

Minutes of the Open Meeting Law Advisory Commission
September 8, 2011
100 Cambridge Street, 2nd Floor, Boston, MA

Members present: Loretta Lillios; Robert Ambrogi; Peter Hechenbleikner; Rep. Peter Kocot

Members absent: Sen. Kenneth Donnelly

Other present: Amy Nable, Assistant Attorney General, Director, Division of Open Government, Attorney General's Office; Jonathan Sclarsic, Assistant Attorney General, Division of Open Government, Attorney General's Office; Philip Mantyla, Paralegal, Division of Open Government, Attorney General's Office; Brigid Kennedy-Pfister, Sen. Kenneth Donnelly's Office; Katie Sagarin, Massachusetts Municipal Association; David Rosenberg, Norfolk Town Meeting Technology Committee, Norfolk, MA.

Chair Loretta Lillios opened the meeting at 2:01PM

Review and Approval of Draft Minutes from May 12, 2011 Meeting

Loretta Lillios suggested an amendment to the May 12, 2011 draft minutes. Ms. Lillios suggested a change to the fourth paragraph on page three to reflect that she suggested there be a discussion with the legislature on whether or not more resources should be allocated to the Division.

Peter Hechenbleikner moves to adopt the minutes from May 12, 2011 with Ms. Lillios' amendment, seconded by Robert Ambrogi. **With unanimous consent, minutes approved with amendment.**

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, who became Director in March, formally introduced herself to the Commission. She commended Jonathan Sclarsic and Philip Mantyla for successfully running the Division while she was on maternity leave.

The Division issued twenty determinations since the last Commission meeting. Additionally, the Division declined to investigate ten complaints, often because they were untimely. The Division also closed out 35 cases where the complainant filed a complaint with the public body, but did not follow up with a complaint to the Attorney General's office. Often, this was because the complainant was satisfied with the action taken by the public body.

The Division issued two determinations in which they found intentional violations. These were against the Wayland Board of Selectmen and the Otis Board of Selectmen. The Division is finalizing a settlement with Wayland, and the hearing process is proceeding in the Otis case. The Division is in its final stages of appointing an

administrative law judge to hear cases in which the Division finds an intentional violation.

The Division has responded to more than 500 inquiries since the last Commission meeting. Currently, the Division has 29 open inquiries.

Since the last Commission meeting, the Division has participated in three trainings and held the last of its regional trainings in Barnstable, Northampton, and Worcester. In all, roughly 400 people attended the regional trainings. The Division was very happy with the turnout. Ms. Nable reported that the Division will be participating in four additional trainings in October and November.

The Division issued proposed regulations on remote participation in late June. The public comment period for the proposed regulations closed Tuesday, September 6, 2011. The Division received about fifty comments in writing. Additionally, the Division heard testimony from five individuals during a public hearing on September 6th. The Division is now reviewing the comments received and will be issuing final regulations once review is complete.

Loretta Lillios asked what interests were represented at the hearing. Ms. Nable responded that the Boston Disability Commission and the State Ethics Commission provided testimony. Testimony was also received by individuals.

Rep. Peter Kocot entered the meeting at 2:09PM.

Robert Ambrogi asked if a summary of the comments are available and whether or not Ms. Nable could characterize the comments. Ms. Nable indicated that the comments will be available as public records.

Peter Hechenbleikner said that he was present at the hearing and the comments seemed positive. Ms. Nable reported the general sense was that people want remote participation. It's just the logistics that need to be worked out.

Rep. Kocot indicated, as a representative of Western Massachusetts, he has heard that some of the towns have expressed concerns with the proposed regulations.

Mr. Hechenbleikner asked if the concerns were that remote participation should not be authorized. Rep. Kocot replied that the concerns were regarding procedures set forth in the regulations.

Continuing with her report, Ms. Nable announced that the Division is working on a searchable database for determination letters. It is expected to be launched by the end of October. This will allow users to search by date, topic, and determination number. The Division is still looking into the logistics of providing an RSS feed.

Rep. Kocot indicated that the legislature will be working on the supplemental budget in the near future. He informed the Division that the Senate and the House would be open to providing resources if the Division would like to add staff or purchase software.

When asked by Mr. Hechenbleikner when the Division expects to finalize the regulations, Ms. Nable reported that there is no specific date but understands this is an important issue. The Division is making every effort to release them as soon as possible. This is a top priority.

Going back to the possibility of implementing an RSS feed, Mr. Hechenbleikner suggested expanding that to notify individuals when there is something new posted on the website, rather than just decisions. He thinks this would be helpful to communities.

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

Loretta Lillios introduced Brigid Kennedy-Pfister from Sen. Kenneth Donnelly's office who provided an update on the pending bills in the legislature.

Ms. Kennedy-Pfister reported that Sen. Donnelly is in caucus and that he intends to come to the meeting, if he can, at some point today.

S. 569: An Act Relative to the Rights of Faculty Members at the University of Massachusetts is scheduled for a public hearing on October 17, 2011, 11:00am at UMass Law School in Boston.

S. 14: An Act Relative to the Open Meeting Law was referred to Joint Committee on the Judiciary with a recommendation that it ought not to pass. It was called for consideration in the Joint Session. The session was recessed without any action being taken on this bill.

S. 1627: An Act Relative to the Accountability of the Governor's Council was heard by the Joint Committee on State Administration and Regulatory Oversight on June 7, 2011. It is currently under consideration.

The remaining bills: *H. 830: An Act Amending the Open Meeting Law*; *H. 848: An Act to Include the Legislature in the Open Meeting Law*; *S. 1625: An Act Relative to Open Meetings*; *H. 1734: An Act Relative to the Open Meeting Law*; *H. 2594: An Act Relative to Open Meetings*; and *H. 3037: An Act Relative to the Open Meeting Law* have been grouped together to be heard on September 20, 2011 at 11:00am.

Ms. Kennedy-Pfister then distributed a summary of the status of bill to the Commission and all in attendance.

Discussion on the Attorney General's Proposed Regulations on Remote Participation

Loretta Lillios open the discussion on the proposed remote participation regulations.

Peter Hechenbleikner stated that the MMA is very supportive of the regulations. There is concern with the restriction on participating remotely due to geographic distance. He does not understand the reason. Members of local public bodies should not be excluded from participating remotely if they are traveling on business. Not everyone can schedule business travel to avoid meetings. Those who are retired and move to Florida for the winter should be able to participate. From a municipal standpoint, this exclusion does not seem right.

Robert Ambrogi agrees with Mr. Hechenbleikner. The newspapers generally endorse this draft. The input provided by the Commission seems to have been used. He's spoken with peers in other states concerning remote participation and they report great experiences with it. Not one person reported a negative experience. He does suggest that the regulations make it clear that if a member is using video conferencing, that person, should be clearly visible to all individuals present. This would allow members of the public to see body language and gestures.

Ms. Lillios asked Amy Nable if there are any specific provisions the Division would like input on from the Commission. Ms. Nable replied there is no specific area where the Division is seeking input on. The comments provided by the Commission will be helpful in going forward with the review.

David Rosenberg addressed the Commission. He noted that he submitted written comments. Mr. Rosenberg suggested allowing members of local public bodies to participate remotely due to geographic, distance but added there should be provisions for a specific distance, like how long it will take someone to get to the meeting.

Mr. Ambrogi agreed with the idea of setting a geographic distance in which someone may participate remotely.

Mr. Hechenbleikner stated that the need for a member to state where he or she is participating from presents a security issue. In Reading, members do not state whether or not they will be out of town when scheduling a meeting. Their meetings are broadcast live. It is not a good idea to let people know when someone is home or not. He suggested allowing a member to inform the chairman of their location. That should be adequate.

Mr. Ambrogi stated that he understands the security concern.

Katie Sagarin addressed the Commission. She stated that the Massachusetts Municipal Association (the "MMA") echoes Mr. Hechenbleikner's comments. The MMA is concerned with the list of acceptable technologies. The MMA understands how difficult it is to change the regulations. Because technology changes rapidly, a sentence should be added that covers new technology.

Discussion on the Role and Goals of the Open Meeting Law Advisory Commission,
Including Meeting Schedule to Accomplish Goals

Loretta Lillios noted that the Commission has held a number of meetings as they approach their one year anniversary. This is a good time to evaluate the role and goals of the Commission with respect to the Division. Ms. Lillios suggested first looking at the statute that created the Commission. The Commission is made up of five members with consideration given to various viewpoints. The Open Meeting Law states that the Commission shall review issues relative to the Open Meeting Law and shall submit to the Attorney General recommendations for changes to the regulations, trainings, and educational initiatives. The discussion was then opened up to other members.

Rep. Peter Kocot stated, as a legislator, hearing of the Division's experiences out in the field would be helpful to him. There has been no comprehensive analysis from the Division. He would like to hear what the Division is hearing when out in various cities and towns enforcing the Open Meeting Law and conducting trainings.

Ms. Lillios stated that perhaps the Division could share some stories encountered over the first year. Commission members could then funnel these stories back to their individual interests.

In response, Amy Nable commented that the Division gives regular updates at every meeting. If the Commission is interested in the Division providing more in depth briefings, they may be willing to provide more details.

Rep. Kocot stated that the legislature is looking for the Division to comment on the bills currently under consideration. One conflict is the issue of intent and how to look at it. It would be helpful for the legislature to hear the Division's experience with the concept of intentionality and how to prove it.

Peter Hechenbleikner stated that himself, Mr. Ambrogi, and Ms. Lillios have looked at pending legislation at previous meetings and individually have differences. Mr. Hechenbleikner thinks that because the law is new, it should be left alone for now. In terms of the Division's reports, he thinks the information received at every meeting is good. He is reluctant to add more work for the Division but if the legislature finds it helpful, it may be worth the investment.

Rep. Kocot stated that he is not looking for anything lengthy, just whether or not boards and staff members understand the law.

Mr. Ambrogi stated that he felt there were certain aspects of the law that should have been addressed right away, while some aspects could wait. The positive is that there seems to be an increased awareness of the law. Perhaps the Division is seeing an increase in complaints because more people are aware of the law. The role of the Commission is unclear and undefined. The Division has been responsive to some of the Commission's recommendations. In terms of legislative issues, he is unsure of what the Commission can accomplish because he doesn't think they will be able to come to a consensus.

Ms. Lillios suggested that the airing of various viewpoints may be a role of the Commission. She points out that the subject of the resources of the Division has come up quite often. Has the Commission jumped to conclusions too quickly that the slow pace is due to a lack of resources, when in fact it is because of the deliberative process required with some of these issues? Looking back on her past experience with enforcement of the law, one issue that always came across her desk was the question of what is a public body. These scenarios are fact specific. An advisory opinion would only establish broad contours. She is not convinced that there is a resource constraint.

Ms. Nable responded that there are only three people in the Division. Some issues are taking longer than they would like because they are tough issues. The Division has found that advisory opinions are not necessarily the best way to deal with these issues because many are fact specific. The Division tries to use determinations and FAQs as a way to provide guidance. The Division believes it is best to look at the individual facts.

Mr. Hechenbleikner suggested a different approach. To the extent that the Division can address issues in the form of a regulation or advisory opinion the amount of work for the Division may decrease. Communities are looking for guidance to assist them in complying with the law. It is counterproductive for the Division to wait for the questions.

Ms. Lillios disagreed with Mr. Hechenbleikner's comments. Based upon her experience, there will always be questions from board members. The Middlesex District Attorney's Office had a lot of these inquiries with a limited number of cities and towns under their jurisdiction.

Mr. Hechenbleikner stated that he certainly thinks viewing how proposed regulations effect the Open Meeting Law is an appropriate role of the Commission. Perhaps advocating for changes to the law may be appropriate as well.

Rep. Kocot was in agreement.

Ms. Lillios questioned whether or not advocating for changes in the law should be done through the Commission. She doesn't believe that it is within the legislative language.

In response, Rep. Kocot indicated that if there is anything the Commission feels strongly about, the legislature would welcome testimony.

Mr. Hechenbleikner replied that he understands what Ms. Lillios is saying. The legislation says the Commission is to advise the Attorney General, but there are two members of the legislature on the Commission. Surely there must be some role in advocating to the legislature.

Mr. Ambrogi stated that he is in favor of presenting information to the legislature to show how different stakeholders feel on certain issues.

Again, Ms. Lillios questioned whether or not the Commission is authorized to do that. The role of the Commission is to advise the Attorney General. The Attorney General is able to bring issues to the legislature and individuals can also provide testimony to the legislature.

Mr. Hechenbleikner would like to get an opinion from the Attorney General on whether or not she thinks providing information to the legislature as a Commission would be appropriate.

Rep. Kocot stated that if the Attorney General was looking for resources, it may be helpful if she came in front of the legislature and the Commission. If the Commission were to come to a consensus, that could be a powerful tool.

Rep. Kocot left the meeting at 3:06PM.

Mr. Ambrogi stated that he doesn't think the Commission needs expressed permission to testify to the legislature. The Commission could inform the legislature of what they advised the Attorney General.

Ms. Lillios stated the legislation provides that the Commission is to advise the Attorney General on regulations and trainings. While she takes to heart that the Commission does not need permission to testify to the legislature, the Commission should focus on its core function. To some extent, this is what the Commission has done.

Mr. Hechenbleikner stated that the Commission had a robust conversation prior to the development of the remote participation regulations. At the last meeting, individuals came to the Commission and seemed like they wanted the Commission to get involved with enforcement. The Commission has no role in enforcement. Rather, the Commission should get involved in looking forward. Mr. Hechenbleikner believes the Commission should have a discussion on the technology issues raised by David Rosenberg and make a recommendation to the Attorney General.

Mr. Ambrogi agreed with Mr. Hechenbleikner's statements.

Brigid Kennedy-Pfister inquired as to how the Commission makes recommendations. Are recommendations only reflected in the minutes or are written recommendations submitted to the Attorney General? Ms. Lillios responded that to date the recommendations have been reflected in the minutes. The Commission makes it clear whether or not these recommendations are unanimous. Depending on the issue, she would be open, as Chair, to make formal recommendation in writing if the opportunity presents itself.

Public Comment

Loretta Lillios acknowledged David Rosenberg who was in attendance. For the past two meetings, Mr. Rosenberg has submitted information on internet discussions. Ms. Lillios

indicated that she had a conversation with him earlier in the day and informed him that this issue would not be taken up by the Commission today. She understands that this information was presented to the Division and agrees that this item is appropriate for future deliberation by the Commission.

Peter Hechenbleikner stated that he would like to go back to the other items on the agenda from their cancelled meeting and prioritize them. Mr. Hechenbleikner thought that a written update on the status of upcoming legislation at the next meeting would suffice, rather than an agenda item.

Ms. Lillios was in agreement.

Mr. Rosenberg suggested that a mechanism be created to notify individuals when there are changes on the Open Meeting Law website. He offered his services with helping the Division on that.

Katie Sagarin asked/ what area will the Division be looking into next once the remote participation regulations have been finalized? Amy Nable replied that she could not comment.

Mr. Hechenbleikner asked if the Division could provide the Commission with a list of issues they are considering. Ms. Nable responded that the Division could provide the Commission with a list of top 5 questions received during their next update.

When asked by Mr. Hechenbleikner if the Division tracks the types of activity received on a month to month basis, Ms. Nable reported that the Division does have a database. If there is anything that is helpful, the Division may be able to provide that information.

Ms. Lillios again posed the question, what is the Commission's purpose? It seems as if the Commission is acting as an oversight authority. The Commission should not be doing that.

In response, Mr. Hechenbleikner stated that if the Commission is going to advise the Attorney General, it would be helpful to understand what levels of different types of activity are.

Mr. Ambrogi stated the better the Commission is informed, the better they can advise.

Ms Lillios stated that it may be helpful to the extent that the Attorney General would like the Commission to focus on certain areas.

Scheduling Next Meeting

Loretta Lillios indicated she is not convinced that monthly meetings are required. She suggested scheduling quarterly meetings. Further, she suggested the Commission work quickly to generate the agenda. If something is pressing or the agenda is large, she would

be open to scheduling other meetings. However, at this time her recommendation is to schedule a meeting three months from now. Ms. Lillios invited members to submit their own testimony to the legislature. She asked the Division to assist in scheduling the next meeting.

Peter Hechenbleikner stated it is his sense that there is much to do and the Commission should meet more often. He suggested seeing the agenda then reevaluating how critical the items are.

Robert Ambrogi said that it has been too long since the last meeting. He suggested meeting every other month. But he is in agreement with the Chair.

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

With unanimous consent, meeting adjourned at 3:31PM.

List of Documents Used by the Commission at the Meeting

1. Meeting agenda for September 8, 2011
2. Draft minutes for May 12, 2011 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. 569: *An Act Relative to the Rights of Faculty Members at the University of Massachusetts.*
11. S. 1625: *An Act Relative to Open Meetings*
12. Status of Bills Pending in the Legislature Regarding the Open Meeting Law
13. Proposed Revisions to 940 CMR 29.00