

The New Open Meeting Law ***...One Year Later***

Training for Acton, MA

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Stephen D. Anderson and Nina Pickering Cook



OML Resources

- New OML - Chapter 28 of the Acts of 2009
 - Effective July 1, 2010
 - G.L. c. 30A, §§ 18-25
- [AG's Guide to New OML](#)
- [AG's Regulations 940 CMR 29](#)
- [A&K Memo on Executive Session Rules](#)
- [AG's OML FAQ \(categorized\)](#)

- [**Need More? Visit AG's Website**](#)

Why Today's Training?

- Reminder of the Key Provisions in Order to Avoid Mistakes, Prevent Complaints, Protect Decisions and Ensure Both Your and the Town's Reputation.
- Review of the AG's Regulations Implementing the New OML and Determinations of OML Complaints (including Penalties/Enforcement Actions).

Review of Key Definitions

- “Meeting”
- “Deliberation”
- “Public Body”
- “Intentional Violation”



“Meeting”

- “A deliberation by a public body with respect to any matter within the body’s jurisdiction.”
- Exceptions: attendance of a quorum at...
 - a **public or private gathering** (social, training or conference)
 - an **on-site inspection**
 - a **meeting of another public body**
 - “a meeting of a [state] **quasi-judicial board** or commission held for the **sole purpose of making a decision** required in an **adjudicatory proceeding**”
 - **Town Meeting** (but matters should not be deliberated on outside of public view)
- **... as long as the public body does not deliberate.**
 - OML 2011-16 (where quorum of BOS were present and engaged in deliberation of matters within BOS’s jurisdiction at Recreation Committee meeting, BOS had held an improperly noticed meeting).
 - OML 2010-7 (“[The OML] *permits* member of a public body to meet and discuss subject matter under the public body’s jurisdiction [outside of a noticed meeting] so long as members do not constitute a quorum.”).

“Deliberation”

- “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.”
- Includes Email, Blogs, You-Tube, Twitter, Facebook, Skype, Chat Rooms.
- **Advice: Keep it to yourself until you get to the meeting.**

Exceptions to “Deliberation”

- Distribution of:
 - Meeting agenda
 - Scheduling information
 - Procedural information
 - Reports or documents
- *Provided “no opinion of a member is expressed.”*
 - OML 2011-20 (Clerk’s sending of draft zoning amendment by email not a deliberation, but expression of opinions in reply email was; members should have sent comments directly to staff without copying quorum)
 - OML 2011-14 (Email sent by Chair of policy subcommittee violated OML where it went beyond distributing the proposed policy to adding her opinion about the policy and asking for agreement/disagreement)
 - OML 2011-15 (serial communication by non-committee member to each Committee member did not constitute “deliberation” where non-committee member did not convey each members’ opinion to the others).

“Public Body”

- **This Means You:**
 - Every board, commission, committee or subcommittee
 - Created, elected, appointed or otherwise constituted
 - Established to serve a public purpose
 - Including advisory sub-committees. *See OML 2011-34 (subcommittee created by public body to select search firm to hire University President was a public body).*
- **But not** Town department staff meetings or informal bodies formed to assist staff in the conduct of his/her duties. *See OML 2010-1 (Outlining factors for determining whether a body is a public body).*

“Intentional Violation”

- Act or omission
- **By a public body or a member**
- Knowingly violates the OML. See OML 2011-12 (Committee did not intentionally violate OML by answering reporters’ questions after close of public meeting where the intention was to publicize their opinions).
- Repeated conduct where “body or member has previously been informed by receipt of decision from a court...or by the [AG]” that the conduct violates the OML. 940 CMR 29.02.
 - Many enforcements actions cite this on first infraction.

New Certification

Exhibit A for the Prosecution

- AG Certification
 - Within 2 weeks of qualification for office
 - Obtained by appointing authority or town clerk
- Evidence that the violation was intentional where a member “has read and understands the requirements of the open meeting law and the consequences of violating it.” See OML 2011-26.

Notice and Posting Rules

- Contents of Notice
 - Date, Time, Place
 - Date and time notice was posted
 - **Topics the Chair “reasonably anticipates”** (Agenda items)
 - Must be sufficiently specific to advise public of the issues to be discussed. OML 2011-11; OML 2011-15; OML 2011-32
 - Boilerplate disclaimer is not enough. OML 2011-25
 - The Chair does *not* need to guess at what items might arise. See OML 2011-21; OML 2011-23. However, AG advises that public bodies avoid discussing a controversial or especially important topic until that topic has been properly listed in a meeting notice. AG 5-04-11

Time for Posting Notice

- 48 hours ahead. Meetings cannot be “continued” in order to avoid additional posting. OML 2011-34.
- **Excluding Saturdays, Sundays, and Holidays**
- Email to clerk@acton-ma.gov
- Emergency – post Notice ASAP
- **Meeting Night**
 - **Monday** - Post by 4:45PM Thursday
 - **Tuesday** - Post by 4:45PM Friday
 - **Wednesday** - Post by 4:45PM Monday
 - **Thursday** - Post by 4:45PM Tuesday
 - **Friday** - Post by 4:45PM Wednesday

Posting Method

- Town Clerk posts notice
 - **Must be conspicuously visible to the public at all hours in or on Town Hall**
 - Accessible in the Town Clerk's office
- If not visible 24/7 at Town Hall, then local public body must use AG-prescribed alternative method
 - But must post notice of alternative method so that it is conspicuously visible 24/7 “on or adjacent to the main and handicapped accessible entrances to” Town Hall

Acton's Posting Method

- Town Clerk notified AG that Acton public bodies will post meeting notices under Alternative Method 940 CMR 29.03(2)(b)(1) – **posting on the Town website.**



- All public bodies “**shall** consistently use the municipality’s most current notice posting method on file with the Attorney General”

Meeting Procedures

Chair Controls

- Public participation:
 - With Chair's permission, address meeting.
 - At Chair's request, be silent
 - If continued disruption after clear warning:
 - Chair may **order the person to leave**
 - If the person doesn't leave, chair may authorize a constable or other officer to **remove the person** from the meeting.
 - See OML 2011-2 (OML allows Chair to conduct meetings, maintain order at meetings, and take comment from whomever she deems appropriate, even if deemed unfair to certain members of public).

Electronic Recording

- **Public has a right to record meeting**
 - Transmit through any medium (audio or video)
- Requirements
 - Notify chair
 - Chair informs public at outset
 - Chair reasonably regulates to avoid disruption

- **Welcome to**



Remote Participation

- **Participation by members of a Public Body in a meeting by telephone or other media:**
 - **Not yet allowed**; subject to AG's regulation or letter ruling
 - By statute, if allowed, must have:
 - (1) physical quorum;
 - (2) Chair physically present; and
 - (3) all must be audible.



AG's *Proposed* Regulations on Remote Participation

- Encourages physical presence if possible
- BOS must vote to adopt, applying to all public bodies, and determine the amount and payment of costs for such capability.
- Compliance with statutory requirements
- Remote members **can vote** and are not absent
- Remote participation allowed if presence is “unreasonably difficult” due to:
 - Personal illness or disability;
 - Emergency;
 - Military service; or
 - Geographical location (for local public bodies, a member participating remotely for this reason will be considered absent and **may not vote**).
- How? By telephone or internet enabled **audio conferencing**; or telephone, internet, or satellite enabled **video conferencing** (as determined by the individual Public Body).

AG's Proposed Regulations on Remote Participation

- Technical difficulties? Must try to resolve; if unable then note disconnection in meeting minutes.
- Procedures for Remote Participation:
 1. Member must notify Chair within “reasonable period of time” prior to the meeting
 2. If multiple requests would affect quorum, Chair’s discretion who may participate remotely
 3. At start of meeting, Chair must state (i) name of those remotely participating; (ii) reasons; (iii) physical location. Must reflect in minutes.
 4. May participate in Executive Session upon statement that no unauthorized individuals are present
 - 5. All votes must be roll call votes.**
 6. Chair will try to distribute documents used during meeting to remote participants prior to meeting.
- **Not final.** Public hearing on Sept. 6.
- [Acton provided comments to the AG](#)

Executive Session Procedure

- Convene in open session
- **Chair must publicly state** the purpose for the executive session and **all subjects that may be discussed without compromising the purpose** for the executive session and announce whether open session will reconvene at end of executive session. See OML 2011-34; OML 2011-31 (Chair failed to announce whether public body would reconvene).
- Take roll call vote of majority of members to enter executive session (record in minutes)
- Maintain accurate minutes of executive session
- Take all votes by roll call (no secret ballots)
- **Not discuss any matter other than purpose for which executive session is lawfully called.** OML 2011-30.

NOTE - These are not merely “technicalities,” according to the AG.

Only 10 Purposes for an Executive Session

1. Discuss reputation, character, health, discipline, charges, complaints, but not professional competence of individual. [OML 2011-22](#)
2. Conduct strategy sessions in preparation for negotiations, to conduct collective bargaining sessions or contract negotiations, with nonunion personnel. Contract must be approved in open session. [OML 2011-28](#)
3. **Discuss strategy for collective bargaining or litigation.*** See [OML 2010- 6 \(There is no enumerated purpose in the OML for seeking legal advice from counsel\)](#)
4. Security personnel or devices
5. Criminal misconduct
6. **Acquisition of real property***
7. Comply with law or grant-in-aid requirement
8. **Preliminary Screening for employment*** See [OML 2011-34 for discussion of screening and employee search process.](#)
9. Confer with mediator on litigation or decision
10. Trade secrets in the course of activities conducted by a public body as an energy supplier

*** If holding an open meeting would have a detrimental effect and the chair so declares on record beforehand**

Expanded Minutes

- Was:
 - Date
 - Time
 - Place
 - Members
 - Actions
 - Votes
- Now *Also* Includes:
 - **Summary of Matters Discussed**
 - **List of Documents “Used”**
 - **See OML 2011-34 for further guidance.**



Image

Open Session Minutes and Records

- Meeting minutes
 - Must create and approve in a timely manner
- Documents and exhibits used
 - list in minutes and retain
- Public Records subject to request (unless specifically exempt)
 - **Minutes, even if still in draft form**
 - **Notes, recordings, materials used to prepare minutes**
 - Documents and exhibits used

Executive Session Minutes and Records

- Disclose once publication will no longer defeat executive session purpose unless
 - Exempt from public records law or
 - Attorney-client privileged
- **Review periodically**
 - By chair or public body
 - Determine if purpose of executive session remains.
OML 2011-29 (BOS properly withheld information collected during screening process for hiring new town manager until entire search process was complete)
 - Include determination in subsequent meeting minutes

Timetables to Review Minutes

- Open Session Minutes
 - Available on request in 10 days
- Executive Session Minutes
 - Review at regular intervals to determine whether reason for withholding continues
 - Provide within 10 days in response to a request, unless a review has not yet been undertaken, in which case **board must review minutes at its next meeting or within 30 days, whichever comes first**



Image courtesy of <http://www.ivc.edu>

Complaint Process

Self-Correction

- Person Files Complaint
 - With Town Clerk within 30 days. AG 6-9-2011 (Complaint period not tolled where alleged OML violation occurred at open meeting and was therefore immediately discoverable)
 - Must file two copies: One with Town Clerk, another with the Public Body.
- Public Body's Response
 - **Review complaint, send copy to AG, describe actions taken to resolve issues**
 - Within 14 Business Days
 - 24 Business Days if additional info needed
 - Further extension discretionary with AG

Escalated Complaint Process

- **“Can’t Get No Satisfaction”**
 - File Complaint with AG
 - Within 90 days after alleged OML violation



"I don't like this complaint department."

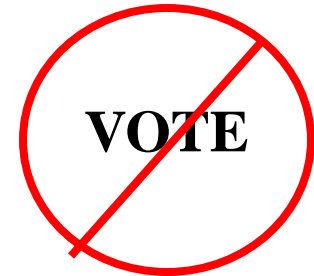
AG's Enforcement Tools

- **Increasingly Onerous for Volunteer Board**
 - Investigate
 - Request additional information
 - Conduct hearing
 - Issue subpoenas
 - Take testimony
 - Determine whether violation occurred
 - Determine whether violation was intentional

Attorney General Remedies

- **Increasingly Painful to Board, Individual and Town**

- Compel OML compliance
- Compel release of minutes or other materials
- Compel OML training attendance
- **Nullify action** taken in violation of OML
- **Reinstate employee and make whole**
- **Impose civil penalty** for intentional violation



- Up to \$1,000 per violation
- Imposed on public body
- If AG believes violation was intentional, the matter will be referred to a full hearing to determine if fine is appropriate. [OML 2011-26](#); [OML 11-27](#)

- Specify other appropriate relief
- File suit to compel compliance with AG's Order

Appeal of AG Order

- Appeal
 - **By public body or aggrieved member**
 - To Superior Court
 - Within 21 days of receipt of AG's order
- Appeal stays AG's order
 - But if AG's order nullifies action of public body, "the body shall not implement such action pending judicial review"

Alternative OML Enforcement

- Plaintiff: **AG or 3 or more voters**
- Suit: in Superior Court to enforce OML
- Remedies:
 - Same as AG's plus
 - All other remedies available to Superior Court
- Goal: “speediest possible determination”
- Burden of proof: on defendants (**i.e. you**)

Civil Penalties

- **Can Individual Be Subject to \$\$\$ Penalty? *Still unclear.***
 - Discrepancy between language in statute and regulations speaking of “civil penalty” or “fine” upon public body and statutory language indicating individual could be liable for such penalty **has not been resolved by the AG’s guidance documents.**
 - No cases imposing such a penalty so far.
- Defense to penalty = “public body, after full disclosure, acted in good faith compliance with the advice of the public body’s legal counsel.” *But see OML 2011-34 (UMass).*
- **You do not want to be the test case.**

Complaints & Enforcement (to date)

Complaints:

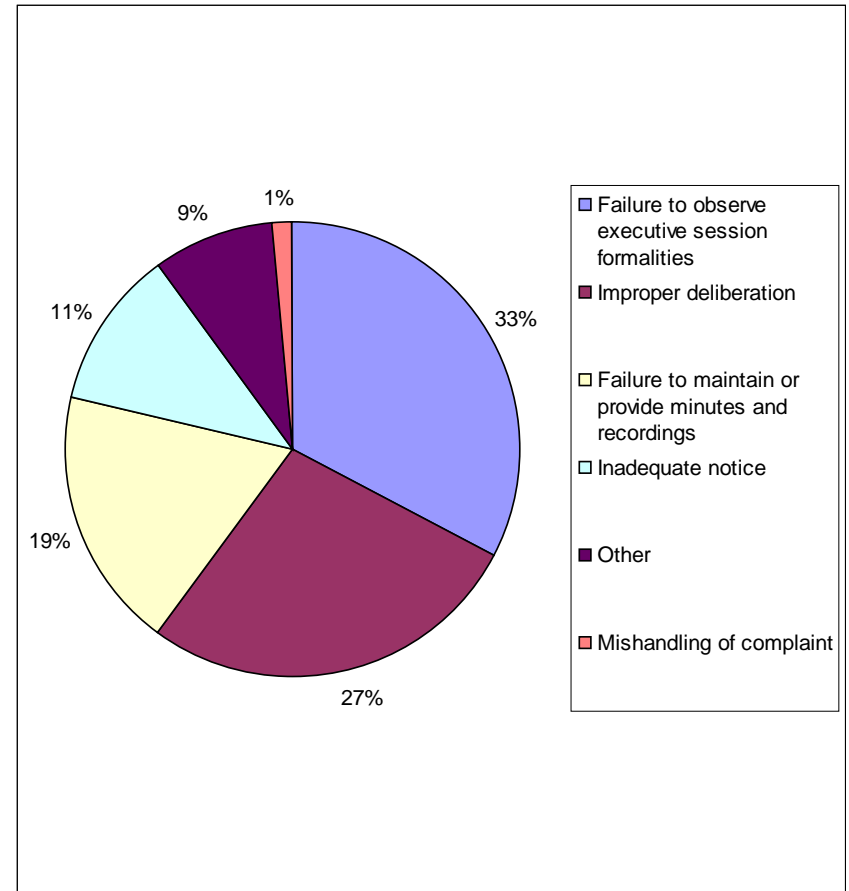
- AG has found 26 violations from 42 complaints. (7 in 2010, 35 in 2011)
 - Violations found **more than 60% of the time**
 - Figures do *not* include untimely complaints
 - Many complaints also addressed matters outside OML jurisdiction (improper influence, public records requests, ethics violations, etc.)
- Improper observance of executive session formalities is most often cited violation.
- Breakdown by Public Body:
 - Selectmen = Greatest number of OML Complaints filed
 - School Committee = Highest percentage of violations found
 - ZBA = Lowest percentage of violations found

Enforcement:

- **No vote has yet been undone.**
- Typical enforcement action includes (1) a reminder to comply going forward, and (2) a warning that any future violation of the same section will be considered an intentional violation, thus subjecting the public body to a hearing and possibly fines.

Complaints By Category

- Improper Posting: 25
- Failure to observe Executive Session formalities: 23
- Improper deliberation: 19
- Inadequate notice: 8
- Failure to maintain or provide minutes and recordings: 13
- Other: 6
- Mishandling of complaint: 1



Lessons Learned from AG

- Often, **no enforcement action if the body takes steps to cure** the action before the complaint reaches the AG (releases withheld minutes, re-votes, re-deliberates in open session, etc.)
- AG will reject cure where it is only “ceremonial” given intentional nature of violation. OML 2011-26
- AG often cites “**spirit of the OML**” in determining whether violations occurred and, in a few cases, whether they were intentional
- **Formalities of executive session are *not* treated as mere technicalities**, but substantive violations of the OML. See OML 2011-30
- **Meeting notices need to be as specific as possible** – list locations and/or names of topics being discussed (i.e. discussion of permit for 3 Main Street, discussion of appointment of John Smith for Police Chief) OML 2011-11; OML 2011-15; OML 2011-32
- OML does not require Chair to guess at all topics that might possibly be raised to be included in the meeting notice.

Complaints Case Study

Acton ZBA (OML 2011-2)

- Complaint alleged ZBA (including counsel) violated OML by entertaining comments from a developer's attorney after the close of the public comment portion of the meeting
- AG found no OML violation
- Chair of a public body is empowered to allow members of the public to speak and to maintain order over the meeting. OML does not regulate conduct of public hearings.
- So far, the only complaint against the Town.

Enforcement Case Study

UMass Board of Trustees– Presidential Search Committee (OML 2011-34)

- AG investigated UMass Presidential Search process
- “Wide-ranging” and “serious” OML violations found:
 - Improperly discussed professional competence in executive session rather than noticed topic of reputation and character.
 - Reached consensus on candidate in secret (during Executive Session)
 - Purported to enter executive session under purpose of complying with law, but failed to site any law
 - Allowed members to participate by phone without permission
 - Did not notice each meeting and executive session and instead attempted to treat them as “continued” meetings.
 - Did not open meetings in open session before entering Executive Session
 - Minutes did not include list of documents used or sufficient summary of discussion
 - Notices did not contain list of topics to be discussed
 - Created a subcommittee which was also public body and which also failed to follow OML
- Board required to, among other things: (1) undergo OML training before appointing new Chancellor; (2) submit copies to AG of all required meeting notices and meeting minutes created during the chancellor appointment process; and (3) create, review and approve minutes for the Search Committee where none exist.

Take Aways

- To comply:
 - Observe the formalities
 - Stow opinions for the meeting
- To violate
 - Ignore the formalities
 - Express opinions in e-media
- Complaints
 - Easier to make
 - Easier to prove: Electronic records
- Consequences
 - Increasingly serious
 - Time, money, energy, penalties

An Ounce of Prevention ...

- Posting problem – Postpone the meeting
- Item not listed on posted notice - Save it for later
- Receive problematic email
 - Gently remind board member individually not to do so
 - Remind fellow board members at a meeting not to do so
- Receive several problematic emails
 - Ask Town Manager to admonish offender
- See a pattern of problematic emails
 - Ask Town Manager to involve Town Counsel
- Discussion strays off topic in executive session
 - Speak up – get back on topic
- **Police yourselves before others police you. AG 6-3-2011 (BOS, as executive authority and the authority often responsible for appointing members to Town boards and committees, “must ensure that all municipal public bodies comply [with the OML].”)**



Image courtesy of <http://www.mediabistro.com/fishbowDC/original/police.png>