

# TRANSCRIPT

## Open Meeting Law Web Training

### **1. Introduction/Definitions**

#### Slide 1

Welcome to the Massachusetts Attorney General's training on the Open Meeting Law. During this training, we'll explain the requirements of the Open Meeting Law so that you as a member of the public, the press, or a public body can understand and follow the law. Please note that this presentation is current as of March 2018. Please check with the Attorney General's office to ensure that a more recent presentation has not been published. You can do so by visiting the Attorney General's Open Meeting Law website at [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting).

This training is divided into 6 parts. You can view the entire training by watching each part in order, or you can skip to any particular part you'd like to review. The run time for the entire presentation is approximately one hour.

#### Slide 2

The Open Meeting Law tries to strike a balance between government accountability/transparency and government efficiency. The law ensures transparency by requiring public bodies to post notice of their meetings, conduct deliberations in public view, and provide public access to both their meetings and certain documents.

The law also enables the government to efficiently and effectively manage its operations by allowing certain deliberations to take place in executive, or closed, session. Finally, the law permits public bodies to maintain the confidentiality of certain executive session records.

#### Slide 3

The Division of Open Government within the Attorney General's Office is responsible for educating and training public officials and members of public bodies on the requirements of the Open Meeting Law. The Division also has the authority to promulgate regulations to interpret and enforce the law. You can find the Attorney General's Open Meeting Law regulations on our website.

The Division also provides guidance on the Open Meeting Law's requirements through a hotline that the public can call with questions. The hotline number is 617-963-2540. Questions can also be emailed to the Division at [openmeeting@state.ma.us](mailto:openmeeting@state.ma.us). We also provide monthly webinars where staff attorneys speak about the Open Meeting Law and answer questions in real time.

Finally, the Division addresses Open Meeting Law complaints filed against public bodies. The Division investigates complaints, makes findings and, if necessary, brings enforcement actions. All of the Attorney General's Open Meeting Law determinations are available on the Attorney General's website, along with other educational guidance such as checklists for the creation of meeting notices and minutes, and answers to certain frequently asked questions.

#### Slide 4

The Open Meeting Law requires that all public body members sign a certification form within two weeks of taking an oath of office or, if no oath is required, before beginning performance of the office. Public body members must certify that they've received copies of the Open Meeting Law, the Open Meeting Law regulations, the Attorney General's Open Meeting Law Guide, and Open Meeting Law determinations issued to the member's public body within the last five years in which the Attorney General found a violation of the law; members also certify that they've read and understand the consequences for violating the law. For local public bodies, these materials should be provided by the municipal clerk, either in digital or paper form. For regional, district, county and state public bodies, they should be provided by the appointing authority, the executive director, or another administrator or designee. The certification form, as well as the Guide, can be found at the Attorney General's website.

The person distributing the materials should retain the certifications as a public record. The Office of the Attorney General does not need to receive a copy.

A public body member must sign a new Certificate upon reelection or reappointment to the public body but need not sign a Certificate when joining a subcommittee.

#### Slide 5

This presentation covers a number of aspects of the Open Meeting Law, however there are some basic principles that we'd like you to keep in mind. First, whenever a public body holds a meeting, the public must be given proper notice of the meeting.

Second, all meetings must be open and accessible to the public, unless the public body properly enters into executive, that is closed, session.

Third, public bodies must create and maintain accurate minutes for all meetings, including both open and executive sessions.

Finally, there's a complaint process, whereby a person may file a complaint alleging that a public body violated the Open Meeting Law. We'll discuss later the ways that Open Meeting Law complaints can be filed.

## Slide 6

The Open Meeting Law only applies to public bodies, and a question we are asked frequently is whether or not an entity is a public body. To make that determination, the best place to start is with the Open Meeting Law's definition of the term Public Body. A public body is defined as a multiple-member board, commission, committee or sub-committee, however created, elected, appointed, or otherwise constituted, that's established to serve a public purpose.

This is a very broad definition, but it's important to note that a public body must have multiple members. An individual public official cannot be a public body, and therefore does not have to comply with the Open Meeting Law, unless that individual is serving as a member of a public body. Also, note that a public body can be any type of multiple-member board, regardless of what it's called. It can be called a committee, a task force, an ad-hoc committee, or a working group, but if it meets this definition, it is a public body.

Subcommittees are also public bodies. A subcommittee includes any multiple member board created to advise or make recommendations to a public body.

There is a judicially recognized exception to the definition of public body. This is the Connelly exception, and it was created in 1991 by the Supreme Judicial Court in the case of Connelly versus School Committee of Hanover. The Connelly exception states that where an individual public official voluntarily creates a body to advise that person on a decision that he or she has the sole authority to make, that committee is not subject to the Open Meeting Law.

In the Connelly case, the superintendent of schools had the sole authority to recommend a candidate for the position of principal to the school committee for confirmation. The superintendent decided to create a committee to interview candidates and make recommendations to him. This committee consisted of members of the public as well as school officials and even some school committee members. And the Court found that because the committee was created by the superintendent solely to advise the superintendent, and because the superintendent could have interviewed and chosen a candidate without creating a committee, the committee was not a public body and therefore was not subject to the Open Meeting Law.

Note however, that if it had been the school committee that had the power to choose the new principal, and the school committee decided to create a committee to interview candidates, the committee would have been a public body subject to the Open Meeting Law.

## Slide 7

There are also several statutory exclusions to the Open Meeting Law's definition of public body. The Massachusetts state legislature and its committees are not public bodies.

Bodies of the judicial branch, such as judicial panels or juries, are also not public bodies. Not for profit organizations are not public bodies. Bodies created by one of the six constitutional officers solely to advise that constitutional officer are also not public bodies. However, this applies only to the Governor, the Lt. Governor, the Secretary of State, the Attorney General, the State Auditor and the Treasurer.

In addition, all bodies that are not established to serve a public purpose are not public bodies for purposes of the Open Meeting Law. For example, an office committee to plan a retirement party for a colleague will likely not be a public body. Finally, groups that do not take any collective action are not public bodies. For example, focus groups - where a public official invites all interested persons to attend a meeting and provide feedback on an issue of concern, but no votes will be taken, or report produced, and there is no required number of attendees, such groups generally will not be considered public bodies.

#### Slide 8

There are different types of public bodies: State, local, regional, district, and county. These distinctions matter only for the process of filing meeting notices and authorizing remote participation.

State public bodies include bodies such as the Open Meeting Law Advisory Commission, the Massachusetts Gaming Commission, and the UMass Board of Trustees. Note also that charter school Boards of Trustees are considered state public bodies, not local.

Local public bodies can include the Board of Selectmen, School Committee, and Planning Board. The governing board of a local housing or redevelopment authority is also considered a local public body.

Regional or district public bodies are those with a jurisdiction that covers more than one municipality. Regional school committees, water commissions, and planning commissions are all examples of regional or district public bodies.

County public bodies may exist in areas that still have a county government. Boards of County Commissioners, County Retirement Boards, and a County Charter Review Commission are some examples of county public bodies.

#### Slide 9

Now here are some examples of entities that are not public bodies.

At the state level, the legislature is statutorily exempt from the Open Meeting Law. The Judicial Nominating Commission is also not a public body because it's a body created to advise a constitutional officer, namely the Governor. The Massachusetts Municipal Association is also not a public body because it's a private, not-for-profit entity.

At the regional level, a regional high school boosters club is also a private organization, so it's not considered a public body.

At the local level, neighborhood watch associations and parent-teacher organizations are generally private organizations that are not created by government, and therefore are not public bodies. Local political groups, such as Republican and Democratic town committees, are not subject to the Open Meeting Law.

#### Slide 10

Once you've determined that a group is a public body, the next step in figuring out whether the Open Meeting Law applies is to look at what the group is doing, specifically whether it's deliberating.

Deliberation is defined as an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction.

This is also a very broad definition. It covers any communication, whether in person, over the phone, or through email, between or among a quorum of a public body. For purposes of the Open Meeting Law, a quorum is defined as a simple majority of the members of the body, unless otherwise provided in a general or special law, executive order or other authorizing provision.

#### Slide 11

Fewer than a quorum of a body's members can discuss matters within that body's jurisdiction without that communication being a deliberation. So if three members of a seven-member committee, for instance, decide to meet to discuss committee business, that would not be a deliberation, provided those three members are not a subcommittee.

However, public body members should be careful to avoid serial communications between a quorum. For example, if there's a five-member board, and member A calls member B, then member B calls member C and relays what he just discussed with member A, this could constitute a deliberation, because the communication has now reached 3 members which would be a quorum. This is a particular problem with conversations over email that are forwarded from one member to another, or on which a quorum of the members are copied. We therefore caution members of public bodies to avoid email communications except for specific, exempt activities.

For instance, members of a public body may distribute via email or by hand a meeting agenda, procedural or scheduling information, and generally that will not constitute deliberation. Reports or documents to be discussed at a meeting can also be distributed to a quorum of a public body without constituting deliberation. These exceptions only apply, though, if the person distributing the agenda, document, or scheduling information doesn't express any opinion on matters within the body's jurisdiction.

For instance, a public body member can email the rest of the members of the public body a report generated by a consultant to be discussed at the next meeting. However, the distributor cannot comment in the email that he or she agrees with the report and thinks the body should approve it at the next meeting.

Finally, there is no deliberation where a public body, such as Board of Selectmen, discusses whether to recess and continue Town Meeting due to a weather-related or public safety emergency. Discussion must be limited to this narrow subject, however.

## Slide 12

The next important definition is that of meeting. A “meeting” is a deliberation by a public body with respect to any matter within the body’s jurisdiction. So, if a quorum of the members of a public body expect to deliberate, they must hold a meeting and provide notice to the public.

Again, there are statutory exclusions to this definition. First, an on-site inspection by a quorum of a public body is not considered a meeting, provided the members do not deliberate. Thus, members of a school committee may tour a new school and take notes for discussion at a subsequent open meeting, but may not deliberate while on the tour.

A quorum of a public body may also attend an event or training, provided they don’t deliberate. So if all the members of the school committee attend a holiday party, for instance, but they don’t discuss school committee business, they don’t have to post notice for a meeting.

A quorum of a public body may also attend the meeting of another public body, provided they don’t deliberate. Members of a public body may participate in the meeting of another public body if they communicate only by open participation, such as by sitting in the audience and addressing the public body on the same terms as members of the public, and again, do not deliberate. If a quorum of a public body wants to deliberate during a meeting of another public body, then the two bodies should notice and hold a joint meeting.

Meetings of quasi-judicial boards for the sole purpose of making a decision in an adjudicatory proceeding are also not considered meetings subject to the Open Meeting Law. This exception only applies to certain state public bodies that conduct adjudicatory proceedings, and it’s not available to local public bodies, such as Zoning Boards of Appeal or Boards of Health.

Finally, sessions of Town Meeting, the formal legislative session of many municipalities, are not meetings subject to the Open Meeting Law. The Attorney General interprets this exemption to mean that all communications between Town Meeting members about Town Meeting are exempt from the requirements of the Open Meeting Law, even if they

occur outside of a session of Town Meeting. Thus, the Division of Open Government will not investigate Open Meeting Law complaints concerning such discussions.

## 2. Notice

### Slide 13

This section of the presentation covers the Open Meeting Law's meeting notice requirements. Please note that this presentation is current as of March 2018. Please check with the Attorney General's office to ensure that a more recent presentation has not been published. You can do so by visiting the Attorney General's Open Meeting Law website at [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting).

Except in an emergency, a public body must post notice of every meeting at least 48 hours in advance, not including Saturdays, Sundays, and legal holidays. So for a Monday meeting, notice must be posted by the previous Thursday, assuming Monday is not a legal holiday.

Each notice must include, at a minimum, the date, time, and place of the meeting, and a listing of topics that the chair reasonably anticipates will be discussed at the meeting. The topics must be described with enough detail so that a member of the public will understand what will be discussed at the meeting. Broad topics such as new business or old business are not sufficiently specific, though they may be used as headings under which more specific topics are listed.

Public bodies may discuss topics that were not listed in a meeting notice if the topics were not reasonably anticipated by the chair 48 hours in advance of the meeting. Thus, public bodies may include a topic for public comment or open forum. However, our office strongly encourages public bodies to postpone taking action on any subject that arises for the first time during a meeting, particularly if the subject is controversial or of concern to members of the public, until appropriate notice of the discussion can be given to the public.

Finally, notices must also include on the face of the notice, or with the notice, the date and time the notice was posted. This applies to any revised notice as well. Notices revised within 48 hours of a meeting must include the date and time that the original notice was posted, and the date and time of the revision. This serves the dual purpose of letting the public know the body has complied with the law's posting requirements, and assisting our office in resolving a complaint that alleges that the body failed to comply with the law.

### Slide 14

Public bodies do not have to post notice 48 hours before an emergency meeting. An emergency is a sudden, generally unexpected occurrence or set of circumstances demanding immediate action. An example of an emergency is a water main break or a

flood, something that requires a public body to immediately take action and usually includes issues involving health or public safety. A forgotten deadline or scheduling conflicts among members generally will not constitute a valid basis for an emergency meeting.

If a public body holds an emergency meeting, the public body must post notice as soon as reasonably possible prior to that meeting.

#### Slide 15

The next few slides cover how to post the notice for a meeting. Local public bodies must file a meeting notice with the municipal clerk. The notice must be posted in a manner conspicuously visible to the public, including persons with disabilities, at all hours in or on the municipal building where the clerk's office is located. Some towns use an outdoor bulletin board or a binder of notices in a weatherproof box to comply with this requirement.

Alternatively, a municipality may adopt its website as the official location for notice posting. Prior to utilizing the municipal website, the Chief Executive Officer of the municipality must authorize or vote to adopt such website as the official method of posting notice. The clerk of the municipality must inform the Division of Open Government of its notice posting method and must inform the Division of any future changes to that posting method. Public bodies must consistently use the most current notice posting method on file with the Division. A description of the website, including directions on how to locate notices on the website, must also be posted on or adjacent to the main and handicapped accessible entrances to the building where the clerk's office is located.

If a municipal website is used, the clerk must still keep a paper copy of the notice available for the public to view during the clerk's regular business hours.

#### Slide 16

Regional or district public bodies must post notice in each city or town within the region or district in the manner prescribed for local public bodies, or may post to website as an alternative method of notice posting. Once again, any public body choosing to use an alternative posting method must inform the Division of Open Government.

For a regional school district, the secretary of the regional school district is the clerk of the school district and shall file the notice with the clerk of each city or town in the district, or may post notice to a website as an alternative notice posting method.

County public bodies must post notice with the office of the county commissioner and a copy of the notice must be posted in a manner conspicuously visible to the public at all hours in a place or places designated by the county commissioners, or they may post to a website as an alternative notice posting method.



## Slide 17

State public bodies must post their meeting notices to a website. The website can be either the website of the public body, or the website of its parent agency.

State public bodies must notify the Attorney General of the location of the website where meeting notices will be posted, but do not have to send the Attorney General a copy of every notice.

State public bodies do need to send a copy of each meeting notice to the Regulations Division of the Secretary of State's Office. Notice can be sent by email to [regs@sec.state.ma.us](mailto:regs@sec.state.ma.us).

## Slide 18

There are some common concerns regarding notice posting.

A question we frequently receive is "What do I do if a topic comes up before the meeting, but after notice has been posted?" Public bodies are encouraged to update the meeting notice, if possible, if they become aware within the 48 hour period before the meeting of a new topic that will be discussed at the meeting.

One way to prevent this problem is for chairs to avoid posting notice so far in advance that there is a high likelihood new topics will arise. Public bodies that wish to give the public additional notice of the dates it plans to meet may publish a schedule of all their meeting dates for a year. However, that schedule will not suffice as the Open Meeting Law notice until the updated listing of topics is added closer to the time of the meeting.

We are also frequently asked "What do I do if the clerk can't post notice in time?" Chairs of local public bodies are encouraged to work with municipal clerks to enable sufficient time for posting. Responsibility for ensuring compliance with the Open Meeting Law lies with the public body, not the clerk. It is therefore important to be familiar with the clerk's schedule. Some municipal clerks' offices are closed on Fridays, or have reduced hours on certain days. A notice is considered posted when it is published to the public, not when it is received by the clerk.

Meeting cancellations do not require 48 hours' notice; they can be cancelled at any time. However, we encourage public bodies to update the notice posting when a meeting is cancelled.

Meetings that are continued, or cancelled and rescheduled, must comply with all notice requirements of the Open Meeting Law. A public body cannot adjourn a meeting one night, and then reconvene the next night, unless 48 hours' notice has been posted.

Finally, it's important to note that other laws may require additional notice for certain meetings. For example, some public hearings require two weeks' notice and publication of the notice in a newspaper, in addition to the Open Meeting Law's notice requirements.

#### Slide 19

Notices should be easy to find on a website. Notices should be listed either in a central page, where all notices are kept like a calendar page; or they should be listed on the public bodies' specific page. So, for example, the notice for a Board of Selectmen meeting would be listed on the page that is designated for the Board of Selectmen. It is best to avoid posting in multiple locations on a website unless they are all linked to the same document.

Where a public body adopts a website as the official method of posting notices, it must make every effort to ensure that the website is accessible at all hours. If a website becomes inaccessible within 48 hours of a meeting, not including Saturdays, Sundays or legal holidays, the website must be restored within six business hours of the discovery. If the website is not restored within six business hours, the public body must re-post notice of its meeting to another date and time.

### **3. Accessibility/Remote Participation/Public Participation**

#### Slide 20

This section of the presentation covers the Open Meeting Law's requirements for accessibility, remote participation, and public participation in meetings. Please note that this presentation is current as of March 2018. Please check with the Attorney General's office to ensure that a more recent presentation has not been published. You can do so by visiting the Attorney General's Open Meeting Law website at [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting).

Public bodies must ensure that open meetings are accessible to the public. Access to a meeting must include the opportunity to be physically present as well as to see and hear what is being discussed by the members of the public body. Thus, public bodies must take reasonable steps to accommodate anticipated crowds, and must meet in locations that are accessible to persons with disabilities.

The Attorney General's Civil Rights Division is available to assist the public in meeting the requirements of laws including the Americans with Disabilities Act, the Federal Rehabilitation Act of 1972, and certain state law provisions. If you have questions about how to comply with any of these laws, please call the Civil Rights Division at (617) 963-2939.

Finally, though meetings should be held in locations that do not discourage public attendance, public bodies may meet in buildings with security policies intended to ensure the safety of building employees. Note, however, that security policies may not be used

as a pretext for unlawfully excluding certain members of the public from open meetings, and our office generally discourages any policy that excludes interested members of the public from a meeting.

#### Slide 21

The Attorney General has authorized the use of remote participation during meetings of public bodies if the practice has been adopted by the appropriate entity. Remote participation should be used as a means of increasing participation in government, and not as a means of undermining the spirit of the Open Meeting Law. The Attorney General strongly encourages members of public bodies to physically attend meetings whenever possible.

Before members of a public body may participate in a meeting remotely, remote participation must be adopted as follows:

For local public bodies, the Chief Executive Officer must authorize remote participation for all public bodies in the municipality. Generally, this will be the Board of Selectmen or the Mayor, depending on the municipal charter.

For county public bodies, the county commissioners must authorize remote participation for all county public bodies in that area.

For all other public bodies, including state and regional public bodies, a simple majority of the public body members must vote to authorize remote participation, with that vote applying to all subsequent meetings.

Local commissions on disability may authorize remote participation through a simple majority vote of the commission's members. These commissions may vote to authorize remote participation for a specific meeting or for all of their meetings, and do not need approval by the municipality's chief executive officer.

#### Slide 22

If remote participation has been adopted, public body members can participate in meetings remotely if physical attendance would be unreasonably difficult.

There are certain minimum requirements that public bodies must meet when using remote participation during a meeting. The remote participants, and all persons present at the meeting location, must be clearly audible to each other. Also a quorum of the body, including the chair, or in the chair's absence, the person authorized to chair the meeting, must be physically present at the meeting location. If a local commission on disability has adopted remote participation, however, only the person chairing the meeting must be physically present at the meeting location. All other members may participate remotely.

Members who participate remotely and members present at meeting location must be clearly audible to each other. Finally, members of all public bodies who participate remotely may vote and shall not be deemed absent from the meeting.

#### Slide 23

If a member of a public body anticipates needing to participate in a meeting remotely, that person must first notify the chair as soon as reasonably possible before the meeting. If the chair determines that the person's physical attendance would be unreasonably difficult, then the chair must announce at the beginning of the meeting who is participating remotely. This information also must be included in the meeting minutes.

During a meeting at which a member of a public body is participating remotely, all votes must be taken by roll call. A public body member may participate remotely during an executive session, but he or she must state first at the start of the executive session that no other person is present or able to hear the discussion at the remote location, unless the presence of that person has been approved by a simple majority vote of the public body.

Whenever feasible, the person chairing the meeting should distribute to remote participants, in advance of the meeting, copies of any documents or exhibits that he or she reasonably anticipates will be used during the meeting. If used during the meeting, such documents are part of the official record of the meeting, and must be listed in the meeting minutes.

Acceptable methods for remote participation include telephone, internet, or satellite enabled audio or video conferencing. Any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another is also acceptable. Participating by online chat or text message however is not permitted. The public body may choose which method of remote participation it wants to use.

When a public body uses video technology, the remote participant must also be clearly visible to all persons present at the meeting location. However, the public body is not required to make the entire meeting room visible to the remote participant.

If technical difficulties arise during a meeting, the person chairing the meeting may decide how to proceed, but is encouraged, wherever possible, to suspend discussion while reasonable efforts are made to correct any problem that interferes with a remote participant's ability to hear or be heard clearly by all persons present at the meeting location. If technical difficulties result in a remote participant being disconnected from the meeting, that fact and the time at which the disconnection occurred must be noted in the meeting minutes.

Slide 24

The Open Meeting Law was meant to ensure public access to the activities of government, but it does not guarantee the public an absolute right to participate in meetings. Members of the public have a right to attend any open session of a public body's meeting. However, the chair has discretion over who may speak during a meeting, and members of the public may not address the body without permission of the chair. We strongly encourage chairs to give the public an opportunity to comment, however, especially where the discussion involves a topic that is controversial or of great public interest.

Members of the public have the right to make an audio or video recording of any open session meeting, provided they notify the chair first. Once notified, the chair cannot prohibit a person from recording an open meeting. The chair can set reasonable requirements as to the placement and operation of the equipment so that it doesn't interfere with the conduct of the meeting. If a person informs the chair that the meeting is being recorded, the chair must then inform the other attendees at the beginning of the meeting or when the recording begins.

Finally, the chair has the authority to keep control of the meeting. If a person is disruptive, the chair can give that person a clear warning to stop. If the person continues to be disruptive during the meeting, the chair can order that person to leave, even where the disruptive individual is a member of the body. If the person does not leave, the chair may authorize a police officer to remove the person from the meeting.

#### **4. Executive Session**

Slide 25

This section of the presentation covers the Open Meeting Law's requirements for executive sessions. Please note that this presentation is current as of March 2018. Please check with the Attorney General's office to ensure that a more recent presentation has not been published. You can do so by visiting the Attorney General's Open Meeting Law website at [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting).

The Open Meeting Law allows public bodies to conduct closed, or executive session meetings in certain circumstances. There are 10 purposes for executive session, and a public body may only enter executive session for one of those 10 purposes.

Before entering executive session, there are a number of procedural steps a public body must take. Failure to take these steps could result in nullification of any action taken during the executive session.

A public body must convene in open session prior to going into executive session. It is not appropriate, for example, for a public body to hold an executive session at 6:30 p.m.

and then hold its open meeting at 7 p.m. The body must convene an open, public meeting first, and then follow the procedures in public to enter executive session.

When entering executive session, the chair must publicly state the purpose or purposes for the executive session. The chair must provide as much detail as possible about the reason for the executive session without compromising the purpose for confidentiality. This level of detail about the discussion topic should also be included in the meeting notice, provided the executive session was reasonably anticipated by the chair 48 hours before the meeting. While we generally defer to public bodies' assessment of whether the inclusion of specific details would compromise the purpose for an executive session, a public body must be able to demonstrate a reasonable basis for that claim if challenged.

The public body must conduct a roll call vote to enter executive session and obtain a majority vote of the members.

Before entering executive session, the chair must inform the public whether the body will reconvene in open session after the executive session, or if it will adjourn from the executive session.

At the start of the executive session, if any members of the public body are participating remotely, they must state for the record that no other person is present at the remote location, unless approved by the body.

During the executive session, the public body must maintain minutes of the meeting, and retain any documents used by the public body. This is particularly important because, since these discussions occur outside of public view, the minutes are the only way the public knows what was discussed.

It is important that the executive session remain focused on only those matters for which the executive session was lawfully called. If the executive session was called to discuss litigation, for instance, it is not appropriate to discuss other items such as contracts, even if the discussion would have been appropriate for executive session had the topic been announced. The chair must moderate the discussion and keep members from straying to topics that were not announced or are not appropriate for the executive session.

Finally, to create the clearest possible record, all votes taken during executive sessions must be recorded by roll call and included in the minutes.

## Slide 26

Purpose 1 allows a public body to enter executive session “to discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual.”

A public body may not use Purpose 1 to discuss the professional competence of an individual. Employee evaluations and annual reviews must be conducted in open session. Discussions of professional competence can only occur in executive session if they are directly related to a complaint against or discipline of an individual.

If a public body enters executive session under Purpose 1, the public body must afford the individual being discussed certain rights. Failure to do so could result in nullification of any action taken by the public body during the executive session, and possible reinstatement of a dismissed employee.

The public body must notify the person being discussed in writing at least 48 hours before the proposed executive session. The individual has the right to request that the discussion be conducted in open session, and the public body cannot deny this request. The individual also has a right to be present at the executive session during deliberations that involve him or her. The individual has a right to have counsel or another representative present for the purpose of advising the individual, but not for the purpose of active participation. The individual has a right to speak on his or her own behalf during the session. Finally, the individual has the right to create an independent record of the session through audio-recording or transcription, at his or her own expense.

Note that a public body is not required to discuss any topic in executive session. Thus, if a public body chooses to discuss a topic in the open that may be appropriate for executive session under Purpose 1, it may do so, and the subject of the discussion cannot force the body to discuss the subject behind closed doors.

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Purpose 2 allows a public body to enter executive session to conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

When discussing the contract of non-union personnel, there is a presumption that professional competence of the individual has already been discussed in open session. It is not appropriate to use this executive session purpose to perform an annual review of an employee's performance if one has not already occurred in open session, however how a performance evaluation affects a contract negotiation can be an appropriate part of the executive session discussion.

While a public body may agree on terms with individual non-union personnel in executive session, the final vote to execute such agreements must be taken by the public body in open session.

Generally, a public body must identify the specific nonunion personnel or collective bargaining unit with whom it is negotiating before entering into executive session under Purpose 2. A public body may withhold the identity of the non-union personnel or bargaining unit if publicly disclosing that information would compromise the purpose for

which the executive session was called. Public body must be able to demonstrate a reasonable basis for this claim if challenged.

#### Slide 28

Purpose 3 allows a public body to enter executive session to discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares. The chair must declare publicly before entering executive session that deliberating in open session would have a detrimental effect on the public body's bargaining or litigating position.

When entering executive session to discuss strategy with respect to litigation, the litigation must be pending in court, or imminently threatened or demonstrably likely. It is not appropriate to enter executive session simply because a party has an attorney, or has a right to appeal a decision by the public body.

In contrast to non-union employee negotiations, a public body may approve final terms and execute a collective bargaining agreement in executive session. However, once a public body has approved the collective bargaining agreement, the public body should disclose the agreement in open session following the agreement's execution.

Generally, a public body must identify the collective bargaining unit with which it is negotiating or the litigation matter it is discussing before entering into executive session under Purpose 3. A public body may withhold the identity of the collective bargaining unit or name of the litigation matter if publicly disclosing that information would compromise the purpose for which the executive session was called.

#### Slide 29

Purpose 4 allows a public body to enter executive session to discuss deployment of security personnel or devices. Examples include discussing security detail at an event or parade route, or discussing the location of security cameras. This purpose may not be used to discuss police contracts or employment in executive session.

Purpose 5 allows a public body to discuss matters of criminal misconduct in executive session, and includes the discussion of referrals to law enforcement authorities. Unlike Purpose 1, this executive session purpose does not require that the public body inform the person who is the subject of the discussion, or state the individual's name in the meeting notice.

#### Slide 30

Purpose 6 allows a public body to enter executive session to consider the purchase, exchange, lease or value of real property, if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body. The public body



must be considering the purchase, sale, lease or value of real estate. General discussions of land use are not appropriate under this executive session purpose. The chair must also declare publicly before entering executive session that deliberating during an open session would have a detrimental effect on the public body's negotiating position.

Generally, the body should identify the specific piece of property it plans to discuss before entering executive session, unless disclosure of this information would compromise the purpose for secrecy.

#### Slide 31

Purpose 7 allows a public body to enter executive session to comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements. The public body must cite the specific statute, or federal grant-in-aid requirement, that requires confidentiality or a closed session. For example, the law requiring that abatement applications be kept confidential. We strongly recommend consulting with counsel before entering executive session under this purpose, as it may require a legal determination.

Prior to entering into executive session, the public body should disclose the specific statute that requires confidentiality, unless public disclosure would compromise the purpose for secrecy.

#### Slide 32

Purpose 8 allows a public body to enter executive session to consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening.

A preliminary screening committee need not include any members of the parent body but, if it does, it must consist of less than a quorum of the parent public body. People who are not members of the parent public body may also be members.

A preliminary screening may include resume review and more than one round of interviews resulting in the recommendation of two or more finalists to the parent body. Once there are finalists, however, all additional interviews must be conducted in open session.

Before entering executive session under this purpose, the chair must declare that an open meeting will have a detrimental effect in obtaining qualified applicants.

## Slide 33

Purpose 9 allows a public body to enter executive session to confer with a mediator on a litigation or other decision during a formal mediation process. Note, though, that the decision to participate in mediation must be made in an open session meeting.

The last purpose, Purpose 10, applies to a select few public bodies. It allows them to enter executive session to discuss trade secrets in the course of activities conducted by a public body as an energy supplier. These are public bodies organized to supply energy pursuant to specific state laws.

### **5. Minutes and Records**

## Slide 34

This section of the presentation covers the Open Meeting Law's requirements for meeting minutes and records. Please note that this presentation is current as of March 2018. Please check with the Attorney General's office to ensure that a more recent presentation has not been published. You can do so by visiting the Attorney General's Open Meeting Law website at [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting).

Public bodies must create and maintain accurate minutes of every open and executive session meeting. The minutes must state the date, time, place of the meeting, and list of the members present or absent, though our office recommends including a list of both those members who are present and absent.

Minutes must include a summary of the discussion on each topic. The summary doesn't need to be a transcript of everything that occurred, but it should include enough detail so that a member of the public who did not attend the meeting could read the summary and understand what occurred and why the body took the action it did. The summary should also include minority as well as majority opinions, where relevant.

The minutes must also note every decision made and action taken, including a record of all votes. Secret ballots are strictly prohibited, both for open and executive sessions meetings.

The minutes must contain a list of the documents and other exhibits, such as pictures or charts, that are used by the public body at the meeting, including any documents used by a remote participant. The documents or exhibits do not need to be attached or included as part of the minutes, just listed in the minutes.

Finally, the minutes must include the name of any member who participated remotely.

## Slide 35

All minutes, both open and executive session, must be created and approved by the public body in a timely manner. Timely manner is considered to be within the next three public body meetings or 30 days from the date of the meeting, whichever is later, unless the public body can show good cause for further delay. We encourage public bodies to approve minutes at the next meeting, if possible. All documents and exhibits used by a public body must be retained as public records, but they do not need to be physically stored with the meeting minutes.

If a person requests the minutes of an open session meeting, the minutes must be provided within 10 days of the request, whether they're in draft or final form, and regardless of whether the public body has approved them.

Executive session minutes, as well as all documents used during an executive session, must be disclosed once publication will no longer defeat the purpose for having entered into executive session, unless they are exempt from disclosure under the public records law, or because of attorney/client privilege.

The state and municipal record retention schedules dictate how long certain records must be retained, and when they can be destroyed. Meeting minutes must be retained permanently. Please visit the Secretary of State's website for more information.

## Slide 36

Executive session minutes must be reviewed periodically by the chair or by the public body to determine whether the purpose for the executive session remains. We recommend that public bodies do so whenever they believe the purpose for confidentiality may have expired, or at regular intervals, such as every other month. This determination must be announced during the next meeting and must be included in the minutes.

If a person makes a request for executive session minutes, the public body must respond to the request within 10 days. If the public body has determined, prior to the request, that certain executive session minutes may be released, it should respond to the requestor directly, notifying him or her of the availability of those minutes. If the public body previously determined that executive session minutes should remain confidential because publication would defeat the lawful purposes of the executive session, it should respond by stating the reason why the minutes continue to be withheld. And if, at the time of a request, the public body has not conducted a review of the minutes to determine whether continued nondisclosure is warranted, the body must perform such a review and release the minutes, where appropriate, no later than its next meeting or within 30 days, whichever occurs first. In such circumstances, the body should still respond to the requestor within 10 days, notifying him or her that it is conducting this review. After the review is completed, the public body must announce at its next meeting whether the

minutes are being released or, if they're being withheld, the reason why continued confidentiality is required.

#### Slide 37

There are two specific types of records that are exempt from disclosure by the Open Meeting Law.

The first type of exempt record is materials used in a performance evaluation of an individual that bear on his/her professional competence and were not created by members of the public body for purposes of evaluation. For example, if a school committee conducts an annual review of the superintendent's performance, the evaluations created by the school committee members are public records and not exempt from disclosure. However, if in that process, teachers who are not members of the school committee fill out evaluations of the superintendent, then those documents may be withheld from the public as personnel records.

The second category of exempt materials are those used in deliberations about employment or appointment of individuals, including applications and supporting materials but excluding resumes, which must be disclosed. So any employment applications discussed during an open meeting may be withheld from the public, but resumes must be disclosed. Resumes of non-finalists used in executive session by a preliminary screening committee are exempt from disclosure, however.

#### **6. Complaint Process/Review/Resources/Contact**

This section of the presentation covers the Open Meeting Law's requirements for public body member certification and the Open Meeting Law complaint process. Please note that this presentation is current as of March 2018. Please check with the Attorney General's office to ensure that a more recent presentation has not been published. You can do so by visiting the Attorney General's Open Meeting Law website at [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting).

#### Slide 38

There are two types of Open Meeting Law complaints. First, we will review the administrative complaint process. This process allows any person who believes that a public body or member of a public body has violated the Open Meeting Law to file a complaint. The complaint must be submitted on a two-page form available at the Attorney General's website, and often available with municipal clerks. Complaints must be signed, and are considered public records. Complaints must be filed with the public body that is the subject of the complaint within 30 days of the alleged violation or, if it could not have been known at that time, within 30 days of the date the complainant reasonably should have discovered the alleged violation.

If, for example, something occurs during an open session meeting that allegedly violates the law, a complaint must be filed within 30 days of that meeting because the violation could reasonably have been discovered on the meeting date. However, if a public body violates the law during executive session, it is likely that the violation may not be reasonably discovered until the executive session minutes are released, possibly months later. In that instance, the complainant would have 30 days from the date the executive session minutes were released to file his or her complaint.

Complaints should be sent to the chair of the public body. For municipal public bodies, a copy must also be sent to the municipal clerk.

#### Slide 39

Once a complaint has been received by the chair of the public body, the chair must disseminate the complaint to the other members of the public body. The public body has 14 business days in which to meet, review the complaint, and respond. In its response, the public body must inform the Division of Open Government of any remedial action taken. Copies of the public body's response to the complaint must be sent to both the complainant and the Division of Open Government.

A public body may request from the Director of the Division an extension of time to respond to the complaint, if it can show good cause.

It is important that a public body review the complaint and decide what action to take. This discussion can be conducted in executive session pursuant to purpose 1 – to discuss complaints or charges brought against a public officer or individual. Once a public body has reviewed a complaint, it may direct the chair or legal counsel to respond on its behalf. It is not appropriate, however, for the chair or counsel to respond to a complaint before it has been reviewed by the public body.

#### Slide 40

If the complainant is not satisfied with the public body's response to his or her complaint, he or she may file the complaint with the Division of Open Government. The complainant must wait at least thirty days after he or she filed the complaint with the public body before doing so.

To be considered timely, the complaint must be filed with the Division no later than 90 days after the date of the original alleged violation.

The Attorney General's Office will not review anonymous complaints or allegations that were not raised in the initial complaint filed with the public body.

In most circumstances, complaints filed with the Attorney General's Office, and documents submitted with the complaint, are considered public records, and are available to any person upon request.

## Slide 41

After a complaint has been received by the Division of Open Government, the Division will send a letter to the parties acknowledging the complaint. The Division will then review the complaint, and if it's timely, conduct an investigation. As part of the investigation, the Division may request documents from the public body, such as executive session minutes. The Division may also interview members of the public body or others with knowledge of the events at issue.

The Division will then determine if a violation has occurred, and whether any violation found was intentional. The Division will also consider any action taken by the public body in response to the complaint to determine if the action was adequate to resolve the complaint.

Finally, the Division will resolve the complaint, through a letter. The letter may be brief and informal, or take the form of a more formal determination with a review of the facts and law. Any finding of a violation may include an order for remedial action.

A public body that has been found in violation of the Open Meeting Law has the right to appeal that decision in superior court within 21 days of receiving the Attorney General's determination.

If a complainant files five complaints with the same public body or within the same municipality within 12 months, the public body may request mediation upon the fifth or subsequent complaint in order to resolve the complaint. If the complainant refuses to participate in mediation, the Division will decline to review the complaint if it is subsequently filed with the Attorney General. The public body must request mediation prior to, or with, its response to the complaint, and will assume the expense of such mediation. If the parties cannot come to an agreement after mediation, the public body will have ten business days to respond to the complaint and its resolution will proceed in the normal course.

Mediation may occur in open session or in executive session under Purpose 9. In addition, a public body may designate a representative to participate on behalf of the public body. If mediation does not resolve the complaint to each party's satisfaction, the complainant may file the complaint with the Attorney General. The complaint must be filed within 30 days of the last joint meeting with the mediator.

The mediator will be chosen by the Attorney General. If the complainant declines to participate in mediation after a request by the public body, the Attorney General may decline to review a complaint thereafter filed with our office. A public body may always request mediation to resolve a complaint, but only mediation requested upon a fifth or subsequent complaint triggers the requirement that the complainant participate in the mediation before the Attorney General will review the complaint.

Any written agreement reached in mediation must be disclosed at the public body's next meeting following execution of the agreement and will become a public record.

#### Slide 42

If the Attorney General conducts an investigation and finds that a public body violated the Open Meeting Law, there are several statutory remedies that the Attorney General may order. The Attorney General may compel immediate and future compliance with the law. This means that the public body has been put on notice that this conduct violates the law, and future similar violations may be found to be intentional. The Attorney General may compel a public body to attend a training on the requirements of the Open Meeting Law. The Attorney General may compel the public release of executive session minutes or other confidential documents used at a meeting.

The Attorney General may nullify any action taken by a public body in violation of the Open Meeting Law. The Attorney General may reinstate an employee and make him or her whole. This remedy may be appropriate where an employee was not afforded the rights guaranteed by executive session Purpose 1. And, finally, the Attorney General may impose a civil penalty of up to \$1,000 on a public body for each intentional violation of the law but this penalty would not be imposed until after a hearing before an administrative law judge.

The law allows the Attorney General to order other appropriate relief, such as revocation of the right to use remote participation.

#### Slide 43

In addition to the administrative complaint process just discussed, there is an alternative complaint process that does not require filing a complaint with the public body or the Attorney General. Instead, the Attorney General, or three or more registered voters, may initiate a civil action in court to enforce the Open Meeting Law. Complaints against state public bodies must be filed in Suffolk Superior Court. For all other public bodies, the complainant must file in superior court in the county in which the public body acts or meets.

#### Slide 44

Let's briefly review the topics covered by this entire presentation. First, public bodies must post notice for every meeting. The notice must be posted 48 hours in advance, except in an emergency, and include the date, time, and place of the meeting, and a sufficiently detailed list of the topics the chair reasonably anticipates will be discussed.

Meetings must be open and accessible to the public, unless a public body meets in executive session. Executive session discussions must fit within one of the 10 purposes for executive session, and the public body must follow the necessary procedural steps before entering executive session.

A public body must take and maintain accurate minutes of every open and executive session meeting. The minutes must include a summary of the discussion of each topic, must contain all votes, and must contain a list of the documents and exhibits used during the meeting.

All public body members must sign the Attorney General's Open Meeting Law certification form within two weeks of taking office, certifying that they have read the Open Meeting Law, the Attorney General's Regulations, the Open Meeting Law Guidebook, Open Meeting Law determinations issued to the member's public body within the last five years in which the Attorney General found a violation of the law, and understand the consequences for violating the law.

Finally, all Open Meeting Law complaints must be filed using the Attorney General's form, and must be filed first with the public body. The public body must be given an opportunity to respond to the complaint before the complainant may file with the Attorney General. Alternatively, three or more registered voters may file a complaint in superior court.

#### Slide 45

There are a number of resources available to help you understand and comply with the Open Meeting Law. We encourage you to visit the Attorney General's website, [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting). There you will find the text of the Open Meeting Law, the Attorney General's Regulations, and the Open Meeting Law Guide. We have also posted answers to frequently asked questions, which are periodically updated and supplemented. The website also includes a searchable database of every Open Meeting Law determination issued by the Division of Open Government, and checklists on topics including minutes, notices, and executive session procedures.

#### Slide 46

We thank you for taking the time to view this presentation. If you have remaining questions about the Open Meeting Law, please contact the Division of Open Government. You can reach us by telephone at 617-963-2540, or by email at [openmeeting@state.ma.us](mailto:openmeeting@state.ma.us).