the Commission's request, Ms. Nable provided the Commission with a list of the top five questions the Division received since the last Commission meeting:

- Remote participation is the number one type of question that the Division has received. This was consistently the number one type of inquiry received since the Division began tracking.
- The Division has seen a spike in the number of calls regarding the definition of a meeting. Examples include: Are discussions between less than a quorum of a public body considered meetings under the Open Meeting Law? And must a public body post notice of a meeting for a site visit?
- Steady at number three are questions concerning, what is an appropriate purpose for entering into executive session?
- Questions regarding the definition of a public body have fallen and are now the fourth frequent question the Division receives.
- Questions concerning acceptable email communication have bumped questions regarding notice posting out of the top five. Questions concerning email communication include, what is appropriate email communication between members of a public body?

The Division published final regulations on November 11, 2011 that permit remote participation in certain circumstances if the practice has been adopted by either the Chief Executive Officer, for local public bodies, or the public body, for all other bodies.

The Division launched a searchable database for its determinations since the last Commission meeting. Individuals can now search determinations by keyword, whether or not there was a violation found, date of complaint, public body, and municipality.

In regards to implementing an RSS feed to notify members of new content on the Division's website, the Division currently lacks the resources necessary to create and run an RSS feed. The Division cannot create an RSS feed for web content. The Division would have to upload everything in a PDF which would create an added workload. The Division is exploring the idea of using the Attorney General's Twitter feed. The Attorney General has more than 5,600 followers. Any updates to the Division's website could be tweeted.

Robert Ambrogi asked if the Division would create a separate Twitter account or utilize the Attorney General's account. Ms. Nable replied that the Division would likely use the Attorney General's account.

Sen. Kenneth Donnelly entered the meeting at 3:09PM

Loretta Lillios asked if the Division is currently posting Open Meeting Law updates on the Twitter account. Ms. Nable replied that the Division has posted updates in the past, for example during Sunshine Week, but the Division does not post updates regularly.

Ms. Nable reported it is her understanding that it may be possible for individuals to send tweets to an RSS feed.

Mr. Ambrogi's concerns were that Twitter wouldn't necessarily notify individuals if someone is following numerous people. The Tweet could get erased depending on how many people you are following post tweets.

When asked by Mr. Ambrogi if an email notification would work, Ms. Nable stated that creation and maintenance of an email list may not be the most effective way, or feasible given the Division's resources.

Ms. Lillios stated that during the last meeting it was reported from the Division that the lag time between releasing a decision and posting it on the Division's website was short. Is this still the case? Ms. Nable replied that the Division typically posts determinations 48 hours after release.

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

Loretta Lillios stated that the Commission has been given a written update of the Open Meeting Law bills pending in the Legislature.

Peter Hechenbleikner stated he has interest in House Docket 04135: *An Act to Enhance Technology in Civic Engagement*. However, Ms. Lillios stated that the Commission will discuss this further during the discussion on internet deliberations.

#### Discussion on an Advisory Opinion or Other Regulation on What Kind of Detail Needs to be Included in a Meeting Notice (Freetown Soli Conservation Board, OML 2011-11, Case Follow Up)

Loretta Lillios opened the discussion and turned it over to Peter Hechenbleikner, who requested this agenda item.

Mr. Hechenbleikner stated he was interested in where the Division is on this issue. He would like a summary of the comments that the Division received and whether or not there is any likely change in the Division's interpretation of the amount of specificity required on a meeting notice. This decision requires public bodies to list every license and permit on its meeting notice. His concern is that for license and permit renewals, this level of specificity may require public bodies to have a 15 page agenda. This is not only burdensome but also counterproductive.

Amy Nable reported that after releasing Holbrook Board of Selectmen, OML 2010-2; Natick School Committee, OML 2011-7; and Freetown Soil Conservation Board, OML 2011-11 determinations the Division received numerous questions regarding the level of specificity required in meeting notices. Therefore, the Division released a request for comment, seeking information on what costs and/or burdens might be associated with providing more detailed notices. In response, the Division received 14 comments. Ten comments were filed on behalf of local public bodies and four comments were filed by members of the public. Four parties were critical of the Division's interpretation of the level of specificity required in meeting notices; three supported the interpretation; and seven individuals provided no opinion about the Division's interpretation. Ms. Nable noted that the Division is not seeking to revisit the decisions. The Division issued this request to learn where additional guidance might be needed.

Ms. Nable reported that several commenters stated that requiring additional detail would create unnecessary added workload for public bodies, might chill participation in government, or that there simply wasn't enough physical space on their meeting notice board for longer notices.

A number of issues raised in the comments are already addressed through online FAQs, the Open Meeting Law Guide, and in trainings. These include, whether or not a public body may consider a topic that arises for the first time at a meeting; the permissibility of "Old business" and "New business" as topics; and the amount of detail needed on a meeting notice when a public body plans on entering executive session.

Ms. Nable indicated that there are several areas where the Division has previously answered questions, but hasn't provided written guidance. These include the level of specificity required on a meeting notice when a public body plans on discussing the Town Meeting Warrant, the annual budget, and tax abatements. The Division is planning on creating FAQs to address these issues.

However, there are some areas, such as liquor license renewals, with which the Division is not particularly familiar. The Division plans to conduct additional research before publishing any written guidance.

Mr. Hechenbleikner stated that liquor licenses are almost automatically renewed annually. Municipalities also review rooming house licenses, common Victualers licenses, Class 1 2 and 3 motor vehicle licenses, various vendor licenses, and many more. License renewal is really an administrative item.

Ms. Nable stated that there was an initial spike in these questions after the determinations were issued, but the number of questions received concerning this matter has dropped. The Attorney General believes that FAQs are the appropriate way to address these issues.

Ms. Lillios asked, what was the agenda item in question in the Freetown determination? Jonathan Sclarsic responded that the Board was discussing the renewal of five soil conservation permits. The meeting notice stated 'renewal of soil permits.' The Division held that the notice should have included the individuals' names and specific locations of the respective permits.

Mr. Hechenbleikner ended the discussion by noting that this seems like a reasonable approach by the Division and was satisfied with the action being taken.

#### Discussion on Internet Deliberations

Loretta Lillios opened the discussion by introducing the proposed legislation, House Docket 04135: *An Act to Enhance Technology in Civic Engagement*. This pertains to remote participation among a quorum of a public body in cyber space which would be open to the public, in the sense that a notice would be posted directing the public to an accessible site that could be monitored and commented on by a quorum of the members of a public body. Ms. Lillios indicated that the Attorney General has asked the Commission to consider this idea. She then opened the conversation up to the other members.

Robert Ambrogi stated that he has concerns with this bill. He understands the reasoning behind it but is concerned with any law that allows a public body to deliberate exclusively on the internet without having a physical meeting. Mr. Ambrogi believes there continues to be a large portion of the population who do not have access to the internet or are not internet savvy. These people tend to be the elderly and/or the low income. Any bill that disenfranchises these groups from the political process is not good policy. Mr. Ambrogi believes that is what this bill will do. Perhaps there is a way to create online forums to post documents. However, he cautioned that if final voting takes place online, people may become disenfranchised.

Peter Hechenbleikner stated that he shares the same concerns. When conducting a meeting online, individuals don't know who else is involved. People participating online may not be who they say they are. When conducting a meeting in person, you are able to actually see who is participating. Mr. Hechenbleikner indicated that he is nervous about meetings that take place outside of a public forum. He is in favor of crafting this bill to allow some sort of online participation but is not sure he agrees with the extent of this bill.

Sen. Kenneth Donnelly stated that he is cautious to comment on this bill at this time. He envisions one concern being the lack of resources that many cities and towns are facing. Many cities and towns are struggling with budget cuts. The legislature should be careful to make sure it is not adding any more costs for municipalities. Sen. Donnelly stated that he may be apprehensive to pass legislation that would add to the budget. However, he would be interested in hearing the pros and cons before voting.

Mr. Ambrogi stated that after talking to David Rosenberg he is sympathetic to the issues he raises. By the time board members get through a meeting, they are not able to get a lot done. Perhaps the preliminary posting of information might be appropriate. Information could be posted in advance of the meeting so there is at least some groundwork laid out before the meeting.

Mr. Lillios pointed out that current law does allow members of a public body to distribute documents to be discussed at a meeting, provided no opinion is expressed.

In regards to public hearings, Mr. Hechenbleikner stated the purpose of a public hearing is to gain information. If someone provides information online prior to a meeting, and if that conversation is not repeated at the public hearing, then it would defeat the purpose of the public hearing.

Mr. Rosenberg stated that he has been intimately involved with this issue and was responsible for drafting a document that has morphed into this bill. Mr. Rosenberg stated that there was never intent to allow for a full-on internet meeting. This bill makes a distinction between a having a meeting and exchanging information. This bill does not replace in-person meetings. As far as the issue of cost, if enacted, this bill would provide an option. The bill does not obligate members of public body to participate in internet deliberation. It simply offers an option.

Mr. Rosenberg stated that three scenarios motivated him to explore this option:

- Prior to Town Meeting in Norfolk, the Warrant is published online. Individuals have the ability to discuss the articles and have their questions answered in an online forum. Often times, those with the most expertise of a particular article are members of the public body who sponsored the article. However, Town Counsel opined that if a quorum of a public body posts to this message board, they may violate the Open Meeting Law.
- The second scenario is the idea of a committee blog. Committees or individual committee members may want to write a blog, stating their opinion on certain matters under consideration by the committee. However, if a quorum were to comment on a blog, it may be a violation of the Open Meeting Law.
- The last scenario is that many towns have public bodies that consist of unpaid, part-time members with full time jobs. These bodies may only meet once a month for two hours. A member may wake up in the middle of the night with an idea that he or she would like to post on a message board to other members.

In all scenarios the public would have full access to what is exchanged. This may result in more participation in government.

Mr. Hechenbleikner stated if there was a public hearing on a site plan approval and members of the public body had already exchanged ideas online, it is likely that there wouldn't be a full discussion at the hearing. This could also happen at Town Meeting.

Mr. Rosenberg stated that the same problem exists with in-person meetings. People come to Town Meeting and say, 'how come I didn't hear about this?' The response often is, 'we had meetings. Why didn't you come?'

Ms. Lillios indicated that part of this goes to the definition of deliberation in the statute. The definition of deliberation would have to be looked at in order to push this initiative forward.

Andres Navedo, Foxborough, MA addressed the Commission. He inquired as to the difference between Town Meeting and deliberations of a public body. He stated he is not sure that the two are related.

Mr. Lillios stated that Town Meeting is excluded from the Open Meeting Law. Mr. Rosenberg is talking about deliberations between members of public bodies prior to Town Meeting.

When asked by Mr. Hechenbleikner what the process is with this piece of legislation, Sen. Donnelly stated that this would be sent to a committee for discussion. It would more than likely be sent to the Joint Committee on State Administration and Regulatory Oversight. Sen. Donnelly indicated that, per Mr. Hechenbleikner's request, he would notify the Commission when a hearing is scheduled.

Mr. Hechenbleikner commended Mr. Rosenberg for bringing this issue forward. He stated that while it's fascinating, it may be tough to strike the balance on increasing dialogue while also protecting transparency.

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

There were no items.

### Election of New Chair for 2012

Loretta Lillios stated that it was an honor and a privilege to serve as chairperson for 2010 and 2011 and she is very thankful for the opportunity. Ms. Lillios then entertained nominations for a new chairperson for 2012.

Robert Ambrogi thanked Ms. Lillios for her service.

Mr. Ambrogi moves to nominate Peter Hechenbleikner as chairperson for 2012, seconded by Ms. Lillios. **With unanimous consent, Peter Hechenbleikner was elected chairperson for 2012.**

Peter Hechenbleikner thanked the Commission for electing him chairperson. Mr. Hechenbleikner thanked Ms. Lillios and stated that she did an excellent job of setting up the Commission.

### Scheduling Next Meeting

Loretta Lillios stated that she would like to schedule the next meeting sometime in February or March and asked the Division to assist in scheduling the next meeting.

Peter Hechenbleikner moved to adjourn the meeting, seconded by Robert Ambrogi.

**With unanimous consent, meeting adjourned at 3:50PM.**

### **List of Documents Used by the Commission at the Meeting**

1. Meeting agenda for December 1, 2011
2. Draft minutes for September 8, 2011
3. Division of Open Government update
4. Status of bills pending in the legislature regarding the Open Meeting Law
5. H. 1734: *An Act Relative to the Open Meeting Law*
6. H. 830: *An Act Amending the Open Meeting Law*
7. H. 848: *An Act to Include the Legislature in the Open Meeting Law*
8. H. 2594: *An Act Relative to Open Meetings*
9. S. 1627: *An Act Relative to the Accountability of the Governor's Council*
10. H. 3037: *An Act Relative to the Open Meeting Law*
11. S. 14: *An Act Relative to the Reform of the Executive Council*
12. S. 569: *An Act Relative to the Rights of Faculty Members at the University of Massachusetts*
13. S. 1625: *An Act Relative to Open Meetings*
14. House Docket 04135: *An Act to Enhance Technology in Civic Engagement*

15. Division of Open Government request for comments on specificity of meeting notice topics issued: April 27, 2011