

**Minutes of the Open Meeting Law Advisory Commission
January 23, 2018, 2:00PM**

Approved on June 18, 2018

100 Cambridge Street, Room D 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; 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: Patrick Walsh, Office of Chair Jennifer Benson

Call to Order

Carrie Benedon called the meeting to order at 2:00PM. Representative Jennifer Benson and Robert Ambrogi introduced themselves.

Review and approval of draft minutes for August 2, 2017 Commission meeting

Ms. Benson thanked the Division of Open Government for preparing the minutes from the last meeting. Rep. Benson moved to approve the minutes. Mr. Ambrogi seconded the motion. **By unanimous vote (3-0), the minutes were approved.** (Sen. Timilty had not yet arrived.)

Report from the Attorney General's Division of Open Government

Ms. Benedon opened the floor to the Attorney General's Division of Open Government to present the 2017 Annual Report from the Division of Open Government, regarding the Open Meeting Law and the activities of the Division.

Jonathan Sclarsic explained that the Division is required by statute to provide the Commission with a report each year by the end of January about the Division's activities of the previous year. Mr. Sclarsic planned to walk the Commission through the report and compare the 2017 data to 2016. The median resolution time was 67 days, a decrease by 10 days from the previous year. The Division received a record number of complaints (323). 484 complaints were filed with public bodies; many were resolved. Since 2011, the amount of complaints received has more than doubled. The Division resolved 249 complaints.

Mr. Ambrogi asked if the 2016 complaint data was in the report. Mr. Sclarsic said the 2016 data he was referencing was from last year's report.

Mr. Sclarsic said that the Division found violations in 87 of the 200 determinations issued. In three determinations, the Division found intentional violations. In four, the Division found that the public body took appropriate remedial action, so the Division did not order any additional relief. The most frequent violations were: 1) insufficiently detailed meeting notices; 2) failure to follow appropriate procedures for entering executive session; 3) deliberation outside of a properly posted meeting, including email deliberation; 4) insufficiently detailed or inaccurate meeting minutes; and 5) failure to hold meetings that are accessible and open to the public. The Division saw a couple issues about inaccessible meetings. The most frequent actions ordered by the Division were: 1) immediate and future compliance with the OML; 2) creation or amendment of open or executive session minutes; 3) attendance at a training on the OML or review of all or part of the Attorney General's online training video; and 4) payment of a fine to the Commonwealth's General Fund. The Division did not issue any nullifications or reinstatement of employees in 2017.

Sen. Timilty arrived.

Mr. Sclarsic moved on to discuss the 3 intentional violations: Webster Board of Selectmen, Fall River City Council, and Wayland School Committee. It was the second intentional violation for Webster. When a public body goes into executive session for a disciplinary action, the body has to notify the individual with 48 hours of notice. The Division settled on a fine of \$1,000 for Webster and that was collected into the General Fund.

In the case of the Fall River City Council, the Council did not respond to a complaint within 14 business days. This was the first time that a determination has gone to hearing. It was heard by an administrative law judge, who affirmed the Division's decision. The Council then appealed the administrative judge's decision.

Ms. Benedon asked about the practical impact on a public body if it is found in violation.

Mr. Sclarsic said that that was the case in Webster. Since they had previously been notified that they needed to comply immediately with the Law, and then they violated the Law again, the Division found the violation to be intentional. That is really all the Division is empowered to do.

Ms. Benedon asked Mr. Sclarsic if, in his opinion, that penalty is sufficient.

Mr. Sclarsic said that the intentional finding does deter public bodies from repeating violations. Media also deters repeat violations. The New York equivalent of the Massachusetts Open Meeting Law does not have a fine option, so often they report violations to the news.

Mr. Sclarsic said that in addition to the intentional findings, the Division also had four determinations challenged. One was a case where the complainant was not satisfied when the Division did not find the public body in violation. A complainant does not have standing to appeal a determination, so that case was dismissed. In Southampton, as part of settling an employment dispute, the Board agreed to dismiss the challenge. In Swansea, the Division had found a violation for an insufficient meeting notice (listing appointments). They had done it

previously and so when they did it again, the Division did not find them in violation but offered guidance, and they challenged the Division's finding.

Mr. Sclarsic said that the Division also has two appeals pending from 2016: West Bridgewater Board of Selectmen and Fall River City Council, and two from 2015: Board of Selectmen and Town Administrator of Hull, and Revere Retirement Board. The Hull appeal is about convening in executive session to discuss litigation and property. The Division argues that the Board should have demonstrated good cause for withholding information about the litigation and property. The Revere case is about Purpose 3. The Retirement Board is arguing they can go into executive session under purpose 3 because a retirement hearing is akin to litigation. They are also arguing that there is an attorney-client privilege in the Open Meeting Law. The Division maintains that the Middleborough case specifically says that the 10 purposes are narrow and that attorney-client privilege is not in itself a purpose for executive session.

Mr. Ambrogi asked about the Wayland case, currently under review by the Supreme Judicial Court.

Mr. Sclarsic said that the Division filed an amicus brief because the Superior Court vacated one of the Division's decisions. The issue is whether there is an exception for deliberation in the form of an emailed report. The Division is curious as to what ends up happening in that case. However, it is not technically a challenge to the Division's decision in the way that the other appeals are.

Rep. Benson said that it seems like there has been a linear increase in complaints. Are the complaints all valid or are they being dismissed regularly?

Mr. Sclarsic said that he has not found a clear pattern. The Division is a victim of its own success. The Division has been doing a lot of trainings, so the Open Meeting Law is on more people's radar and therefore they are filing more complaints. Compliance across MA is improving (minutes are more robust and notices are clearer). Fewer public bodies were found in violation in determinations issued in 2017 than in 2016. The Division has a lot of frequent fliers. 25% of the complaints in 2017 were filed by 5 individuals. What might be reflected in the data are ongoing conflicts within a Board or a Town. For the most part, the complaints are not frivolous. The guidance that the Division provides through determinations is important.

Sen. Timilty said that a high volume of complaints comes from few individuals. Is there a methodology of discerning whether complaints constitute harassment?

Mr. Sclarsic said that the OML does not have a harassment clause like the Public Records Law does. The Division has talked about it before, what that might look like. The Division considered it during the recent regulation review. Many of the complaints themselves do not have frivolous allegations. The Division does not see many cases when the complainant raises the same allegations once the Division has already resolved them, and when that happens, the attorneys try to call out that behavior in the resolution letters.

Mr. Ambrogi asked if that is what brought about the mediation piece of the new regulations.

Mr. Sclarsic said that yes, the Division attempted to address some of the frequent conflicts by empowering towns to address repeat complaints through mediation. Some towns have reached out to the Division about mediation, and they are trying to decide whether it would be financially worth it. Mr. Sclarsic said that one of his goals is to find funding for public bodies to pursue mediation. For a town with 30 complaints, mediation may be worth pursuing.

Mr. Sclarsic said that the Division made a real effort to focus on training in 2017. It is always a balance to resolve complaints, respond to inquiries, and offer trainings. The Division held 12 regional trainings in 2017, with participants from 84 communities. The Division held 11 webinars, covering people from all over the state, and 15 other trainings with associations and agencies. In 2016, the Division held 6 webinars and 7 regional trainings. The Division almost doubled the amount of people trained in 2016, and responded to over 1,800 inquiries in 2017.

Mr. Sclarsic said that the Division has an e-update with 188 subscribers, to send out guidance and the training schedule. A lot of the subscribers are members of associations, who likely forward the e-update to their listservs.

Mr. Sclarsic said that the Division also did a lot to update OML educational materials to reflect the new regulations. The website itself was updated through the state-wide update.

Mr. Ambrogi asked if most of the training participants are members of public bodies or members of the public.

Mr. Sclarsic said that the majority are public body members, but some are also members of the public and press.

Mr. Sclarsic said the Division also updated the training PowerPoint with the new regulations. Unless the Commission has more questions, Mr. Sclarsic proposed moving on to an update on the OML regulations.

Ms. Benedon said yes, at the last OMLAC meeting, the Commission members provided feedback on the then-proposed regulations.

Update on Attorney General's Open Meeting Law Regulations

Mr. Sclarsic said that the Division started the regulation review last March with a comment period, then proposed regulations, had another comment period, appeared before the Commission, and held a hearing. The Division received 44 comments in writing and 12 comments during the hearing. The Division made a couple changes to the regulations since the last OMLAC meeting in August. The Division added a requirement to public body member certification. Members are now required to review all determinations issued in the past 5 years to the public body where a violation is found, so that those public bodies can avoid a finding of an intentional violation. The Division does not anticipate it will be burdensome for Town Clerks because the determinations are all on the OML website and most public bodies have not been found in violation many times. The Division also had proposed that complainants filing would

not have to file with the town clerk in addition to public body, but after receiving comments in opposition to that change, the Division kept that piece as it was. The Division tried to address what a public body should do if its website goes down, when the website is the official notice posting method. The Division increased the time allowed for fixing website issues to 6 business hours without having to reschedule a meeting. One of the changes that is most helpful for public bodies is that the regulations define timely manner for creating minutes.

Mr. Sclarsic said that the Division also reissued most of the educational materials, including the Guide book. The Division issued new checklists, updated to reflect changes, and a number of FAQs that are of concern to public bodies, in particular with social media. A lot of public body members really want to communicate with their constituencies online. The Division tried to offer as much guidance as it could through the social media FAQs, but some of those issues are tricky.

Mr. Sclarsic said that the Division is pleased with the regulation process, the amount of public comment, and the finished product.

Ms. Benedon asked if the regulations have taken effect.

Mr. Sclarsic said that yes, the regulations took effect on October 6, 2017.

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

Ms. Benedon asked if either of the legislators have updates on the bills listed in the bill summary sheet in the meeting packet (H.1669, H.1699, H.1687, H.1704, H.2414, H.2675, H.3355, H.3374, And S.1767).

Sen. Timilty said he would like to supplement what is in the packet. Each of the bills has received a hearing and is being reviewed by the Joint Committee on State Administration and Regulatory Oversight.

Public comment

Ms. Benedon asked if any members of the public would like to provide comments.

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

Ms. Benedon asked if Commission members had any items to discuss that were not reasonably anticipated by the Chair 48 hours in advance of the meeting.

Mr. Ambrogi said that he has been on the Commission since it was created, and that he wanted to say what a great job Mr. Sclarsic and the Division have done.

Rep. Benson said that she agrees wholeheartedly. She also wanted to share an update about the Public Records Commission (created in the Public Records legislation passed last year). The members were appointed and the Commission will begin its work soon.

Sen. Timilty said that the Public Records Commission has very talented members and it is poised to do great work. Also, something we take for granted is that the Division is very vigilant about the Open Meeting Law. Mr. Sclarsic does a great job enforcing the Law and treating people with dignity. It is all about education and the Commonwealth deserves a lot of credit.

Schedule next meeting

Ms. Benedon moved on to scheduling the next meeting, noting that the Commission usually meets a couple times a year. Unless the Division wanted to meet sooner, she proposed aiming for July or August. The other Commissioners agreed.

Adjourn

Ms. Benedon asked for a motion to adjourn. Mr. Ambrogi moved to adjourn the meeting, and Rep. Benson seconded the motion. With all in favor (4-0), Ms. Benedon adjourned the meeting.

List of Documents Used by the Commission during the Meeting

1. OMLAC Meeting Notice for January 23, 2018
2. Minutes from OMLAC Meeting of August 2, 2017
3. 2017 Annual report from the Division of Open Government, regarding the Open Meeting Law and the activities of the Division of Open Government
4. Attorney General's revised OML Regulations (940 CMR 29.00-29.11), effective October 6, 2017
5. Summaries of Bills Pertaining to the Open Meeting Law