

Minutes of the Open Meeting Law Advisory Commission
May 12, 2011
100 Cambridge Street, 2nd Floor, Boston, MA

Members present: Loretta Lillios; Robert Ambrogi; Peter Hechenbleikner

Members absent: Sen. Kenneth Donnelly; Rep. Peter Kocot

Others present: Jonathan Sclarsic, Assistant Attorney General, Division of Open Government, Attorney General's Office; Philip Mantyla, Division of Open Government, Attorney General's Office; Britte McBride, Assistant Attorney General, Policy and Government Division, Attorney General's Office; Debra Johansen, Rep. Peter Kocot's office; Brigid Kennedy-Pfister, Sen. Kenneth Donnelly's office; Katie Sagarin, Massachusetts Municipal Association; Nancy Vargas, Southborough, MA; Daniel Lieber, Wakefield, MA; David Rosenberg, Chair, Norfolk Town Meeting Technology Committee, Norfolk, MA; Jack Boesen, Director, Personal Care Attendant Quality Home Care Workforce Council.

Chair Loretta Lillios opened the meeting at 10:33am.

Approval of Minutes of November 29, 2010

Robert Ambrogi moves to adopt the minutes from November 29, 2010 meeting, seconded by Peter Hechenbleikner. **With unanimous consent, minutes approved.**

Report from the Attorney General's Division of Open Government

Jonathan Sclarsic provided the report on behalf of the Division of Open Government (the "Division"). Mr. Sclarsic introduced Amy Nable as the new director of the Division. Amy is unable to be here today as she is out on maternity leave.

The Division has issued 19 determinations since the last Commission meeting. Additionally, the Division declined to review 6 complaints, often because the complaints were untimely.

The Division has participated in 11 trainings since the last Commission meeting, including 4 regional trainings. The Division has 3 regional trainings upcoming.

Currently, the Division has 67 open complaints and 20 open inquiries. An open inquiry is any request for information that is not considered a complaint. Since July 1, 2010, the Division has answered over 2000 inquiries.

The Division recently updated the Open Meeting Law guide and posted it on their website. The guide includes the Attorney General's updated Open Meeting Law regulations, information on alternative methods of notice posting, and updates to the Open Meeting Law certification process.

The issue of remote participation is still being considered by the Division. The Division is actively reviewing public comment as well as the Commission's comments that were

gathered from the last meeting. The Division is far along in their review but have not released anything on remote participation as of yet. The Division hopes to have a determination in the near future.

The Division is continuing to develop a test for the definition of a public body. The Division continues to come across new scenarios and is continuing to update policy.

The Division is planning on conducting several more trainings. Training was held in Dalton, MA last night. The Division received positive feedback from the folks in attendance. Trainings usually consist of an hour-and-a-half PowerPoint presentation followed by a Q&A. Generally, 50-70 people attend each training. Mr. Sclarsic stressed that it continues to be the Attorney General's belief that many violations are unintentional and are due to a lack of understanding the law.

Mr. Sclarsic reports that all of the Division's determinations, including declination letters, have been posted online, in part, because of the Commission's feedback requesting web access to determinations. Determinations are typically posted 3-4 days after they are released in order to give the parties involved an opportunity to view the determinations before publication. The Division is constantly updating and adding to their frequently asked questions section of the website.

The Division put out a request for public comment stemming from a determination issued in response to a complaint filed against the Freetown Soil Conservation Board (the "Board"). In this case, the Division found the Board violated the Open Meeting Law by failing to list topics on their agenda with sufficient specificity. Since the release of the decision, the Division has received numerous requests from public bodies and municipal clerks on how specific notices must be. Therefore the Division decided to ask for feedback because they recognize that this is not a one-size-fits-all answer. The request was posted on the Division's website and sent to the Massachusetts Municipal Association, the Clerk's Association, and to a number of other groups to distribute to their members. The deadline for the request for comment is May 31, 2011. Mr. Sclarsic requested that Commission members reach out to others to notify them of this request. Once all the comments are in, the Division will review them and issue either an Advisory Opinion or a frequently asked question.

Questions/Comments:

Robert Ambrogi asked, what is the impact of the Division in terms of the workload with Britte McBride transitioning out as Director and with Amy on leave? Mr. Sclarsic answered that the Division will continue to handle the work-load with himself as the primary attorney along with senior attorneys from the Government Bureau. He did note that it may take longer than normal to release determinations.

Peter Hechenbleikner inquired as to what percentage of time is being spent on reactive work (responding to complaints) versus proactive work (providing trainings or guidance)? Mr. Sclarsic said the breakdown is about 50/50. They have received over

2000 inquiries which has kept them busy. Many of the inquiries require research. Mr. Sclarsic noted that the Division has conducted regional trainings, trainings for the Massachusetts Municipal Association, and trainings for the Massachusetts Association of School Committees. Such trainings take up a significant amount of time. The Division also continues to receive complaints at a regular rate.

Mr. Hechenbleikner stated the definition of a public body is an important issue for municipalities. He questioned whether or not the Division is adequately staffed and whether or not resources are available for proactive work. Mr. Hechenbleikner stated he had hoped that a determination on remote participation and a public body test would have been issued by now. Mr. Hechenbleikner noted that this should not be taken as a criticism of the Division. Rather, he brings this up because he thinks the Division may be understaffed. Mr. Sclarsic replied that the Division is in the final stages of reviewing remote participation, but noted the public body test is a difficult question and it is still evolving.

Robert Ambrogi suggested that the definition of a public body be determined on a case by case basis rather than through a ruling. Peter Hechenbleikner disagreed. He feels there should be a ruling so communities can make the best decision based on guidance.

Loretta Lillios suggested that there be a discussion with the legislature on whether or not more resources should be allocated to the Division. She understands that communities need guidance but also sees how this subject requires a deliberative process which takes time. Many of these scenarios are fact specific.

Mr. Sclarsic encouraged cities and towns to contact the Division, in the meantime, if any questions arise regarding whether or not an entity is a public body.

Peter Hechenbleikner asked about the Division's posted decisions. He felt they will become difficult to access as more decisions are posted. Jonathan Sclarsic confirmed that the Division is actively working on updating how decisions are indexed on the website.

Mr. Hechenbleikner explained how the Civil Service Commission posts their decisions. He explained that individuals can subscribe to electronic bulletins that alert them every time a decision is posted. Mr. Hechenbleikner asked if this is something the Division could implement? Mr. Sclarsic said it is something he can bring back to the office but questioned whether or not the Division has the resources. Robert Ambrogi suggested something similar to an RSS feed.

When asked by Robert Ambrogi if there have been any issues with public bodies failing to abide by orders issued in Open Meeting Law determinations, Mr. Sclarsic stated he has not been made aware of any. As a follow up, Mr. Ambrogi asked how determinations would be enforced. Mr. Sclarsic explained the Attorney General's Government Bureau would bring a public body to court in order to enforce a determination.

Peter Hechenbleikner asked if anyone has appealed a determination. Mr. Sclarsic replied there have been no appeals.

Finally, Robert Ambrogi commended Britte McBride for a job well done. Mr. Ambrogi stated she did an excellent job getting the Division up and running. Peter Hechenbleikner and Loretta Lillios enthusiastically concurred.

Discussion on Bills Pertaining to the Open Meeting Law Currently Pending in the Legislature.

The Commission began their discussion with H. 1734 *An Act Relative to the Open Meeting Law*. Loretta Lillis explained this bill dispenses with the intentionality requirement and includes a public reprimand and/or civil fines when a violation of the Open Meeting Law is found.

Robert Ambrogi stated that he read this as the Attorney General will not be able to fine individuals but rather the courts would be able to impose individual fines. He also noted that this bill would require public bodies to reimburse for attorneys fees. Mr. Ambrogi stated that he is a strong advocate that the Open Meeting Law needs more teeth. He feels there are no consequences for individuals who violate the Open Meeting Law. A fine on a public body is a fine on the taxpayers. He believes this bill would encourage citizens to bring action in court. He also feels the individual reprimand will add to the Attorney General's regulations and is in favor of this bill. The Massachusetts Newspaper Publishers Association endorses this bill.

Peter Hechenbleikner asked if the Commission was discussing this for their own knowledge or to advise the Attorney General. Ms. Lillios responded that they are discussing this to come up with a consensus to advise the Attorney General.

Mr. Hechenbleikner stated he disagrees with Mr. Ambrogi's views on this bill. The law is new and there is still a lot of work to be done. Mr. Hechenbleikner disagrees that there is no penalty under the current version of the Open Meeting Law. If a violation is found, it becomes a public record which will be picked up by the media. The ramifications, he believes, are that violations are publicized. Mr. Hechenbleikner is opposed to this bill.

Ms. Lillios does not have an official view on this bill as a whole. She feels there should be an educational purpose to the law and to the Attorney General's position in enforcing it.

The discussion then turned to H. 830 *An Act Amending the Open Meeting Law*. Loretta Lillios explained this would add an additional executive session purpose to discuss strategies for any contract negotiation, such as vendor contracts.

Robert Ambrogi is opposed to this. He does not see the necessity.

Peter Hechenbleikner cited an example of cable TV contract negotiations. He sees the difficulty in discussing this type of contract negotiation in the open.

Mr. Ambrogi stated there is a law that if a public body needs legal advice they may be able to enter into executive session for that. He feels that the public has the right to know what is going on with these negotiations.

Mr. Hechenbleikner reminded that a hearing would be required for cable TV contract negotiations. Regardless of the fact, Mr. Hechenbleikner stated he is not in favor of any amendments to the Open Meeting Law at this time.

The Commission briefly discussed H. 848 *An Act to Include the Legislature in the Open Meeting Law* and H. 2594 *An Act Relative to Open Meetings* which would include the legislature in the Open Meeting Law.

Robert Ambrogi felt the legislature should be included in the Open Meeting Law.

The Commission brought up S. 1627 *An Act Relative to the Accountability of the Governor's Council* and S. 14 *An Act Relative to the Reform of the Executive Council*. Loretta Lillios explained that both bills would mandate the Governor's Council to be subject to the Open Meeting Law. She noted there was a judiciary hearing on S. 14 and a determination was made that S. 14 ought not to pass. Ms. Lillios was not sure about S. 1627.

Robert Ambrogi questioned why the Governor's Council was exempt. Jonathan Sclarsic explained that while they are not specifically excluded in the Open Meeting Law, they are a constitutional office and not subject to the legislative restriction. Mr. Ambrogi stated he was in favor of having their deliberations be conducted in open.

Robert Ambrogi then distributed S. 1625 *An Act Relative to Open Meetings*. He explained that this was sponsored by Senator Tarr and would include the legislature and require the legislature to video record public hearings and archive the recordings on their website. Mr. Ambrogi also explained this bill would create the Commonwealth of Massachusetts Free-Lance Media entity with the task of establishing an independent media registry. Mr. Ambrogi is not in favor of the Commonwealth registering the news media.

Mr. Ambrogi then distributed S. 569 which would allow the University of Massachusetts Board of Trustees to enter into executive session to award tenure and honorary degrees. He is opposed to this bill.

Discussion on Possible Regulations of the Definition of a Public Body

Loretta Lillios explained that the definition of a public body is a very fact specific inquiry and noted that the Division already updated the Commission on this matter earlier in the meeting.

Peter Hechenbleikner inquired as to how many calls the Division gets related to the definition of a public body. Jonathan Sclarsic responded, the Division receives about 2 or 3 calls on this subject per week. Mr. Sclarsic reported that sometimes the questions are easy and sometimes they require extensive research.

Discussion of Posting of Agenda Items on Meeting Notices (Per OML 2011 – 11)

Peter Hechenbleikner believes if public bodies are to follow the guidance issued in this determination, they could end up with a 5 page agenda and believes this could be detrimental.

When asked by Mr. Hechenbleikner how the media and newspapers feel about how detailed agendas should be, Robert Ambrogi responded that they do not have a strong position. The newspapers would like agendas to be specific but agrees that too much specificity could be detrimental. He believes there should be enough specificity so people know what will be discussed during the meeting.

Loretta Lillios stated it was her belief that a balance was struck in this determination.

Mr. Hechenbleikner commended the Division on opening this up for public comment.

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

A number of individuals attended the meeting and expressed interest in addressing the Commission.

Daniel Lieber, Wakefield, MA addressed the Commission and brought up the idea of adding an anti-retaliation component to the Open Meeting Law. He recently filed an Open Meeting Law complaint. Mr. Lieber stated he was retaliated against after filing the complaint. He decided not to seek re-election because he felt it was not in his best interest. Mr. Lieber expressed his frustration that members of the public body did not attend any Open Meeting Law training. He sees other areas of improvement in the law such as the concept of intentionality. Mr. Lieber believes the intent of individuals should be clarified. He feels there is no teeth to the law.

Loretta Lillios felt that public bodies should be required to attend training when a violation of the Open Meeting Law is found.

Robert Ambrogi expressed interest in Mr. Lieber's idea that the law should address retaliation. He thinks that members of public bodies may be reluctant to file complaints because of the potential for retaliation.

David Rosenberg, Chair, Norfolk Town Meeting Technology Committee, Norfolk, MA was next to address the Commission. Mr. Rosenberg noted that he is commenting as an individual. He is concerned with the use of technology or lack thereof by public bodies. Mr. Rosenberg stated that he submitted 3 requests for Advisory Opinions to the Division

concerning the use of technology by a public body. One such request centered around whether or not a public body may create a web based discussion forum. If the public body makes this forum available so members of the public may view it, it would make the process open. Mr. Rosenberg suggested posting notice of the website where this is available. He feels this should be authorized by the Attorney General's Office through an Advisory Opinion but would also be interested in changing legislation to allow discussions of this nature on the internet.

When asked by Loretta Lillios if the Division has issued any FAQs on this, Jonathan Sclarsic replied that it is on their list of FAQs and Advisory Opinions they would like to visit.

Mr. Rosenberg explained his other requests – blogs and listservs. He feels that if done properly, all these deliberations can be very open.

Peter Hechenbleikner explained that the Open Meeting Law anticipates meetings to be in person meetings. The Commission's guidance to the Attorney General on remote participation encourages people to be physically present at a meeting. Mr. Hechenbleikner admits it is difficult to figure out what the right level of permissibility should be without having a contrary affect on the Open Meeting Law.

Nancy Vargas, Southborough, MA explained her involvement in the Open Meeting Law complaint process. She was encouraged by H. 1734, *An Act relative to the Open Meeting Law*. Ms. Vargas felt strongly that you can compel training but cannot compel people to take the training seriously. She feels that if the Open Meeting Law has no teeth, adherence to the law is not going to happen. Ms. Vargas also feels strongly, as it stands right now, that there are no repercussions for violations. Fines are on the taxpayers not the individuals who are violating the law. Ms. Vargas also agreed with earlier suggestions of introducing anti-retaliation component to the law as she feels she was victimized after she had filed her Open Meeting Law complaint. Ms. Vargas also disagrees with the 30 day requirement in which an Open Meeting Law complaint must be filed with the public body. She feels it is cumbersome and unrealistic because individuals may not know the complaint process or be able to recognize a violation within 30 days. Ms. Vargas also commented that she is in favor of personal fines against those who violate the Open Meeting Law as well as reimbursement for legal fees incurred by a complainant.

Robert Ambrogi thought it was enlightening to have two individuals come before the Commission and explain that the legislature needs to address the issue of adding more teeth to the Open Meeting Law. He also states that more than 40 states provide attorneys fees for those who bring action under the Open Meeting Law. According to him, Massachusetts is behind on the issue.

In response to Mr. Ambrogi's comments, Peter Hechenbleikner stated Massachusetts communities depend heavily on volunteerism, as opposed to other states. That is the reason why 40 other states have that sort of legislation. Adding more teeth to the law may hurt volunteering numbers. He also reminded the Commission and those present that the

representations made on specific cases, while of interest to the Commission, are one side of the stories in those cases; and that the Commission's function is to provide advice to the Attorney General on the Open Meeting Law, not to adjudicate or provide advice on individual situations or cases.

Jack Boesen, Director, Personal Care Attendant Quality Home Care Workforce Council requested an update on remote participation and whether or not any decision is imminent. Loretta Lillios responded with what was reported earlier: the Division is still reviewing the matter and hopes to have a decision in the near future. Mr. Boesen explained the difficulty in getting a quorum together for meetings of the Personal Care Attendant Quality Workforce Council. He explained that 5 members of the Council have a disability that makes it difficult for them to travel. He suggested remote participation may qualify as a reasonable accommodation under the Americans with Disabilities Act.

The Commission sympathized with Mr. Boesen and agreed that these are all important issues under consideration.

Katie Sagarin, Massachusetts Municipal Association asked Jonathan Sclarsic, whether or not a determination is considered law once it is posted on the Division's website? Mr. Sclarsic responded that once a determination is released it becomes the formal position of the Attorney General. He noted, the Division usually waits a few days to post the decision to ensure the individuals involved receive notice first. Ms. Sagarin echoed Peter Hechenbleikner's suggestions that the Division should do more to notify people of new content on their website.

Brigid Kennedy-Pfister, Sen. Kenneth Donnelly's office asked if the Division's trainings are posted on their website; and how does the Division market their trainings? Jonathan Sclarsic explained there are 2 types of trainings: regional trainings which are open to all members of the public; and trainings for specific organizations. For example, last week the Division conducted a training for the Massachusetts Association of School Committees. Previously they had conducted trainings for the Massachusetts Municipal Association. People were invited to those trainings. For the regional trainings, the Attorney General's Press Office contacted newspapers; the Division sent out notices to the Massachusetts Municipal Association and other groups; and posted this information on the Division's website. Ms. Kennedy-Pfister stated there is concern that this information is not getting to those who are not affiliated with groups such as the MMA. Mr. Sclarsic responded that the office tries its best with the resources available to them.

Scheduling Next Meeting

The Commission agreed the time between meetings has been too long. Peter Hechenbleikner suggested meeting in July then scheduling meetings every other month for the rest of the year. Loretta suggested scheduling a meeting in July and see how that goes. She asked the Division to assist with coordinating the next meeting date. The Commission agreed.

The next meeting will be scheduled sometime for July 2011.

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

With unanimous consent, meeting adjourned at 12:22PM.

List of Documents used by the Commission at the Meeting

1. Meeting agenda for May 12, 2011.
2. Draft minutes for November 29, 2010 meeting.
3. H. 1734: *An Act Relative to the Open Meeting Law*
4. H. 830: *An Act Amending the Open Meeting Law*
5. H. 848: *An Act to Include the Legislature in the Open Meeting Law*
6. H. 2594: *An Act Relative to Open Meetings*
7. S. 1627: *An Act Relative to the Accountability of the Governor's Council*
8. H. 3037: *An Act Relative to the Open Meeting Law*
9. S. 14: *An Act Relative to the Reform of the Executive Council*
10. S. 513: *An Act Relative to the Rights of Faculty Members at the University of Massachusetts*
11. S. 1625: *An Act Relative to Open Meetings*
12. OML 2011 – 11 Freetown Soil Conservation Board