DOHERTY
WALLACE
& PILLSBURY
MURPHY P.C.
Attorneys at Law

1414 Main Street, One Monarch Place, Springfield, MA 01144-1002
Telephone 413-733-3111 Fax 413-734-3910 E-Mail dwpm@dwpm.com

Point of View

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MASSACHUSETTS OPEN MEETING LAW

By David J. Martel, Esq.

Open meetings of governmental bodies are an important feature of state and local government in Massachusetts. The purpose of the law is to ensure transparency in the deliberations on which public policy is based. As the Attorney General has stated, "the democratic process depends on the public having knowledge about the considerations underlying governmental action."

The Open Meeting Law is codified in Massachusetts General Laws Chapter 30A, Sections 18 through 25.

The law applies to any meeting of what the law refers to as a "public body" which is broadly defined to include virtually any elected or appointed multi-member board, committee or subcommittee within the executive or legislative branch of state or local government if the body is "established to serve a public purpose." This definition is obviously broad enough to reach beyond a board of selectmen or a school committee and would include a subcommittee of a public body or some other officially-constituted body whether its role is decision-making or advisory.

Individual governmental officials, however, such as a mayor or police chief and members of their staffs, are not "public bodies" and therefore they may meet with one another to discuss public business outside the requirements of the Open Meeting Law.

The law applies whenever a "quorum" of a public body assembles. The law defines a quorum as a simple majority of the body in question unless some other law or bylaw defines a quorum differently. Thus, if a quorum of a public body assembles to discuss any public business, the actions of the body are subject to the Open Meeting Law.

The law applies whenever a quorum of a public body engages in "deliberations." The law defines a "deliberation" as "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any business within its jurisdiction." The law makes it clear that email communications among a quorum of a public body do in fact constitute "deliberations" which should not take place except at a property-convened open meeting. The law does allow email discussion of certain procedural matters such as the timing or the agenda for a meeting. The electronic exchange of documents is permitted prior to a meeting as long as the members of the public body do not express an opinion on the documents.

Notice to the public of meetings is an important aspect of the law. A local public body must file a meeting notice with the municipal clerk sufficiently in advance of the public meeting so that the notice can be posted at least 48 hours in advance of the meeting. Saturdays, Sundays and legal holidays are not included for purposes of calculating the 48 hour notice period. The meeting notices may be posted on a bulletin board or in a loose-leaf binder or on an electronic display (such as a computer monitor) as long as the notice is "conspicuously visible" to members of the public at all hours either inside or on the outside of the municipal building, such as the town hall, in which the town clerk's office is located. The law allows for alternative posting methods, such as posting notice of a meeting on cable television, provided that the notice and cable television access are also available in an alternate municipal building, such as the police or fire station, where the notice is accessible at all hours. A public body may also satisfy the requirement by posting notice on the municipal website.

The meeting notice must be in a legible and easily understandable format and must contain the date, time and place of the meeting. The law also now requires that the notice include the topics that, as of the time the notice is filed, the chair of the body in question "reasonably anticipates" will be discussed at the meeting. The point of this requirement is to allow the public to be reasonably informed of the issues which are likely to be discussed. The public body is permitted, however, to discuss matters which may arise after the posting of the notice but prior to the meeting itself. The notice requirement does not apply to a meeting called in case of an "emergency" but the term "emergency" is narrowly defined and, even if a true emergency arises, the body should still give as much notice as possible.

Once a meeting is held, the public body must keep accurate minutes which, at a minimum, set forth the date, time and place of the meeting; identify those members of the body who were present or absent; and describe all actions, including votes, which were taken at the meeting. The minutes should also reflect any discussion or consideration of issues even if no vote was actually taken. Minutes must be prepared in

a timely manner and must be made available within 10 days of a request.

The minutes also need to list all the documents and other exhibits used at the meeting. These materials must be retained in the records of the body although they do not need to be attached to or physically stored with the minutes. If an executive session (discussed below) is authorized, then all votes taken must be by roll call. Similarly, no vote taken by a public body in an open or an executive session shall be by secret ballot.

The law permits anyone in attendance to make an audio and/or video recording of a meeting provided that the chair is advised and the recording does not interfere with the conduct of the meeting. At the beginning of the meeting the chair must inform other attendees that the meeting is being recorded. A person attending a meeting does not have the absolute right to address the public body and must obtain permission from the chair to do so.

Although the obvious guiding principle of the Open Meeting Law is that meetings should be open to the public, the law still recognizes that there are certain situations where the public interest would not be jeopardized by having a meeting in private, that is, in an "executive session." The law contains ten narrow and specific grounds for holding an executive session.

Of the ten purposes which allow an executive session, five are most likely to come into play. First, an executive session is allowed to discuss the reputation, character, physical condition or mental health of any individual or to consider the discipline or dismissal or complaints or charges against a public officer, employee, staff member or individual. Clearly, an executive session makes sense for the protection of the person who will be discussed. If an executive session is to be held then the person to be discussed is entitled to 48 hour written notice prior to the proposed session. In addition, an individual is entitled to be present at the executive session; to have counsel or a representative of his or her choice in attendance; to speak on his or her own behalf; and to make an audio recording or transcription of the proceedings. The person can waive the right to have the matter taken up in executive session and open the meeting to the public. Finally, this exception does not allow an executive session to discuss the "professional competence" of an individual. Thus employment reviews of an individual are not matters for an executive session.

Two exceptions to the open meeting requirement deal with strategy sessions. First, an executive session is appropriate to "conduct strategy sessions in preparation for negotiations with non-union personnel or to conduct collective bargaining sessions or contract negotiations with non-union personnel. In addition, an executive session is allowed 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..." Clearly, "going public" with the body's negotiating position or settlement

position for a lawsuit would not be in the best interests of the body. In these circumstances an executive session is appropriate provided that the chair declares that an open meeting would have a detrimental effect on the body's position.

An executive session is also authorized to consider the "purchase, exchange, lease or value of real property" provided that the chair of the body declares that an open meeting would have a detrimental effect on the body's negotiating position. Obviously, if the public body is considering the purchase of real estate, it makes sense not to let the seller know how much the body would be willing to pay.

Finally, an executive session is allowed on the part of a preliminary screening committee for choosing candidates for employment, again if the chair declares that an open meeting would have a detrimental effect on obtaining qualified applicants. Once the screening committee completes its work and sends names of candidates to the next level, however, the final selection proceedings must be held in open session.

The Open Meeting Law itself should be consulted for further details concerning the proper way for a body to go into executive session and for maintaining and publishing minutes of these sessions.

The regulations issued by the Massachusetts Attorney General now allow "remote participation," such as by telephone conference call, by members of a public body. Remote participation is not automatically allowed; rather the procedure must be approved by the "Chief Executive Officer" of the municipality in question. This would be the board of selectmen, the city council or the mayor, depending on the municipality.

The Open Meeting Law is now enforced by the Massachusetts Attorney General rather than by the local District Attorney as was the case prior to a 2010 amendment of the law.

This newsletter is intended to be a basic summary of the Open Meeting Law. The text of the law itself and guidelines issued by the Massachusetts Attorney General should be consulted for further details. An "Open Meeting Law Guide" is available on the Attorney General's website which is www.mass.gov/ago.

David Martel *began practicing law at a Wall Street firm in New York City and remains a member of the New York bar. He moved to Springfield in 1974, joined Doherty, Wallace in 1981, and practices in the areas of general business; land use, including zoning and conservation matters; and real estate tax appeals. In addition, as town counsel for Longmeadow since 1979, for Ludlow since 1991, and Hampden since 2000, he has developed extensive expertise in municipal law. David is the former vice-chairman of the statewide Commission on Judicial Conduct and is a former president of the Hampden County Bar Association. He is also a trustee of Springfield Cemetery, is a director and former president of the Springfield Public Forum and a member of the executive committee of the Affiliated Chambers of Commerce of Greater Springfield. Prior to beginning his law career, David was a newspaper reporter, first in Springfield and then in Washington D.C. where he covered Congress for a number of New England daily newspapers.*

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Telephone 413-733-3111 Fax 413-734-3910 E-Mail dmartel@dwpm.com
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