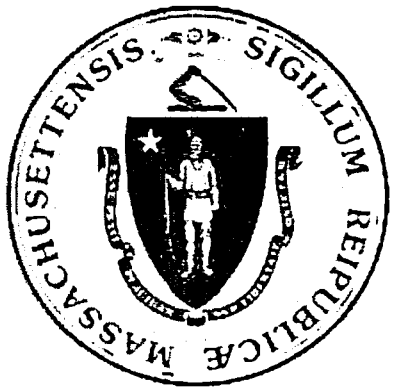
Open Meeting Law Guidelines



Commonwealth of Massachusetts
Office of the Attorney General

Tom Reilly
Attorney General

One Ashburton Place
Boston, MA 02108
(617) 727-2200
http://www.ago.state.ma.us

Town Clerk's Office
577 Bay Road
Hamilton, MA 01936
(978) 468-5570
http://www.hamiltonma.gov

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A Message from Attorney General Tom Reilly

Dear Reader:

The Massachusetts Open Meeting Law applies to governmental entities at the state, county and local levels. In general, the Law requires that meetings of such entities be open to the public, that notice of such meetings be publicly posted and that accurate records of the meeting be kept and made available to the public.

As Attorney General, I am charged with the enforcement of the Open Meeting Law as it applies to state government bodies. The local district attorney is responsible under the Open Meeting Law for enforcing its provisions in the county and cities and towns within his or her district.

I hope that these Guidelines will give officials a tool to ensure their ability to comply with the Open Meeting Law. I also hope that they will offer to citizens a guide with which to better understand the responsibilities of their elected and appointed officials, and of their rights and the means of enforcing those rights under the Law.

Sincerely,

Tom Reilly

Tom Reilly
Attorney General

OPEN MEETING LAW IN A NUTSHELL

SCOPE: All meetings of a quorum of any governmental body, board, committee, or subcommittee, however constituted, held to discuss any public policy matter within body's jurisdiction.

NOTICE: Posted in clerk's office for at least 48 hours, including Saturdays but not Sundays or legal holidays.

EMERGENCY: Meeting on less than 48 hours notice due to an unexpected set of circumstances demanding immediate governmental action to preserve public interest.

EXECUTIVE SESSION: Announcement of purpose and role call vote in open session properly convened. Minutes of executive session must be kept and released as soon as need for secrecy ends.

LAWFUL PURPOSES: (1) reputation, character, physical condition or mental health, not professional competence, of an individual, upon notice to individual concerned; (2) to consider discipline, dismissal, or to hear complaints against an individual, upon notice to individual concerned; (3) to discuss strategy in collective bargaining or litigation and to conduct negotiations, if open meeting may have detrimental effect; (4) deployment of security personnel; (5) to investigate criminal misconduct; (6) to consider or negotiate real estate transactions if open sessions may have detrimental effect; (7) to comply with another law (general privacy); (8) to consider and interview applicants at preliminary level, if open session may have detrimental effect.

I. Overview and Summary of the Open Meeting Law

Massachusetts adopted in 1958 its first open meeting law applicable to governmental units at the state, county and municipal levels. St. 1958, c. 626. In fact, there were — as there continue to be — three separate laws, one applicable to each level of government (state, county and municipal), but the substance of the three laws was the same.[1] The first statute was fairly general in approach, and after a series of amendments over the years, the Open Meeting Law was substantially revamped in 1975, adding for each level of government a set of definitions of terms used and making more specific the provisions governing closed meeting sessions and notices of meetings. There have been a number of amendments to the Law since 1975, but its general format and provisions have remained the same.

The purpose of the Open Meeting Law is to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based. It accomplishes this purpose by requiring open discussion of governmental action at public meetings. The requirements of the Open Meeting Law grow out of the idea that the democratic process depends on the public having knowledge about the considerations underlying governmental action, for without that knowledge people are not able to judge the merits of action taken by their representatives. The overriding intent of the Open Meeting Law is therefore to foster and indeed require open discussion of governmental action at public meetings. Yet the Law does recognize that public officials might be "unduly hampered" if all discussions by public officials were required to be open. As a result, it specifies certain types of issues that may be discussed and decided in a closed session. These exceptions, however, are limited in number and narrow in scope.[2]

The Law applies to those meetings of governmental bodies in which a quorum of the body convenes to deliberate on any public business or policy within its jurisdiction. The terms meeting, governmental body, deliberation, and quorum are specifically defined in the Law. G.L. c. 34, §9F and c. 39, §23A.

For covered meetings, the Law lays out specific procedures that must be followed. Most important is that the meeting be open to the public except in nine specific circumstances that are described in the statute. If one of the exceptions applies, the governmental body can meet in an executive session (closed session), provided it follows certain preparatory steps. Other critical procedural requirements are that records be maintained of all meetings (including executive sessions) and be made available to the public, and that notice of all meetings be publicly posted.

Responsibility for enforcement of the Law at the county and local levels is vested in the District Attorney. However, judicial remedies in the form of prospective injunctive and declaratory relief may be sought by the District Attorney, the Attorney General, or three or more registered voters. Relief may also include an order invalidating or rescinding past actions by a governmental body, and it is also possible to obtain an order requiring the body to make its records public. Other remedies may be available as well; the Law states that its remedial provisions are not exclusive.

II. The Law's Requirements

A. Who is Subject to the Open Meeting Law

1. Governmental Bodies

The Law applies to governmental bodies. These are entities defined at the county level as: a county board, commission, committee and subcommittee; and at the local level as: every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting.

The Law thus governs collegial bodies or groups, such as boards of selectmen or the county commissioners, but not individual officials such as a mayor or a police chief. The Law does not apply to boards informally appointed by individual officials to carry out duties that are assigned to such officials.[3] Insofar as such collegial groups are concerned, however, the definition at each level is very broad.

2. Subcommittees

Subcommittees appointed by any governmental board, commission or committee that is a governmental body are also covered by the Law.[4]

It is the position of the Attorney General that this includes not only subcommittees comprised of the parent governmental body's members, but also subcommittees or special purpose committees that may contain individuals who are not on the parent body, so long as the subcommittee or special purpose committee is carrying out delegated functions or responsibilities of the parent body.

Example: A local housing authority appoints a special committee composed of private citizens, representatives of the local planning board, the local conservation commission and interested tenant groups to study and make recommendations to the authority on the design, placement, and tenant selection criteria for a low and moderate income housing project the authority is building. Since all the matters which have been delegated to the special committee are matters of public business and policy within the housing authority's jurisdiction and responsibility, the special committee itself is a governmental body and subject to the Law.

3. Subcommittees Serving in a Recommendation Capacity

The fact that the jurisdiction of the subcommittee or special purpose committee extends only to making recommendations to the parent governmental body does not render the Law inapplicable.[5]

Example: A subcommittee of a local conservation commission, composed of three of the seven

commission members, is delegated the task of making factual investigations of a local conservation problem, reporting its findings to the full commission and making oral recommendations on what action the commission should take. Although the subcommittee's jurisdiction does not authorize it to make binding decisions on behalf of the commission but is limited to recommendations. the committee still qualifies as a governmental body and when it convenes to discuss its investigations or propose recommendations, this is a meeting.

B. Meetings Covered by the Open Meeting Law

1. Meetings that Cover Public Business

The Open Meeting Law applies to every meeting of a quorum of a governmental body if any public business over which the governmental body has jurisdiction is discussed or considered.[6]

Note: A governmental body engages in "deliberation" under the Law, and must comply with the Law's requirements, whenever a quorum engages in a "verbal exchange." Thus, when a committee interviewed candidates for employment in closed session, the Law applied even though the members did not converse among themselves but merely questioned the candidates. The Supreme Judicial Court held that such interviews constituted "deliberation" under the Law. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 470-471 (1989).

Any on-site inspection of a project or program by a governmental body does not qualify as a meeting. A quorum is defined in the Law as a simple majority of the body unless otherwise defined by applicable constitution, charter, rule or law.

2. Subcommittee Meetings

A meeting of a governmental body subcommittee, which is itself a governmental body, is subject to the Law if a quorum of the subcommittee is present, even if that quorum is not sufficient to constitute a quorum of the parent governmental body.

Example: A school committee with nine members; appoints a three three-member subcommittee to screen applicants for the position of Superintendent and make recommendations to the full committee. When two or more members of any of these subcommittees meet together to discuss or deliberate on the matter assigned to it, this is a meeting covered by the Law even though less than a quorum of the full school committee is present.

3. Joint Meetings

When quorums of two governmental bodies meet jointly it is a meeting of each governmental body. If only one of the governmental bodies has a quorum present, it is a meeting only of that governmental body.

4. Official Meetings

The Law does not apply to any "chance" or "social" meetings of a governmental body or members of the body at which matters relating to official business are discussed, so long as no final decision on

such business is reached. The Law specifically states that chance or social meetings are not to be used to circumvent the letter or spirit of the Law by treating them as occasions to discuss or act on a matter within the governmental body's jurisdiction, control or advisory power.

Example: Two days after a so called chance or social meeting at which members of a school committee discussed the closing of a school, the school committee convened in an open meeting and without discussion ratified a determination about the closing that had been reached at the earlier "chance" meeting. These facts suggest that the chance or social meeting may have been used in circumvention of the requirements of the Law.

5. Emergency Meetings

Except for notice requirements, the Law applies to emergency meetings. Emergency is defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." The emergency in question must be one that relates directly to the functions and responsibilities of the governmental body convening the meeting; it cannot be an emergency brought on by the needs or requirements of a person or entity not related to the governmental body. In addition, the emergency must be of such a nature that there is not time to wait forty-eight hours (the Law's prescribed notice period) to hold a meeting.

Example: A board of selectmen acting as the local licensing board convenes an emergency meeting because it has just been informed by the potential purchaser of a restaurant that unless the purchaser receives approval of the transfer of a liquor license that day, he will lose his option to purchase. This is not the type of emergency that justifies an emergency meeting because the circumstance calling for immediate action is the private financial interest of the purchaser, not an event or act relating to the licensing board's responsibilities.[7]

Example: A series of severe rainstorms causes the Charles River to flood its banks in a particular town, creating a great potential for serious damage to many homes and businesses in the town. The selectmen call an emergency meeting to discuss what steps should be taken to control the flood and damage. These facts suggest the type of emergency that would justify an emergency meeting.

6. Executive Sections

The Open Meeting Law applies to executive sessions (closed sessions) of a governmental body. As discussed in a separate section of these guidelines, the Law defines when an executive session may be held and what special procedures apply to notice, attendance, minutes, etc. See Section II. D. below.

C. Procedures Required by the Law

1. Notice of Meetings

a) Counties:

Except for emergency meetings, a notice of every meeting of a governmental body at the County level is to be filed in the office of the County Commissioners. A copy of the notice is also to be publicly posted in such place or places as the Commissioners designate. All such notices are to be so filed and posted at least forty-eight hours (including Saturdays but not Sundays or legal holidays) prior to the time of the meeting.

The meeting notice is to be printed in easily readable type, and is to include the date, time and place of the meeting. The officer calling the meeting is responsible for complying with these filing and posting requirements.

b) Municipalities and Districts:

For each city and town, a notice of every meeting of any governmental body is to be filed with the clerk of the city or town, and the notice or a copy of the notice must be publicly posted in the office of the clerk or on the principal official bulletin board of the city or town at least forty-eight hours (including Saturdays but not Sundays or legal holidays) before the meeting.

For regional school district committees, the secretary of the regional school district is to file the notice of every meeting with the clerk of each city and town included within the district. Each such clerk must post the notice in his or her office or on the principal official bulletin board of the city or town. In addition, the regional school district's secretary must post the notice in his or her office or on the principal official bulletin board of the district.

For other types of regional or district governmental bodies, the officer calling the meeting is to file notice of the meeting with the clerk of each city and town within the region or district. The clerk must post the notice in his or her office or on the principal official bulletin board of the city or town.

Again, the meeting notice is to be printed in easily readable type, and is to contain the date, time and place of the meeting.

Note: Under the Law, a governmental body may comply with these notice requirements by filing and posting in advance a printed schedule of its future meetings, so long as the day of the week, the time and place of each such meeting is listed, and so long as the governmental body does in fact meet regularly at the scheduled time and place. If such a schedule of future meetings is compiled and posted, there will be no need to file and post a separate notice of each meeting before that meeting is held. On the other hand, a governmental body cannot rely on a pre-filed schedule of meeting days and times to satisfy the Law's notice requirements if in fact it does not regularly meet at the scheduled times. In such an instance, the filed schedule would provide no real notice at all, since there would be no way for a

member of the public to know whether a meeting would or would not be held on a particular scheduled day.

c) Emergency Meetings:

As indicated above, when there is a need for an emergency meeting, the notice requirements of the Law do not apply. Nevertheless, any governmental body that calls an emergency meeting should give as much public notice as is possible in the circumstances.

Example: A board of selectmen determines on a Tuesday that it must hold an emergency meeting the next evening; the circumstances will not permit waiting a full forty-eight hours. In this situation, the selectmen should immediately file notice of the next day's emergency meeting with the town clerk and the clerk should immediately post the notice in his or her office.

Note: The protections of the notice requirements of the Law apply to members of the board which is calling the meeting. Notice must be given even if the only subject of the meeting is the conduct of a member of the board calling the meeting. Pentecost v. Town of Spencer, 29 Mass. App. Ct. 991 (1991).

d) Adjourned Meetings:

If it becomes necessary to adjourn or extend a meeting to another time, the Open Meeting Law's notice requirements apply to the adjourned or extended meeting. Therefore it will be necessary to adjourn the meeting to a date that will permit the governmental body to cause notice to be filed and posted at least forty-eight hours in advance unless the circumstances require the adjourned meeting to be an emergency meeting.

2. Minutes of Meetings

a) Content:

The Open Meeting Law (as well as the Public Records Law, G.L. c. 66, §5A) requires every governmental body to maintain accurate minutes of all its meetings. At a minimum, minutes must set forth the date, time, and place of the meeting, the identity of the members present or absent, and all "action taken."

The District Attorney has interpreted the term "action taken" to include not only votes and other formal decisions made at a meeting, but also discussion or consideration of issues for which no vote is taken or final determination is made. See New England Box Co. v. C & R Construction Co., 313 Mass. 696, 713 (1943). It would be sound practice to also include in the minutes a summary of each discussion held at the meeting. However, a verbatim record of each discussion is not required. See G.L. c. 66, §5A. If votes are taken at a meeting, the minutes must record each vote exactly as it occurred. See id.

The Law also requires that accurate minutes be maintained for every executive session meeting. The contents of executive session minutes must mirror those required for open session meetings, with

one additional requirement: every vote taken in executive session must be recorded in the minutes by "roll call." See "Executive Session" Section II. D. below on the Law's requirements relating to the contents and release of executive session minutes.

If a governmental body keeps in mind that minutes are meant to serve as a record of what was *done* at a meeting and not necessarily all that was *said*, full compliance with the Open Meeting Law's record keeping requirements will likely be assured.

b) Form:

The Open Meeting Law contains no provisions regarding the form in which minutes of meetings must be maintained. However, the longevity requirements for record preservation under the Public Records Law, G.L. c. 66, §§ 3-9 require that a governmental body eventually put its minutes into a written form.[8] Such a requirement is also consistent with the Open Meeting Law's policy of providing ready access to legible minutes. For the same reason, typed minutes — though not required — are preferable.

Governmental bodies that have adopted the practice of tape recording their meetings should be reminded that they may not rely solely on the tapes to satisfy the record-keeping requirements of the Law. Rather, the cassette tapes should serve as an aid (a desirable one) to the body in preparing its "hard copy" minutes.

The Law is also silent on the issue of how long a governmental body may take to adopt and make available for public inspection its "official" minutes. Nonetheless, by implication the Law requires that such minutes be made available to the public within a reasonable period of time after the conclusion of any given meeting. What is reasonable will depend upon such factors as the length of the meeting in question, the complexity of issues discussed at the meeting, the staffing and workload of the particular body responsible for preparing the final document, and the like. Without establishing a hard and fast rule regarding the timeliness of the preparation of "official" minutes, a time frame of two to four weeks may be considered reasonable under most circumstances.

c) Release:

Both the Open Meeting Law and the Public Records Law include provisions which pertain to the release of minutes of meetings convened by governmental bodies. In general, the minutes of a meeting become public records from the moment they are created. This is true regardless of the form in which they may first appear, i.e., stenographic notes, handwritten notes, or tape recordings. The governmental body may not require that it vote to adopt or approve or release open session minutes before they may be released to the public, even though the minutes may be only in draft form at the time of the request. The body or custodian of the records may, of course, label the notes or cassette tape at the time of the release as being in draft, unofficial, or unapproved form, as may be appropriate.

As public records, minutes must be made available to the public, upon oral or written request, at reasonable times and in a reasonable place. The request must be honored promptly, but no later than

ten days from the date of the request. The governmental body must permit the minutes to be either inspected or copied, although it may charge a copying fee as established by the Commonwealth. For more detailed information about the release of minutes, assessment of fees, and the like, consult the Public Records Regulations, 950 CMR 32.00 et seq., promulgated by the Commonwealth.

Release of executive session minutes is discussed in Section II. D. below.

3. Conduct of Meetings

The Open Meeting Law is clear that all meetings of a governmental body are to be open to the public and any person shall be permitted to attend any such meeting unless the governmental body (1) validly decides to hold an executive session for one of the nine purposes outlined in the Law and (2) follows the prescribed procedures for holding such an executive session.

The Law provides that "No votes taken in open session shall be by secret ballot." G.L. c. 34, §9G, paragraph seven; G.L. c. 39, §23B, paragraph seven.

Except when a meeting is held in executive session, any person in attendance may record the meeting with a tape recorder or any other method of sonic reproduction, so long as no active interference with the conduct of the meeting arises as a result of the recording. The Law also allows any person attending an open meeting of a municipal or district governmental body to videotape the meeting from one or more fixed locations as determined by the governmental body, so long as there is no active interference with the meeting. G.L. c. 39, §23B, paragraph eight.

Note: "Telephone meetings" — discussion by telephone among members of a governmental body on an issue of public business within the jurisdiction of the body — are a violation of the Law. This is true even where individual telephone conversations occur in serial fashion.[9]

Insofar as meetings of governmental bodies at the municipal or district level are concerned, the Law specifies that no person may address a meeting of the governmental body without permission of the presiding officer, and that all persons shall be silent at the request of the presiding officer. If a person persists in disorderly behavior in such a meeting after warning from the presiding officer, the officer may order him or her to withdraw from the meeting. If the disorderly person does not withdraw, the presiding officer may order a constable or another person to remove the offender and confine him or her in some convenient place until the meeting is adjourned. Although the Law applicable to counties does not contain a comparable provision, a governmental body at the county level has the inherent authority to take necessary steps to maintain order at its meetings.

D. Executive Sessions

1. Definitions

An executive session is defined in the Open Meeting Law as "any meeting of a governmental body which is closed to certain persons for deliberation on certain matters." The Law defines nine specific purposes for which an executive session may be held, often referred to as "exemptions" from the open meeting requirement, and emphasizes that this list of nine is an exclusive one.

2. Purposes

The nine purposes or exemptions for which a governmental body may vote to hold an executive session are:

(1) To discuss the "reputation, character, physical condition or mental health rather than the professional competence" of a particular individual.

This purpose is designed to protect the rights and reputation of individuals. Some of the concepts included here — physical condition, mental health — are clear; others are less so. It is difficult, for example, to draw any bright lines between "professional competence" on the one hand, and "reputation" or "character" on the other. Nevertheless, it appears that at least in the case where a governmental body is considering applicants for a professional job position, the discussion would center on "professional competence" and could not be conducted in an executive session on the basis of this exception.[10]

The Law affords certain rights to the individual who is the subject of the discussion at an executive session called for the purpose described here. See Section II. D. 2.(3) below.

(2) To consider the discipline or dismissal of, or to hear complaints or charges brought against a public officer, employee, staff member, or individual.

Again the purpose of this exception is to protect individual rights, as well as to promote the public interest in efficient personnel management. While the proposed imposition of disciplinary sanctions by a governmental body on an individual calls forth this section, the section does not apply if, for example, the governmental body is laying off a large number of employees because of budgetary constraints.[11]

As is true of the first purpose, an executive session called for this second purpose triggers certain rights on the part of an individual who is the subject of the discussion. See Section II. D. 2. (3) below. The individual's rights to have his or her dismissal considered at an open meeting takes precedence over the general right of the governmental body to go into executive session to consider collective bargaining matters. Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306 (1991).

(3) 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 governmental body; to conduct strategy sessions in Preparation for negotiations with non-union Personnel; and to conduct collective bargaining sessions or contract negotiations with non-union personnel.[12]

Collective bargaining strategy: Discussions with respect to collective bargaining strategy include discussions of proposals for wage and benefit packages or working conditions for union employees. The governmental body must show — and, if challenged, carries the burden of proving — that an open meeting might have a detrimental effect on its bargaining position to justify an executive session on the basis of this exemption. The showing that must be made is that the open discussion might have an adverse impact on the collective bargaining process; the body is not required to demonstrate or specify a definite harm that would have arisen.

Note: Since the governmental body must determine that an open meeting may have a detrimental impact on its bargaining position in order to convene an executive session under this purpose, it is a good practice to state on the record that a possible adverse impact might occur when the executive session is proposed and voted on.

Litigation strategy: Discussions concerning strategy with respect to ongoing litigation obviously fits within this purpose, but again only if an open meeting may have a detrimental effect on the litigating position of the governmental body. Discussions relating to proposed litigation are not covered by this exemption unless that litigation is clearly and imminently threatened.[13] That a person is represented by counsel and supports a position adverse to the governmental body's does not mean litigation is imminently threatened. Nor does the fact that a newspaper reports a party has threatened to sue mean imminent litigation.

Note: A governmental body's discussions with town counsel do not automatically fall under this or any other exception.

Collective bargaining sessions: These include not only the bargaining sessions but also include grievance hearings that are called for under a negotiated collective bargaining agreement.[14]

Contract negotiations with non-union personnel; strategy sessions to prepare for such negotiations

The 1985 and 1988 amendments to the Open Meeting Law make clear that a governmental body of a municipality or district may enter into executive session to conduct strategy sessions in preparation for, and to conduct, contract negotiations with non-union personnel. See note 11 above.

(4) To discuss the deployment of security personnel or devices.

Self explanatory.

(5) To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.

On the surface this exemption seems easily defined, but in fact the distinction between this exemption and the second exemption described above (to consider the discipline or dismissal of or charges brought against an individual) is not clear. In a close case it is preferable for a governmental body to convene the executive session under the second exemption in order to better protect the rights

of the individual involved.

(6) To consider the purchase, exchange lease or value of real property if an open discussion may have a detrimental effect on the negotiating position of the governmental body with a person firm or corporation.

Under this purpose, as with the collective bargaining and litigation purpose, the governmental body must show that an open meeting might have an adverse impact on the body's negotiating position with a third party. See Section II. D. 2.(3) above. Thus, once the purchase, exchange, lease or other transaction is completed this exemption may no longer be used.

(7) To comply with the provisions of any general or special law or Federal grant-in-aid requirements.

There may be provisions in certain statutes which require that a governmental body consider a particular issue in a closed session. A list of such statutes is beyond the scope of these guidelines, but one example is the following:

Example: General Laws c. 71, §42 permits a school committee to hold public or private hearings to consider the dismissal of a tenured teacher. This specific provision overrides the general requirement that all meetings of a governmental body be open to the public. See Kurlander v. School Committee of Williamstown, 16 Mass. App. Ct. 350, 361 (1983).

Additionally, as the following section discusses, where exemption (h) does not apply, exemption (g) may nevertheless apply to the initial stage of a hiring process.

(8) To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if an open meeting will have a detrimental effect in obtained qualified applicants: provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a primary or preliminary screening.

This amendment applies only to municipal and district governments. It permits a hiring subcommittee of a governmental body or a preliminary screening committee to conduct the initial screening process in executive session if an open meeting will have a detrimental effect on the governmental body's ability to attract qualified applicants. The amendment does not apply to any stage in the hiring process *after* the screening committee or subcommittee votes to recommend a candidate or candidates to its parent body. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 472 (1989).

Note: The new exemption (8) does not apply to county government or to screening by a governmental body itself. It applies only to a special committee or subcommittee. A governmental body which itself engages in a hiring process may nevertheless be able to convene in executive session pursuant to the "other laws" exemption discussed above in Section II. D. 2. (7).

Example: A school committee is seeking to fill an opening for the position of superintendent of

schools. It has received 100 applications in response to its advertisements; some of those responding expressly stated that they wished their applications to remain confidential. G.L. c. 214, §1H, a statute wholly independent and separate from the Open Meeting Law, protects an individual's right to privacy against unreasonable, substantial or serious invasion. It may constitute an unreasonable or serious invasion of these applicants' statutory right to privacy for the school committee to identify them by name and discuss their applications in an open meeting at the initial screening stages; if so, the discussion would be required to be held in an executive session. (Note, however, that the school committee would bear the burden of proving that the statutory privacy right of the applicants warranted the executive session.) As the committee's selection process continues and the list of applicants is narrowed, however, the privacy rights of the individuals still under consideration recede in comparison to the public's right to know who the school committee is seriously reviewing for the post. At least by the time the school committee (or a screening subcommittee of the school committee) has selected a list of semi-finalists, if not before, it is unlikely that the rights of privacy on the part of such persons would require or authorize an executive session to discuss them.[15]

The semi-finalist applicant who asserts a right to privacy under G.L. c.214, §1B must make a particularized showing that releasing his or her name to the public or conducting the interview in public would unreasonably, substantially, or seriously interfere with the applicant's right to privacy. Further, where a governmental body accedes to the semi-finalist's request for privacy, it will be incumbent upon the governmental body, should its actions later be challenged, to make an adequate showing that an open interview or public disclosure of the applicant's name would unreasonably, substantially, or seriously interfere with the applicant's privacy rights.

Note: Under a ruling of the Supervisor of Public Records, SPR 82-219, the names of the initial applicants for the superintendent's position would not appear to be a public record, and would not be required to be included in the minutes of any meeting, whether open or closed, in which the applicants were discussed. However, in SPR 84-66 the Supervisor of Public Records ruled that the list of finalists' names are public records. Although the Supervisor's opinion addressed only the required release of finalists' names, the reasoning of the opinion suggests that the names of semi-finalists would also be considered a public record subject to release to the public upon request.

(9) To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (1) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (2) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section.

3. Rights of Individuals

When a governmental body holds an executive session to discuss an individual's reputation, character, physical condition or mental health (II. D. 2. (1)), or to consider disciplinary sanctions against

an individual (II. D. 2. (2)), the Open Meeting Law affords the individual concerned the following rights:

a. to be present at the executive session during discussions or considerations involving the individual;

b. to have counsel, or another representative of his or her own choosing, attend the session with the individual, to advise the individual, but not to participate actively in the executive session;

c. to speak in his or her behalf;

d. to receive written notice at least forty-eight hours in advance of the proposed executive session;

e. to request that the meeting be open rather than closed.

Note: There may be situations where a governmental body is authorized, under a separate statute, to insist that the meeting be closed. See Section II. E. below.

4. Procedures

a) Notice:

No executive session may be held unless and until an open meeting of the governmental body, for which proper notice was given, has first convened. Written notice of a proposed executive session that will involve the discussion or consideration of an individual (see Section II. D. 3. above) must be given to that individual at least forty-eight hours in advance.

b) Convening:

Once an open meeting has been duly convened, to then convene an executive session a majority of the members of the governmental body must vote to go into the session; the vote of each member must be recorded on a roll call vote and entered in the minutes of the meeting. In addition, the presiding officer must cite for the record the purpose (or purposes if there are more than one) of the executive session, and whether the governmental body will reconvene in an open meeting after the executive session is over.

c) Minutes:

Minutes or an equivalent record of every executive session must be kept. In terms of content, such minutes mirror those required for open meetings: they must set forth the date, time, place, members present or absent, and the action taken. (See II. C. 2. above for a discussion of these requirements.) As with open session minutes, written minutes (preferably typed) are required. Unlike the case with open sessions, however, there is no right to tape record or videotape executive sessions. In addition, minutes of executive sessions must include a record of every vote taken. All such votes must be recorded roll call votes.

d) Publication of Minutes:

The minutes or record of every executive session become public records from the moment they are

created; however, such minutes "may remain secret as long as publication may defeat the lawful purposes of the executive session, *but no longer*" (emphasis supplied). G.L. c. 39, §9G, paragraph seven; G.L. c. 39, §23B, paragraph seven. Generally, the decision when to release the minutes of an executive session is up to the members of the governmental body. Each body should, however, adopt a policy which requires that unreleased executive session minutes will be reviewed on a regular basis. Such a policy will help ensure that closed session minutes are kept secret only as long as needed and as authorized under the Law.

E. Coordination With Other Laws

In its application to municipalities and districts — but not to counties — the Open Meeting Law's provisions are in force only to the extent that they are not inconsistent with express provisions of any other general or special law. G.L. c. 39, §24. It is beyond the scope of these guidelines to try to list all general or special laws that are inconsistent with the Law, but an example may help to illustrate the meaning of this section.

Example: General Laws c. 71, §42, provides that a school committee considering the dismissal of a tenured teacher may choose to deliberate in a closed session. This express provision takes precedence over the Open Meeting Law, so that even if the teacher requests an open meeting to consider the dismissal issue — a right provided by the Open Meeting Law — the school committee is not bound to honor that otherwise binding request.[16]

F. Enforcement

1. In General

The Open Meeting Law states that the District Attorney for the county in which any violation of the Law occurs is to enforce the Law's provisions. The Attorney General is charged with the enforcement of the state Open Meeting Law.

2. Legal Proceedings

Three or more registered voters, as well as the Attorney General or the District Attorney may bring suit to enforce the Open Meeting Law by filing a complaint in the Superior Court or the Supreme Judicial Court alleging a violation of the Law by any governmental body. Such a suit is to be heard with a shortened notice period of ten days, and to be determined in speedy fashion. The body charged with violating the Law carries the burden of proving that the violation(s) alleged did not occur, and must do so by a preponderance of the evidence.

3. Remedies

a) Prospective Relief:

On proof in such a suit that a governmental body or any of its members have violated any provision of the Open Meeting Law, the court may enter an order requiring compliance with the Law at future meetings. Independent of a formal lawsuit, the District Attorney may also seek to enforce the Law by directing governmental bodies in appropriate circumstances to comply fully with the provisions of the Law in the future. See Section IV. A. 4. below.)

b) Other Relief

In addition, the court may enter an order invalidating any action taken at any meeting in which the Law has been violated, provided the complaint is filed within twenty-one days of the date the action was made public. The court may further require records of any meeting held in violation of the Law to be made public unless it determines that secrecy of the records should be maintained.

Finally, the Law specifies that these remedies are not exclusive, and all other available remedies are still operative. Note, however, that there is no provision for monetary fines to be imposed.

End Notes

[1]These guidelines only concern the Open Meeting Law as it applies to counties, G.L. c. 34, §9F-9G, and to municipal and district governments, G.L. c. 39, §§23A-23C and 24. Because the requirements of the Open Meeting Law are essentially the same at the county and municipal levels, the term "Open Meeting Law" or "Law" is used in these guidelines to refer to both the county and municipal statutes, unless otherwise noted.

[2]On the purposes of the Open Meeting Law, see Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978).

[3]See Connelly v. School Committee of Hanover, 409 Mass. 232 (1991), in which the SJC held that a high school principal selection committee appointed by the school superintendent to assist him in choosing candidates was not a governmental body subject to the Law. Because the task of choosing a new principal was one the superintendent could have performed by himself without his being subject to the Law, his informal creation of a selection committee did not subject them to the Law.

[4]See Nigro v. Conservation Commission of Canton. 17 Mass. App. Ct. 433 (1984).

[5]See Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct.433 (1984).

[6]For a statement of what constitutes "public business" or a "public policy matter," the discussion of which would subject a governmental body to the Open Meeting Law, see Medlock v. Board of Trustees of the University of Massachusetts, 31 Mass. App. Ct. 495 (1991). In that case the Court held that because the boards in question only reviewed whether the University was complying with other statutes and did not decide any public policy questions, the Open Meeting Law did not apply.

[7]The fact that the clerk of the Board of Assessors walked off the job after an argument does not create an "emergency situation." Pentecost v. Town of Spencer, 29 Mass. App. Ct. 991 (1991).

[8]See Supervisor of Public Records opinion dated July 18. 1989.

[9]See Harshbarger v. Board of Selectmen of Lexington, No. 88-3644 (Middlesex Super. Ct. August 18, 1989) (order granting summary judgment).

[10]It is possible that another of the Law's exemptions would apply in certain cases. See Sections II. D. 2. g. and II. D. 2. h. above.

[11]See Doherty v. School Committee of Boston, 386 Mass. 643 (1982).

[12]The clause which permits executive session discussion—of strategy regarding contract negotiations with non-union personnel was added by an amendment to the law passed in 1988; the clause permitting executive session negotiations with non-union personnel was enacted in 1985. Neither of these provisions applies to county government; however, an executive session may nevertheless be permissible at the county level if the county's position in collective bargaining with union personnel is likely to be impaired by disclosure of its position regarding contracts with non-union personnel. Compare Attorney General v. School Committee of Taunton, 7 Mass. App. Ct. 226, 230-232 (1979), with District Attorney for the Northern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666-667 (1981).

[13]See District Attorney For The Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985).

[14]See Ghiglione v. School Committee of Southbridge, 376 Mass. 70 (1978).

[15]See Attorney General v. School Committee of Northampton, 375 Mass. 127 (1978).

[16]See Kurlander v. School Committee of Williamstown, 16 Mass. App. Ct. 350 (1983).

Open Meeting Law Guidelines

Appendices

GENERAL LAWS OF MASSACHUSETTS

PART I.
ADMINISTRATION OF THE GOVERNMENT.

TITLE VII.
CITIES, TOWNS AND DISTRICTS.

CHAPTER 39. MUNICIPAL GOVERNMENT.

Chapter 39: Section 23A. Definitions applicable to secs. 23B and 23C.

Section 23A. The following terms as used in sections twenty-three B and twenty-three C shall have the following meanings:[a]

"Deliberation", a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction.

"Emergency", a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

"Executive session", any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.

"Governmental body", every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting.

"Made public", when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body.

"Meeting", any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

"Quorum", a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body.

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Chapter 39: Section 23B. Open meetings of governmental bodies.

Section 23B. All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section.

No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section.

No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.

Nothing except the limitation contained in this section shall be construed to prevent the governmental body from holding an executive session after an open meeting has been convened and a recorded vote has been taken to hold an executive session. Executive sessions may be held only for the following purposes:

(1) To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual, provided that the individual involved in such executive session has been notified in writing by the governmental body, at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights:

(a) to be present at such executive session during discussions or considerations which involve that individual.

(b) to have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation in said executive session.

(c) to speak in his own behalf.

(2) To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the

meeting be open. If an executive session is held, such individual shall have the following rights:

(a) to be present at such executive session during discussions or considerations which involve that individual.

(b) to have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation.

(c) to speak in his own behalf.

(3) 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 governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

(4) To discuss the deployment of security personnel or devices.

(5) To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.

(6) To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.

(7) To comply with the provisions of any general or special law or federal grant-in-aid requirements.

(8) To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if 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 a preliminary screening committee or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a prior preliminary screening.

(9) To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section.

This section shall not apply to any chance meeting, or a social meeting at which matters relating to official business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction or advisory power.

Except in an emergency, a notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts, and the notice or a copy thereof shall, at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town. The secretary of a regional school district committee shall be considered to be its clerk and he shall file the notice of meetings of the committee with the clerk of each city or town within such district and each

such clerk shall post the notice in his office or on the principal official bulletin board of the city or town and such secretary shall post such notice in his office or on the principal official bulletin board of the district. If the meeting shall be of a regional or district governmental body, the officer calling the meeting shall file the notice thereof with the clerk of each city and town within such region or district, and each such clerk shall post the notice in his office or on the principal official bulletin board of the city or town. The notice shall be printed in easily readable type and shall contain the date, time and place of such meeting. Such filing and posting shall be the responsibility of the officer calling such meeting.

A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public; provided, however, that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer. All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions. No votes taken in open session shall be by secret ballot.

A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting.

Upon qualification for office following an appointment or election to a governmental body, as defined in this section, the member shall be furnished by the city or town clerk with a copy of this section. Each such member shall sign a written acknowledgement that he has been provided with such a copy.

The district attorney of the county in which the violation occurred shall enforce the provisions of this section.

Upon proof of failure by any governmental body or by any member or officer thereof to carry out any of the provisions for public notice or meetings, for holding open meetings, or for maintaining public records thereof, any justice of the supreme judicial court or the superior court sitting within and for the county in which such governmental body acts shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provisions at future meetings. Such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney of the county in which the city or town is located. The order of notice on the complaint shall be returnable no later than ten days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of such complaints the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by section eleven A ½ of chapter thirty A, by section nine G of chapter thirty-four or by this section. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

Any such order may also, when appropriate, require the records of any such meeting to be made public, unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized. The remedy created hereby is not exclusive. but shall be in addition to every other available remedy. Such order may also include reinstatement without loss of compensation, seniority, tenure or other benefits for any employee discharged at a meeting or hearing held in violation of the provisions of this section.

Such order may also include a civil fine against the governmental body in an amount no greater than one thousand dollars for each meeting held in violation of this section.

The rights of an individual set forth in this section relative to his appearance before a meeting in an executive or open session, are in addition to the rights that an individual may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements, and the exercise or nonexercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

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Chapter 39: Section 23C. Regulation of participation by public in open meetings.

Section 23C. No person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall, at the request of such presiding officer, be silent. If, after warning from the presiding officer, a person persists in disorderly behavior, said officer may order him to withdraw from the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned.

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Chapter 39: Section 24. Application of chapter.

Section 24. The provisions of this chapter shall be in force only so far as they are not inconsistent with the express provisions of any general or special law; and, so far as apt, shall apply to districts as defined in section one A of chapter forty.