

**Minutes of the Open Meeting Law Advisory Commission
August 2, 2017, 2:00PM**

Approved on January 23, 2018

100 Cambridge Street, Room A of the Leverett Saltonstall Building, Boston, MA 02114

Members Present: Robert Ambrogi, Massachusetts Newspaper Publishers Association designee; Carrie Benedon, Attorney General's designee; Representative Jennifer Benson, Chair of the Joint Committee on State Administration and Regulatory Oversight; Jeffrey Hull, Massachusetts Municipal Association designee; Senator Walter Timilty, Chair of the Joint Committee on State Administration and Regulatory Oversight

Attorney General's Staff Present: Jonathan Sclarsic, Assistant Attorney General, Director, Division of Open Government; KerryAnne Kilcoyne, Assistant Attorney General, Division of Open Government; Kevin Manganaro, Assistant Attorney General, Division of Open Government; Hanne Rush, Assistant Attorney General, Division of Open Government; Kaitlin Maher, Paralegal, Division of Open Government.

Others Present: Ryan Arego, Franklin, MA; Matt Broll, Franklin, MA; John Hawkinson, Cambridge, MA; Sean Hoye, Franklin, MA; David Rosenberg, Norfolk, MA

Call to Order and Welcome New Members

Meeting called to order by Carrie Benedon shortly after 2:00PM. The present Commission members introduced themselves. The Commission members welcomed Representative Jennifer Benson, recently appointed as the House Chair of the Joint Committee on State Administration and Regulatory Oversight. Senator Walter Timilty, the Senate Chair of the Joint Committee on State Administration and Regulatory Oversight, had not yet arrived.

Review and approval of draft minutes for March 8, 2017 Commission meeting

Ms. Benedon thanked the Division of Open Government for preparing the minutes. Bob Ambrogi motioned to approve the minutes and Jeffrey Hull seconded the motion. **By unanimous vote (4-0), the minutes were approved.**

Report from the Attorney General's Division of Open Government

Ms. Benedon opened the floor to the Attorney General's Office to present an update to the Commission regarding the Open Meeting Law (OML) and the Division of Open Government.

Jonathan Sclarsic, the Director of the Division of Open Government in the Attorney General's Office, reported to the Commission on the work of the Division in 2017. So far in 2017, 160 complaints were received by the Division. The Division issued 122 determinations and declined to review 15 complaints. Most declinations were due to untimeliness or due to the allegation falling outside the scope of the Open Meeting Law. Some of the determinations resolved more than one complaint. There are currently 67 complaints pending with the Division. The Division is in the process of investigating those complaints and will issue either determinations or

declinations to resolve each complaint. The most common topics of complaints received by the Division have been related to notice posting requirements and notice specificity, sufficiency and timeliness of approval of minutes, improper executive session purposes, and deliberation outside of a meeting. The Division has issued 3 intentional violations as a result of particularly egregious conduct or repeated violations. The Division has issued findings against the Webster Board of Selectmen, Fall River City Council, and Ashland Board of Health.

The Division continues to respond to inquiries. In 2017, the Division has received over 1075 inquiries to the hotline. The Division tries to respond to every inquiry within a few hours.

The Division held 6 regional trainings this past spring in Fall River, Stoughton, Orleans, and Holyoke. The Division conducted additional trainings with organizations and agencies. Each month, the Division conducts a live webinar with two attorneys. The participants view a presentation and can ask questions to the attorneys.

The Division has 6 regional trainings scheduled for the Fall in Rutland, Mashpee, Great Barrington, New Bedford, Norwell, and Greenfield.

Mr. Sclarsic provided an update on the Division's decisions that are on appeal. If the Division issues a determination with a violation found, the public body can appeal within 21 days. Fall River City Council is appealing a finding about lack of notice for a meeting, and the case is in Superior Court. The Hull Board of Selectmen is appealing a 2015 finding of a violation for a lack of specificity in an executive session notice topic. That is pending in Superior Court. The Southampton Board of Selectmen is appealing a 2017 decision finding an improper action in executive session. That is pending in Superior Court. Wayland is appealing a decision and the case is heading to the Supreme Judicial Court (*Boelter v. Wayland Board of Selectmen*). The Division is not a party but it has submitted an amicus brief. That appeal pertains to the distribution of documents ahead of a meeting. There is also a case where the complainant has appealed a determination issued with the Kingston Board of Selectmen. The Division did not find a violation in that case. There was a prior case where an individual appealed a determination and the Superior Court dismissed it because three registered voters can bring their own case to court. Only the public body may appeal. The Fall River Retirement Board has also filed an appeal, and the Division expects that to go to the Appeals Court. The Division received a favorable decision in Superior Court upholding the Division's finding of a violation by the West Bridgewater Board of Selectmen.

Mr. Sclarsic said that the Division has been sending monthly updates to various stakeholders about activities of the Division, highlighting guidance, the regulations, and new educational materials.

Mr. Sclarsic said that in March, the Division published new FAQs to its website to provide updated guidance to reflect decisions made in recent years.

Mr. Sclarsic indicated he would save his update about the regulations review for the later item on the agenda.

Mr. Ambrogi asked Mr. Sclarsic to send the Commission the West Bridgewater and Revere decisions. Mr. Sclarsic said he would email the decisions to the Commission.

Ms. Benedon asked if there are any other questions for Mr. Sclarsic about the Division's update.

David Rosenberg thanked the Division for the monthly e-update.

Mr. Ambrogi asked if anyone can join the newsletter. Mr. Sclarsic said people cannot automatically opt in to the newsletter, but the Division is working on adding a sign-up option on the website. Ms. Benedon asked how individuals can sign up now for the newsletter. Mr. Sclarsic said they can email OpenMeeting@State.MA.US.

Attorney General's Proposed Amendments to 940 CMR 29.00-29.10

Ms. Benedon proposed waiting until the Senator arrives to address the legislative update, and move on to the discussion of the proposed amendments to the regulations.

Mr. Sclarsic noted that there was a sheet in the packet about the pending bills.

Mr. Sclarsic said the Attorney General's Office promulgated emergency regulations in 2010 when the law was passed. They have been mostly the same since 2010.

Mr. Sclarsic said the Division now has the benefit of multiple years of experience with the Open Meeting Law and that it was valuable to look at the regulations this year and update them. The Division intends to make the process easier for the public and better for public bodies. The Division incorporated a lot of the feedback it has received over the years into the proposed regulation changes.

Mr. Sclarsic said the Division had an open comment in March and then reviewed the comments and proposed amendments to the regulations. The Division then opened the comment period until August 3, 2017 (the day after the meeting). The hearing was scheduled for August 3, 2017 (the day after the meeting). The Division had received about 15 comments. Once the comment period is closed, the Division plans to look at the comments and issue final regulations. After the regulations are issued, the Division will update the training materials and Open Meeting Law guide.

Mr. Sclarsic explained that the Open Meeting Law says the Commission shall submit recommendations to the Attorney General's Office. The Commission could give feedback during the meeting or submit it in writing. Mr. Sclarsic asked if the Commission would rather he walk the Commission through the proposed changes or take the Commission's questions.

Ms. Benedon said she looked through the proposed revisions and passed on suggestions to Mr. Sclarsic.

Mr. Hull asked if Mr. Sclarsic could explain the change in 29.04 (Certification). Mr. Sclarsic said that as the regulations are written, every member of the public body within 2 weeks has to sign the certification form. The educational materials include the Open Meeting Law Guide, Regulations, and the Open Meeting Law. The Division is adding a certification requirement that the public bodies receive a copy of each determination where the public body has been found in violation of the Open Meeting Law within the past three years. There is a lot of turnover among public body members and members might not be fully aware of determinations that put their public bodies at risk of more severe orders if they repeat violations. The Division hopes the new proposed requirement would not be too burdensome. Most public bodies will have 0 determinations, some will have 3, and some 6. The proposed regulations also clarify that public body members must recertify upon each reappointment.

Mr. Hull asked, for example, if the Conservation Commission would receive determinations of prior violations by the Conservation Commission. Mr. Sclarsic said that yes, the members would receive copies of those determinations as part of their certification materials. The materials would be distributed by the same person who distributes educational and certification forms, which is typically the clerk for municipalities.

Mr. Hull said he has a concern with 29.04, with removing the requirement that complainants file a copy of complaints with the Town Clerk. Mr. Hull said it's beneficial to have a point person in the community who keeps the records. Often public body members are part-time volunteers and might miss complaints.

Mr. Sclarsic said he appreciates that feedback. The Division is hoping to hear from people about that proposed change. Mr. Sclarsic said that where it becomes problematic is when someone files with the public body and not the clerk, and the Division has to determine whether a complaint is timely or not. The Division has not had many issues with a public body not responding to complaints. The Division's intent is to make it easier for the complainant. The Division is open to hearing from town clerks about whether the proposed change would relieve a burden or whether they see it as an important part of their jobs. The Division receives calls from clerks wondering what they are supposed to do with complaints, and we explain that there is no role for the clerk, other than receiving the complaint. If the clerks think it is necessary paperwork, the Division wants to hear that. If the clerks do not think its integral, that is important for the Division to know, too.

Mr. Ambrogi said he planned to submit testimony at the hearing.

Mr. Sclarsic said the hearing is more of a listening session. If there is something Mr. Ambrogi would like to discuss, Mr. Sclarsic would be happy to do that at the Commission meeting.

Mr. Ambrogi said that for the Newspaper Association, the change to 29.03 regarding notice posting requirements is a concern. Currently one of the options for posting notice is the newspaper. The change would remove the newspaper option. As the Commission has discussed many times, Massachusetts continues to have a major broadband problem. Poor, elderly, handicapped, and under-educated individuals don't have sufficient access. There are websites that do not work well. The Newspaper Association thinks the regulation change should go the

other way, to require notices to be posted in a newspaper. Part of you Division's premise was that few public bodies are posting in newspapers. However, 1000 meeting notices were published in newspapers this year. That is where the public looks for notices. If public bodies put them exclusively on a website, people have to go looking for them. People will not be routinely looking for them. People find out through looking through their newspaper. Mr. Ambrogi has a lot of statistics in a written statement from Pew.

Mr. Sclarsic said the feedback is helpful and he appreciates newspapers' perspectives. The option is not necessarily between a website and a newspaper. It is more between a website and a bulletin board. In October 2010, the Division created options where a public body could change its notice from what the statute requires (bulletin board), to an alternative (website). Not one public body has adopted the newspaper as its official notice posting location in 7 years. Many bodies do publish their notices in the newspaper, but it is not their legal notice posting location. A town with incomplete internet access can keep a bulletin board. Mr. Sclarsic said he is interested to read Mr. Ambrogi's testimony and hear the facts, and see if there is way the Division can continue to improve access to meeting notices.

Mr. Ambrogi said that Attorney General Healey is interested in promoting transparency. What is best for the town is not always what is best for the public.

Mr. Hull said he would be concerned with a requirement to post in a newspaper because of the cost. There is a requirement for public hearings to be published in newspaper. For regular Boards of Selectmen or Boards of Health, a requirement to post notice in a newspaper would be a problem.

Mr. Sclarsic said there is nothing that prevents a town from publishing in the newspaper. A lot of them put on a website and the bulletin board. It is more of a matter of identifying one legal notice posting location. It is a lot easier to update the meeting notice on a website than a newspaper. But it is an important consideration that newspapers reach a lot of people.

Mr. Ambrogi said that the Legislature passed an act requiring newspapers to put everything online.

Mr. Ambrogi said the other feedback of more substance pertains to mediation. The proposed regulations would create an option for mediation when a complainant has filed more than 5 complaints with one town. Mr. Ambrogi said he thinks it is a great idea and he endorses the idea in principle. He would be concerned though with the body seeking the mediation picking the mediator. There will be an appearance of bias that will be hard to overcome in effective mediation. He would recommend a process in which the Division appoints a mediator.

Mr. Sclarsic said he has already seen many comments about that and he appreciates the feedback. He would be open to adding it. The Division will look at other ways of having a mediator appointed, too.

Mr. Ambrogi said that the only other issue on the mediation piece is that it could be for 5 complaints against any public body in the community. Mediation is a process that happens

between parties. A dispute with one entity in a town may not be at all relevant to another entity. Maybe an individual is harassing one public body but has legitimate complaints with a different public body. It should only be invoked after complaints against one public body.

Mr. Sclarsic said it has not been “apple and oranges.” The Division struggles with how to address the issue of complainants filing over and over again. When a public body feels it is being harassed, there is nothing currently that the Division can do. It is often the town that the complainant is upset with, so they are filing complaints with public bodies. Because the public body needs to want to go to mediation, the Division hopes that it would be used for only ongoing conflict. It would not prejudice the complainant. The town would be unlikely to seek mediation if there are separate issues. It is intended to give public bodies an option for resolving issues.

Mr. Ambrogio said he would raise his other concerns in feedback at the hearing.

Ms. Benedon asked if there were any other comments or questions.

Mr. Sclarsic introduced himself to Senator Timilty, who arrived during the discussion about the regulations.

Mr. Hull asked whether the proposed regulations would allow the Division to nullify a public body’s action earlier in the complaint resolution process.

Mr. Sclarsic said that the Open Meeting Law does not allow the Division to issue a fine without going to a hearing first. The regulations established a process for doing that, which involves an administrative law judge. The hearing process can take several months. The Open Meeting Law does not require a hearing for any other types of actions ordered. The regulations as they were passed in 2010 requires the Division to go to a hearing to nullify a decision. This has ended up favoring the public body. It takes 30-90 days for a complaint to be filed with the Division, then time to investigate the complaint. Then if the Division decides to order a public body to nullify an action taken, it takes several months to go through the administrative hearing process. If a permit was prejudiced, by removing that specification in the regulations, the Division would be able to make that decision more quickly. If the board decides they want to appeal, can go directly to court. The Division’s hope is that it would be more effective this way.

Mr. Hull said the nullified action would become moot over time if the hearing requirement stayed. If a complaint is made, there should be a presumption of innocence until evidence to the contrary. Mr. Hull is not sure that it would play out in the proposed change.

Mr. Sclarsic said the Division is very sensitive to ever ordering nullification. The Division has rarely if ever done it, partially because it takes a while, but also because it is unusual. Where the Division does need to actually order a public body to nullify a decision, that is something the Division wants to be able to do quickly so the parties would not be harmed. The Division never presumes there is a violation. Rather, the Division investigates complaints. The Division has a process by which the complainant files with the board, the board responds, and if the complainant files with the Division, the attorneys reach out to the Board.

Ms. Benedon said she communicated a few comments to Mr. Sclarsic, which she wanted to share with the Commission too. Ms. Benedon had a few suggestions for 29.03, mainly to use consistent wording in sections and subsections. The Division is referring to the same thing in different language. With regard to 29.03(6), where the public body must notify to the Attorney General's Office in writing of the website where the notices will be posted, Ms. Benedon wants to clarify that the town must specify which page specifically. An individual should not have to navigate a whole website. Also, in terms of 39.11(2), which includes guidance about timeliness of meeting minutes. For some public bodies, with a general rule for 3 meetings, that might be a long time. There could be public bodies that would not approve minutes for a year or two.

Mr. Sclarsic said 29.11 is the one section the Division proposed to add. The regulations did not previously have a section about minutes. The Open Meeting Law says minutes must be approved in a "timely manner," which is challenging to enforce. Most of the comments the Division has received have been about this. The Division will probably be tweaking the language to achieve that balance. What about a public body that during Town Meeting season is meeting every night? Do they have to review minutes every night? That is why the Division said "regular." Ms. Benedon's concern is valid. The Division will continue to tweak the language to provide clarity to the public and public bodies. A section about minutes in the regulations would help the Division on the enforcement end. The Division does not want to make a rigid requirement, especially for cases with external factors involved.

Rep. Benson explained that she formerly served as recording secretary for multiple boards at a time. Without employee assistance, it is a big job. Having a short turnaround time is problematic for a lot of people. It is a tall order to get minutes out within a few weeks. Rep. Benson said the Commission has to be realistic about what volunteers can do and by when.

Mr. Sclarsic said he does not know what the magic number is. The Division will not be so rigid that it will be finding violations every time. The concern is more about when public bodies ignore their responsibility to create minutes within a reasonable time.

Mr. Hull said that if a public body meets every four months, the regulations could require it to approve minutes within 6 months, or however many meetings.

Rep. Benson proposed that as an alternative, each committee could be required to maintain a posted policy about when minutes would be posted after a meeting. Then the public would have an expectation of when minutes would become available.

Sen. Timilty said that he represents 10 towns. People quite often volunteer and cannot keep up with rapid-fire meetings. The Commission is supportive of transparency, but it should also be mindful of not putting up bars and markers that burden people doing municipal work who do not have personnel to support them.

Mr. Sclarsic said the Division will also issue guidance on its website. To the extent that the Division cannot address certain circumstances in the regulations, such as Town Meeting, the Division will provide informal guidance. The Division wants it to be an appropriate balance.

Ms. Benedon said that Commission members and members of the public are encouraged to submit public comment.

Mr. Timilty said that he was not in attendance at the March 8, 2017 meeting due to a family emergency and that a staff member from his office was present.

Status of bills pertaining to the Open Meeting Law filed in the Legislature

Ms. Benedon said that there is a summary of the bills in the meeting packet. She asked whether Senator Timilty would like to share any updates on legislation.

Senator Timilty explained that the Joint Committee on State Administration and Regulatory Oversight is transitioning in leadership. Representative Benson is the new House Chair. The Committee is poised to schedule hearings for the rest of the year. Every bill will be scheduled to a hearing and public will be heard.

Public Comment

Ms. Benedon opened the floor to public comment.

No public comments.

Items not reasonably anticipated by the Chair 48 Hours in advance of the meeting

Ms. Benedon asked whether there were any items not reasonably anticipated for discussion.

No items not reasonably anticipated by the Chair.

Scheduling Next Commission Meeting

Ms. Benedon recommended that the Commission transition to discussing scheduling for the next Commission meeting. Typically, the Commission attempts to schedule a meeting for every 6 months. The August 2nd meeting was scheduled sooner because of the proposed regulations. Ms. Benedon thanked everyone for attending so that the Commission could have a robust conversation about the regulations. Ms. Benedon asked Mr. Sclarsic if he anticipated requiring additional feedback from the Commission about the proposed regulations.

Mr. Sclarsic said that once the comment period closes, the Division will review the comments, come up with new language, and then at some point in September, the Division will release revised regulations and educational materials. It would be up to the Commission whether they would like another opportunity to provide additional feedback.

Ms. Benedon proposed scheduling the next Commission meeting for January, and that the scheduling be done through email as in the past.

Mr. Ambrogi moved to adjourn the meeting. Sen. Timilty seconded the motion. **By unanimous vote (5-0), the meeting adjourned.**

List of Documents Used by the Commission during the Meeting

1. OMLAC Meeting Notice for August 2, 2017
2. Minutes from OMLAC Meeting of March 8, 2017
3. Explanations for the Attorney General's Proposed Revisions to the Open Meeting Law Regulations, 940 CMR 29.00-29.10
4. Proposed Revisions to the Open Meeting Law Regulations, 940 CMR 29.00-29.10 (Clean version)
5. Proposed Revisions to the Open Meeting Law Regulations, 940 CMR 29.00-29.10 (Redlined version)
6. Summaries of Bills Pertaining to the Open Meeting Law
7. Open Meeting Law Fall Regional Training and Webinar Training Schedules