

January 20, 2010

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: The New Open Meeting Law – Role of the Attorney General

One of the most compelling changes included in the new Open Meeting Law [G.L. c.30A, §§18-25, effective July 1, 2010; hereafter “the Law”] is the removal of District Attorneys as the interpreters and enforcers of the Law and the centralization of this authority in the Office of the Attorney General. We do not anticipate that the Attorney General will adopt significantly different readings of the provisions of the Law that carry over from the current version. Based on the many new provisions and some new and far-reaching enforcement authority, however, municipal boards and officials should be aware of the Attorney General’s role under the new Law. We expect that the Attorney General will issue regulations and advisories regarding the new Law. This memorandum will address the principal changes in the enforcement of the Open Meeting Law taking effect in July.

Under the new Law, all enforcement authority will be under the Attorney General. A Division of Open Government will be created within the Office of the Attorney General, led by a Director of Open Government, which will handle all of the responsibilities created under the new Law. An “Open Meeting Law Advisory Commission” will also be created, consisting of representatives of state government, the Massachusetts Municipal Association, the Massachusetts Newspaper Publishers Association and the Attorney General. The Commission will analyze the new Law and make recommendations to the Attorney General for regulations and for training initiatives for state and local bodies subject to the Law.

Under the current Law, an individual that believes a public body has violated the Law may submit a written complaint to the local District Attorney. The District Attorney investigates the complaint, assesses whether there has been a violation, and issues a determination to the body as to any actions necessary to remedy the violation. While rarely used, the District Attorney could also enforce violations through civil or criminal actions. Under the new Law, however, the complainant must first file a written complaint with the *public body itself*. The public body shall, within 14 days of receipt, forward a copy of the complaint to the Attorney General and inform the Attorney General of any remedial action taken. The Attorney General may authorize an extension of the time to respond for “good cause.”

Not less than 30 days after the date the complaint is filed with the public body, the complainant may file a complaint with the Attorney General if he or she believes the public body has not sufficiently addressed the alleged violation. The Attorney General must then determine whether there has been a violation and, before imposing a civil penalty, shall hold an administrative hearing on the complaint. Following a determination that a violation has occurred, the Attorney General shall determine whether the public body, or one or more of the members, or both, are responsible and whether the violation was intentional or unintentional.

Upon the finding of a violation, the Attorney General may issue an order to:

1. compel immediate and future compliance with the open meeting law;
2. compel attendance at a training session authorized by the Attorney General (i.e., conducted by the Division of Open Government or other authorized source);
3. nullify in whole or in part any action taken at the meeting;
4. impose a civil penalty upon the public body of not more than \$1,000 for each intentional violation;
5. reinstate an employee without loss of compensation, seniority, tenure or other benefits;
6. compel that minutes, records or other materials be made public; or
7. prescribe other appropriate action.

Remedy 5 in particular is a significant departure from the current Law. While a District Attorney could, in theory, request that a court reinstate a terminated employee for Open Meeting Law violations in the termination process, the new Law authorizes the Attorney General to make such an order directly to the public body. This remedy could obviously have substantial consequences if a terminated employee is suddenly entitled to reinstatement, based only upon what is determined to be an improper open meeting or executive session. While it is, of course, important that *every* meeting be conducted in accordance with the Law, public bodies should take particular care to insure that any meeting that may lead to a suspension, termination or other disciplinary measure comply with all notice and posting requirements and that all executive session procedures are followed and documented.

A public body or any member of a body aggrieved by any order issued by the Attorney General may obtain judicial review of the order through an action in Superior Court. Any such action, however, must be commenced in Superior Court within 21 days of receipt of the order. Any order issued by the Attorney General that is appealed will be stayed pending judicial review. In addition, however, if the order nullifies an action taken by the public body, the body also cannot implement such action pending judicial review.

If any public body or member fails to comply with the requirements set forth in any order issued by the Attorney General, or fails to pay any civil penalty imposed within 21 days of the date of issuance of such order (or within 30 days following the decision of the Superior Court upholding the Attorney General's order), the Attorney General may file an action in Superior Court to compel compliance. It should be noted that if the public body does not appeal the Attorney General's order and also fails to comply with such order and the Attorney General brings litigation to compel compliance, the body is prohibited from contesting the merits of the order in court. The Court may also impose any of the remedies given to the Attorney General listed above.

In the alternative, the Attorney General or three or more registered voters of the municipality may initiate a civil action in Superior Court to enforce the Open Meeting Law. In any court hearing, the burden will be on the public body to show, by a "preponderance of the evidence," that the action complained of in such complaint was in accordance with and authorized by the Law. It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel. The courts will have an expedited hearing process on such actions, requiring an answer to be filed within 10 days and setting a hearing date to provide "the speediest possible determination of the cause consistent with the rights of the parties."

Finally, the Attorney General has authority to initiate an independent investigation of an alleged Open Meeting Law violation and to conduct an administrative hearing and penalty procedure, at which it may compel testimony and the production of documents.

As with many other aspects of the new Open Meeting Law, the Attorney General will likely be issuing regulations and advisories as to how the enforcement process will be implemented. By becoming familiar with the Law's provisions and following them, however, public bodies will be better able to avoid actual or apparent violations and responding to complaints will be made easier as well.

Very truly yours,

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