

Minutes of the Open Meeting Law Advisory Commission
September 4, 2012
One Ashburton Place, 21st Floor, Room 2, Boston, MA

Members present: Peter Hechenbleikner, Chair, Massachusetts Municipal Association designee; Robert Ambrogi, Massachusetts Newspaper Publishers' Association designee; Loretta Lillios, Attorney General's designee.

Members absent: Sen. Kenneth Donnelly, Chairman of the Joint Committee on State Administration and Regulatory Oversight; 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; Jonathan Sclarsic, Assistant Attorney General Division of Open Government; Hanne Rush, Assistant Attorney General, Division of Open Government; Jennifer Stark, Policy Advisor, Chief, Policy and Government Division; Benjamin Meshoulam, Policy Advisor, Policy and Government Division; Christina Mott, Legal Intern, Division of Open Government.

Others Present: Linda Segal, Wayland, MA; Katie McCue, Massachusetts Municipal Association.

Chair Peter Hechenbleikner called the meeting to order at 1:02PM

Loretta Lillios announced that she has taken a position at the Attorney General's Office. Ms. Lillios noted that she will be working in a different division than the Division of Open Government (the "Division"). She will remain on the Commission as the Attorney General's designee for the time being.

Review and Approval of Draft Minutes from May 7, 2012

Ms. Lillios moves to adopt the minutes from May 7, 2012, seconded by Robert Ambrogi. **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.

The Division has taken significant steps, since the last Commission meeting, to increase the number of determinations released each month. Since the last Commission meeting, the Division has issued 55 determinations, declined to review 16 complaints, and closed 36 cases where the complainant filed a complaint with the public body, but did not follow up with a complaint to the Division.

The Division currently has 141 open complaints. More than half of which have been received since the last Commission meeting.

The Division participated in four trainings since the last Commission meeting, and has seven upcoming trainings in September, October, and November. The Division will also be providing

written materials to three additional groups for distribution at upcoming events where the Division cannot attend. The Fall trainings include regional trainings in Lenox, Barre, Taunton, and Barnstable. The Division plans on conducting another round of regional training in the Spring, including locations in the Boston area.

Since the last Commission meeting, the Division responded to 720 inquires, two of which are still outstanding.

The list of top five questions that the Division has received since the last Commission meeting is not too different than the list presented at the last meeting. Questions regarding remote participation have fallen out of the top five and were replaced with questions regarding the permissible time and location of a meeting. The Division is considering whether an FAQ is necessary to address this issue.

The Division has finalized the proposed regulations on remote participation restrictions and the definition of “Intentional Violation.”

- The remote participation regulation was initially published as an emergency regulation. A hearing was held in July. The Division received one written comment and one person testified at the hearing. The comments received were favorable. The final regulation was published in the state register on August 3, 2012.
- With regards to the definition of “Intentional Violation” regulation, the Division received 13 comments and seven people testified at the hearing in July. The majority of the comments were from current and former complainants. The Division also received comments from organizations, including the Massachusetts Municipal Association (the “MMA”), Massachusetts Newspaper Publishers’ Association, Common Cause, and the American Civil Liberties Union. Some commenters were concerned that the Division was creating a new defense for advice of counsel, or felt that the Division would be tying its hands with regard to its ability to find an intentional violation. Changes were made to the proposed regulation to clarify that the Division is not creating a new defense, and clarifying that the Division was not constrained to find intentional violations only in certain circumstances. The final regulation was filed in the state register on August 21, 2012, and will go into effect on September 14, 2012.

With regard to the requests for comments (RFCs) on tax abatement and quorum issues, which will be used to draft frequently asked questions (FAQs):

- The Division received 8 comments in response to the abatement RFC. The majority were from assessors, one comment was from a current complainant, and another was from an attorney who represents public bodies. There was variation in how Boards consider abatement applications – some boards only discuss abatement applications in executive session, while others discuss them in open session. Some public bodies’ notices are detailed, some are not. Based upon the comments, the Division drafted a set of FAQs on applications for tax abatement and exemption. These FAQs were published in August 2012. The Division has not received any feedback since the FAQs were published.
- In response to the RFC on quorums, the Division received 12 comments from a mix of clerks, public body members, and attorneys representing public bodies. Some public bodies have governing documents that spell out the way a quorum is calculated, and

some do not. Most commenters preferred to measure quorum as a simple majority of the positions currently filled, rather than a simple majority of the board as constituted. The Division is currently considering the matter and will be drafting a set of FAQs.

Additionally, the Division is working on reorganizing its website to make it more user friendly.

Mr. Ambrogio commended the Division on the number of determinations that it has released since the last Commission meeting.

With regard to the definition of “Intentional Violation” regulation, Mr. Ambrogio asked how the Division was able to revise the regulation to make it clear that it is not creating a new defense for advice of counsel. Ms. Nable replied that the language of the revised regulation now exactly mirrors the wording of the advice of counsel defense that is currently in the statute.

Mr. Hechenbleikner asked Ms. Nable whether the process of issuing RFCs prior to releasing the FAQs was helpful. Ms. Nable replied that it was extremely helpful. With the abatement RFCs, commenters raised the difference between tax exemptions and tax abatements, and let us know about different types of records used by boards when considering such applications. The Division was able to incorporate language in the FAQs based upon these comments.

Status of Bills Pertaining to the Open Meeting Law Currently Pending in the Legislature – Commission May Vote on Recommendations

Mr. Hechenbleikner stated that the Commission has received a written update on the status of pending Open Meeting Law bills. Most bills have been sent to study. Mr. Hechenbleikner asked whether the Commission has a consensus on any of these bills.

Mr. Ambrogio stated that the formal legislative session has adjourned, and he doesn’t expect that anything will happen the rest of this year. These bills could be refiled, but he doesn’t think there is anything to discuss at this point.

Ms. Lillios agreed.

Discussion of Potential Legislation Proposed by the City Solicitors and Town Counsel Association (CSTCA) Regarding Public Bodies Meeting During Town Meeting

Mr. Hechenbleikner stated that the Division recently posted an FAQ on the issue of public bodies meeting during Town Meeting which has created a lot of discussion amongst local officials. Mr. Hechenbleikner understands that the Division has since taken down the FAQ. There has been some discussion about potential legislation regarding this issue. The change proposed by the CSTCA is to the definition of “Meeting” found in Section 18. The current definition excludes, from the definition, “a session of a town meeting convened under section 9 of chapter 39 which would include the attendance by a quorum of a public body at any such session.” The proposed change would amend that exclusion to read “a session of a town meeting convened under section 10 of chapter 39 which may include the attendance and deliberation on matters before town meeting by a quorum of a public body at any such session.” Mr. Hechenbleikner stated that this

revision would allow, for example, a quorum of a finance committee to answer any questions or opine on particular articles that require their review during a session of Town Meeting. Mr. Hechenbleikner asked whether this proposed legislation is appropriate and whether the language satisfies its intent.

Jennifer Stark stated that the Attorney General is currently prioritizing her legislative goals for the upcoming session. The supplement to the Open Meeting Law Guide came out after the Commission's meeting agenda was set. Therefore, discussion on the proposed legislation may be moot at this point.

Ms. Nable stated that since the last Commission meeting, the Division has taken down the FAQ and published a supplement to the Open Meeting Law Guide that explains the Attorney General's interpretation of the Town Meeting exclusion in the definition of "Meeting." It is the Attorney General's interpretation that the Open Meeting Law does not apply to any aspect of Town Meeting. This would include public bodies meeting during Town Meeting, committees of Town Meeting outside of a session of Town Meeting, and Town Meeting members meeting outside of a session of Town Meeting. Ms. Nable noted that future attorneys general may interpret this exemption differently.

Mr. Ambrogio stated that the need for legislation seems moot at this point because of the Attorney General's interpretation. It also may be premature for the Commission to vote on a recommendation because the legislation hasn't been filed yet. If the Attorney General has taken a position on how her office would approach this, and is satisfied, then the Commission should take a wait and see approach.

Mr. Lillios agreed with Mr. Ambrogio. The proposed legislation and the supplement to the guide are consistent. The supplement goes a long way with clarifying quorums within the context of Town Meeting. The Commission should defer comments on the legislation and refer to the context of the guide.

Mr. Hechenbleikner asked Ms. Nable if there was any process that the Division had to go through to publish the supplement to the guide. Ms. Nable stated that there was no required process akin to promulgating a regulation. This is simply guidance that the Division is providing. The interpretation is not binding as a regulation or legislation would be, so it can be changed if it becomes necessary.

Katie McCue stated that the MMA feels that the statute may need to be changed. The supplement is helpful, but it seems to only be a place holder until a legislative change is made. The MMA is considering whether to seek a sponsor and file legislation similar to the draft prepared by the CSTCA.

Mr. Hechenbleikner stated that the law is a little more than two years old. Perhaps this is something to keep in a folder of potential legislation. Down the line, if we're looking to clarify some issues, this might be one of them. Most of the legislation currently pending has to do with agencies and their application to the Open Meeting Law. It might be time to start thinking of changes that are necessary to clarify parts of the Open Meeting Law.

Mr. Ambrogi stated that at this time, he would like to reserve judgment on this potential legislation. He is not sure whether he agrees with it, and needs more time to think it over.

Correspondence Received

Mr. Hechenbleikner stated that the Commission received correspondence from Patricia Vinchesi, Town Administrator for the Town of Scituate. One of the issues Ms. Vinchesi raised was the need for a mechanism for the Division to inform members of public bodies and municipal counsel of its recent determinations. Mr. Hechenbleikner understands that the Division may not have the resources to implement a list serve or a mailing list, but would like to see if the Division has put any more thought into this.

Ms. Nable stated that an RSS feed is not feasible at this time due to the technology available to the office. Additionally, the maintenance of a list serve may prove to be time consuming for staff.

Mr. Hechenbleikner stated that he would not want to see this effort affect the Division's case load. He suggested working with the state Information and Technology Division (ITD) to see if something can be done.

Ms. Lillios asked what the turnaround time of posting decisions on the Division's website is. Ms. Nable responded that the Division typically posts decisions 48 hours after release. Ms. Lillios asked whether the Division has contacted the state ITD to inquire about the possibility of creating some sort of mechanism to inform individuals of the Division's determinations. Jonathan Sclarsic stated that it is his understanding that the Attorney General's website manager has been in contact with ITD throughout the entire process of revamping the website.

Ms. Nable stated that if the MMA or the CSTCA were to maintain a list serve to distribute the Division's determinations, the Division would have no objections to it.

Mr. Ambrogi asked about the use of Google Groups. He stated that Philip Mantyla periodically sends out updates to Commission members. All he would have to do is add one more email address to the updates he is sending out. It should not be too time consuming.

Mr. Hechenbleikner stated that, for example, he was surprised to learn that a public body cannot vote on contracts in executive sessions. He spoke with colleagues and they were also unaware of this interpretation. By "pushing" this new information to subscribers, whether it's through Google Groups or an RSS feed, it would be helpful for officials and residents to get this information.

Mr. Ambrogi stated that the Supreme Judicial Court sends out emails of its decisions. He finds these emails useful. He rarely thinks to visit their website. When he receives the emails, he always makes it a point to visit the website.

Ms. Lillios stated that if the Civil Service Commission can send notifications of its determinations, then the Division should investigate whether there is any way that it can send notifications of its decisions.

Mr. Hechenbleikner stated that the other piece of correspondence the Commission received was from George Harris in response to the letter submitted to the Commission during its last meeting by Frederick Turkington, Town Administrator from Wayland. Mr. Hechenbleikner stated that the Commission would keep Mr. Harris' letter on file.

Public Comment

Ms. McCue addressed the Commission. She stated that she finds list serves very helpful. The MMA typically posts a story on the Open Meeting Law in every issue of the Beacon. The MMA is more than happy to help get the word out on Open Meeting Law issues. If anyone has any suggestions on creating a central location on the MMA website where Open Meeting Law updates are posted, she would be more than happy to hear them.

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

There were no items

Schedule Next Meeting

The Commission discussed when the next meeting would be appropriate. Based upon the upcoming legislative session, and the fact that new legislation may be solidified by early February, it was agreed that the Commission would hold its next meeting during the first week of February.

The next meeting of the Commission will be held on Friday, February 8, 2013 at 1:00PM, location TBD.

Mr. Ambrogi moves to adjourn the meeting, seconded by Ms. Lillios.

With unanimous consent, meeting adjourned at 1:50PM.

List of Documents Used by the Commission at the Meeting

1. Meeting agenda for September 4, 2012
2. Draft minutes for May 7, 2012
3. Division of Open Government update
4. Status of bills pending in the legislature regarding the Open Meeting Law
5. Potential legislation proposed by the CSTCA regarding the Town Meeting exemption in the definition of "Meeting"
6. Patricia Vinchesi correspondence, dated June 18, 2012
7. George Harris correspondence, dated May 22, 2012