

Roles & Responsibilities of Planning & Zoning Boards



Part II

Open Meeting Law
Public Records Law
Conflict of Interest



Transparency in Government

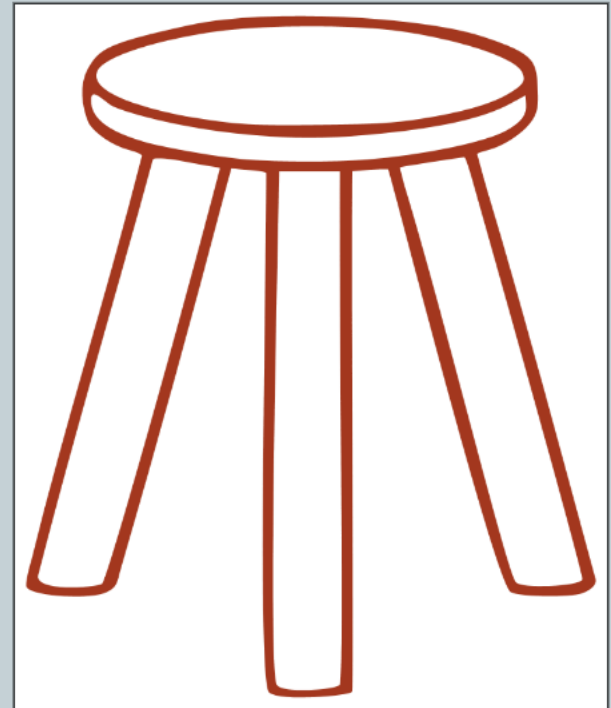


- The Open Meeting Law, the Public Records Law, and the Conflict of Interest Law combine to require openness & integrity in public service.
- Public officials represent the public, who have a right to know what officials do and how they do it, with only a relatively few exceptions provided by law.
- The public also has a right to expect undivided loyalty, and that officials will not have “two masters” in the performance of their official duties.

The “Three-legged Stool”



If you can imagine every action public officials take to rest on a three-legged stool, where each leg represents one of the three laws discussed in this module, if one leg fails, all will fail.



Public Confidence



- If you show a commitment not only to the letter but to the spirit of these 3 laws, you might gain the public's confidence and expect the “benefit of the doubt” in tough cases.
- If, on the other hand, you gain a reputation of only adhering to the minimum requirements of these 3 laws, the public will be less inclined to give you the benefit of the doubt.

Minimum Standards



- Remember – these 3 laws establish minimum standards of conduct.
- As a board member you would do well to aspire to service beyond these minimum standards.

The Open Meeting Law (OML)



The Open Meeting Law



- Effective July 1, 2010, the Legislature repealed the 3 separate Open Meeting laws (state, county, local), and enacted a new consolidated statute applicable to all government levels. MGL c. 30A, §18–25.
- The Attorney General now interprets and enforces the OML.
- The AG's Division of Open Government (“DOG”) administers the OML.

Certification



- Within 2 weeks of becoming a member of a public body, or of taking an oath of office, whichever occurs later, a body member must complete a Certificate of Receipt of Open Meeting Law materials prescribed by the AG.
- The completed Certificate must be retained where the body maintains its official records.

Purposes of the Open Meeting Law



- Except for executive sessions, “*all meetings of a public body shall be open to the public*”.
- Recognizes the necessary balance between government accountability and government efficiency.
- Ensures transparency by public bodies by requiring:
 - Notice
 - Open Deliberations
 - Public Access
- Ensures efficiency by:
 - Providing that certain deliberations may take place in executive session.
 - Maintaining confidentiality of certain records of executive session.

Key Provisions of the OML



- Meetings must be open to the public unless the board enters into a proper executive session.
- Meetings must be posted in a manner that satisfies enhanced notice requirements.
- Public records must be retained with enhanced record keeping requirements.
- Key terms:
 - “public body”
 - “meeting”
 - “deliberation”

“Public Body”



- Any multiple-member board, commission, committee, or sub-committee, however created or otherwise constituted, established to serve a public purpose.
- Does not include:
 - The Legislature.
 - The judicial branch.
 - Bodies created by a constitutional officer as an advisor.
 - Bodies that do not serve a public purpose.
 - Groups that are not established with the “jurisdiction” to make decisions or recommendations collectively.

“Meeting”



- Any deliberation by a public body with respect to any matter within the body’s jurisdiction.
- “Meeting” does not include:
 - an on-site inspection, so-long as the members do not deliberate.
 - attendance by a quorum of the body at a public or private gathering or social event, so-long as the members do not deliberate.
 - attendance and participation by a quorum of the body at a meeting of another public body that has complied with the notice requirements of the OML, communicating only by open participation on matters there under discussion and not privately among themselves.
 - a session of Town Meeting, under MGL c. 39, § 9.
 - adjudicatory proceedings of certain quasi-judicial state bodies.

Remote Participation



Remote Participation may be allowed subject to procedures & restrictions. These include:

- May be approved by Mayor or Board of Selectmen
- May be revoked by Mayor or Board of Selectmen.
- A quorum must be physically present at the meeting location.
- Members participating remotely and all present at meeting location must be audible to each other.
- Remote members may vote and shall not be deemed “absent”.

Remote Participation (continued)



- The Chair must determine that one or more of the following factors make physical attendance unreasonably difficult:
 - Personal illness
 - Personal disability
 - Emergency
 - Military service
 - Geographic distance
- Technology – the following media are acceptable:
telephone, internet, satellite enabled audio or video conferencing, or any other technology that allows remote participants & all persons present to hear each other.
- With video technology, the remote participants must be visible to all persons present at meeting location.

Remote Participation (continued)



- The Public Body determines which of the remote technology may be used.
- The Chair decides technical difficulty issues. Meeting suspension is encouraged. If connection is lost, meeting minutes must reflect that fact and time of occurrence.
- Chair must announce use of remote technology, member using it, and reason for its use.
- All votes must be roll call votes.
- Remote members may participate in executive session but must state that no one else is present or able to listen in.
- Public bodies may adopt bylaws that prohibit or restrict use of remote participation.

“Deliberation”



- Any oral or written communication through any medium, including e-mail, between or among a quorum of a public body on any matter within the body's jurisdiction.
- Deliberation does not include distribution of:
 - A meeting agenda.
 - Scheduling or procedural information.
 - Reports or documents that may be discussed at an upcoming meeting, so long as the material does not express the opinion of a member of the body.

Questions to Ask



- Q1 – Is the communication between members of the body?
- Q2 – Does the communication constitute a deliberation?
- Q3 – Does the communication involve a matter within the body's jurisdiction?
- Q4 – Does the communication fall within one of the exceptions listed in the OML?

Meeting Notice



- Except in an emergency, a public body must post notice at least 48 hours in advance, excluding Saturdays, Sundays, and legal holidays.
- Notice must include:
 - Date
 - Time
 - Place
 - A listing of topics the chair reasonably anticipates to be discussed.
- Emergency means a sudden, unexpected occurrence demanding immediate action.
- In an emergency, body must post notice as soon as reasonably possible.

Posting the Notice



- File the notice with the municipal clerk.
- Post in a manner conspicuously visible to the public, including persons with disabilities, at all hours in or on the municipal building where the clerk's office is located.
- The town clerk must inform the Attorney General of the town's election of alternative posting options.
- Alternative notice options are:

Posting Alternatives



- On the municipal website and post notice or provide internet access in an alternative municipal building where the notice is accessible at all hours.
- On the local cable channel, and cable access in an alternative municipal building where the notice is accessible at all hours.
- In a newspaper, and posting in an alternative municipal building where the notice is accessible at all hours.
- Computer monitor or electronic bulletin board where visible outside of the building
- Audio recording, available to public at all hours.

Notice Tips



- Update notice when new topics arise during the 48 hour notice period.
- Do not post notice so far in advance that new topics are likely to arise.
- Establish good posting arrangements with the municipal clerk.
- Meeting cancellations do not require 48 hour notice.
- Rescheduling a cancelled meeting requires full notice compliance.

Accessibility



- Although not a requirement of the OML itself, all meetings of a public body must comply with federal and state accessibility requirements, including the Americans with Disabilities Act.
- The Civil Rights Division of the Attorney General's Office is available to assist as needed.

Public Participation



- Public may attend open sessions, but may not address the body without permission of the chair.
- Public may make audio or video recording upon notification, subject to reasonable conditions.
- Chair must announce if any recordings are being made.
- Keep the audience informed at all times of where the board is on the agenda and what is occurring at the meeting.

Meeting Minutes



- Must state date, time, place of meeting, and members present or absent.
- Must include:
 - A summary of discussion of each topic.
 - Decisions made, actions taken, and votes recorded (no secret ballots permitted).
 - A list of documents and other exhibits used by the body.

Executive Sessions



- There are 10 purposes for which an executive session may be held.
- Executive Session Process
 - Must first convene in open session beforehand.
 - Must state the purpose(s) of executive session.
 - Must have roll-call majority vote to go into executive session.
 - Must announce if open session will reconvene afterward.
 - Must maintain exhibits and documents used.
 - Must only discuss matters cited.
 - All executive session votes must be by roll-call.

Meeting Records



- Should be created and approved in a timely manner.
- Documents and exhibits must be retained but need not be physically stored with the meeting minutes.
- Open session minutes must be provided within 10 days of a request, whether in draft or final form.
- Unless otherwise exempt from disclosure, executive session minutes must be disclosed if not defeating purpose for which meeting was held.
- Check recently updated records retention schedule.

Complaints – Step 1



- Complaint must be filed with the body within 30 days of alleged violation or of the date by which the violation should reasonably have been discovered.
- Complaint Form is available at the AG's Division of Open Government website.
- The completed form must be sent to the chair of the public body.

Complaints – Step 2



- The chair distributes complaint to body's members.
- The body has 14 days within which to respond and inform the Division of Open Government.
- The Director of the Division may extend the time for response for good cause.

Complaints – Step 3



- After 30 days of Step 1, if the complainant is not satisfied with the body's proposed resolution, the complainant may file complaint with the Division of Open Government.
- Complaints to the Division must be filed within 90 days of the alleged violation.

Complaints - Action by AG



- The AG will acknowledge complaint, and may request or require documents and interviews.
- The AG may determine whether there has been a violation, and if so whether it is intentional.
- The AG may determine if the action taken or proposed by the body is adequate.
- Resolution of the matter may be informal, formal, or possibly by court action.
- The public body may appeal the decision of the AG.

Range of Remedies



- (a) Compel immediate and future compliance.
- (b) Compel attendance at OML training.
- (c) Compel public release of minutes or documents.
- (d) Nullify action taken by body in violation of OML.
- (e) Reinstatement of employee.
- (f) Civil penalty of up to \$1,000 on a body for intentional violation.
- (g) Other appropriate relief.

Alternative Complaint Process



- The Attorney General or 3 or more registered voters may initiate a civil action to enforce the OML.
- The action must be filed in the Superior Court in any county in which the body acts or meets.

Resources and Contact Information



- AG's Open Meeting Law Website:
<http://www.mass.gov/ago/openmeeting>
- Open Meeting Law:
 - MGL c. 30A, §18-25
 - Code of Massachusetts Regulations, 940 CMR 29.00
- Office of the Attorney General
 - Division of Open Government
 - One Ashburton Place
 - Boston, MA 02108
 - (617) 963-2540
 - Email: openmeeting@state.ma.us

The Public Records Law ("PRL")



“Public records” shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose,

...

MASSACHUSETTS GENERAL LAW C. 4, § 7(26)

Public Records



- The Public Records Law (“PRL”) - *Every person has a right of access to public information, including the right to inspect, copy, or have copies provided upon payment of a reasonable fee.*
- A “public record” includes material, regardless of physical form or characteristics, made or received by a public officer or employee (the “custodian”), unless specifically exempted by the Public Records Law.
- A “custodian” is any public officer or employee who in the normal course of duty has access to or control of public records.

Public Record Request & Response



- Requests may be made in person or in writing (mail, fax, email) and must contain a reasonable description of the material.
- Custodian is expected to use any superior knowledge of the records in their custody to assist in locating the material.
- Custodian must respond within 10 days by (a) honoring the request, or (b) providing an estimate of the time and cost of doing so, or (c) by a denial citing specific basis for withholding the requested material.
- Other than under Exemption (n), the custodian may not inquire into the status or motivation of the requester.

Appeal Process



- The requester may appeal to the Supervisor of Public Records if the response is not in compliance with law.
- Although requests do not have to be written, it is recommended that it be written, since no appeal to the Supervisor can be done unless the request is in writing.
- The appeal starts by sending the Supervisor:
 - A copy of the written request
 - A copy of the custodian's response (if any)
 - A cover letter explaining the details

Records in Existence



- Requests may not be made for records that (1) do not exist yet, or (2) that no longer exist.
- Response to a PRL request may be limited to information physically existing and in the custody of the public entity at the time of the request.
- No obligation for the custodian to make a record, but should try to locate existing records that contain the requested information.
- “Information” alone is not a public record, only a record that contains information is a public record.

Fees



- A records custodian may charge a reasonable fee to cover the costs of complying with the request.
- Fees for copies: \$0.20/page, or actual costs of reproduction.
- Fees for “search and segregation” time: the hourly rate of the lowest paid employee with the required knowledge and experience for the time spent in searching, redacting, and reproducing

Exemptions to the PRL



- “Public records” definition contains 18 exemptions that may serve as the basis for withholding a record, in whole or in part.
- Exemptions are strictly and narrowly construed.
- Where exempt information is intertwined with non-exempt information, the non-exempt portions must be disclosed and the exempt portions redacted.
- Other laws may impose a legal obligation to withhold certain information - laws relating to personal privacy and personal identifying information.
- A record is presumed “public” unless an exemption applies.

The “Statutory” Exemption



- Exemption (a) – applies to 2 categories of records that are “specifically or by necessary implication exempted from disclosure by statute.”
 - Category 1 – where a statute expressly states that the record “shall be kept confidential” or that a record “shall not be a public record”.
 - Category 2 – records that expressly limit dissemination of particular records to a defined group of individuals or entities

The “Privacy” Exemption



- Exemption (c) – the most frequently invoked exemption, contains 2 categories:
 - Category 1 – “personnel and medical files or information”.
 - Category 2 – “other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy,” such as intimate details of a highly personal nature.

The “Personal Notes” Exemption



- Exemption (e) – notebooks, notes, and other materials prepared by an employee that are personal and not maintained as part of the files of the board.

(This exemption is not available where such materials are shared with other board members or are being maintained as part of the board's official files.)

The “Appraisals of Real Property” Exemption



- Exemption (i) – “appraisals of real property acquired or to be acquired until:
 - (1) a final agreement is entered into; or
 - (2) any litigation relative to such appraisal has been terminated; or
 - (3) the time within which to commence such litigation has expired.

The “Security & Safety” Exemption



- Exemption (n) – records relating to layout, structure, security, emergency preparedness, and to the security or safety of persons, buildings, structures, facilities, transportation, or other infrastructure, the disclosure of which, in the reasonable judgment of the custodian – subject to review by the Supervisor of Public Records – is likely to jeopardize public safety.

(This exemption is the only one in which the status or motivation of the requester can be inquired into by the custodian, and where disclosure is conditionally discretionary.)

“Attorney-Client Privilege”



- Confidential communications between government entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the Common Law “attorney-client privilege.”
- “Work product” documents of the government attorney are not exempt from disclosure under the Public Records Law.

Computer Records



- The statutory definition of “public records” does not distinguish between paper records and records stored in digital format.
- Records custodians are not required to create a computer record in response to a request, except where reprogramming is required in order to comply with a request.

Records Management & Maintenance



- The PRL requires that public records be retained, well-organized, and readily accessible.
- Records custodian must ensure safekeeping and availability of public records.
- The Municipal Records Retention Manual (revised 2011) lays out the retention periods for all municipal records.
<http://www.sec.state.ma.us/arc/arcrmu/rmuidx.htm>
- Of particular note:
 - Series 1 -- Records in Common
 - Series 3 -- Zoning Board of Appeals
 - Series 15 -- Planning Board

Electronic Records Storage



- No formal standards are currently available for the long-term storage, retrieval, and maintenance of electronic records.
- Exclusive electronic storage may not exceed 10 years.
- Paper originals must be retained for the retention period.
- Records with a retention period of less than 10 years may be stored exclusively electronically once the computer storage system and the proper Destruction Schedule have been approved .

Protecting Personal Information



- In 2007, Chapter 93H was enacted that imposes obligations on the acquisition, handling, and disclosure of personal information.
- Strict notification requirement apply to any known security breach.
- “Personal information” is specifically defined as:

“Personal Information” Defined



- A resident's first & last name or first initial & last name in combination with 1 or more of the following data that relate to such resident:
 - (a) Social Security number;
 - (b) Driver's license number or state-issued identification card number;
or
 - (c) Financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account; provided, however, that “Personal information” shall not include information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public.

Personal Information Tip



- Be critically selective when asking for personal information, and do so only when there is a legitimate programmatic reason to have it.
- Once obtained, retain the information in a secure place with access limited to only those with a programmatic need to know.
- Report any security breach as required by MGL c. 93H, § 3.

Help is Available



- Secretary of State – Public Records Division
<http://www.sec.state.ma.us/pre/preidx.htm>
- Records Management Unit
Mr. Terry French: 617-727-2816
- Supervisor of Public Records Office
Attorney of the Day: 617-727-2832

The Conflict of Interest Law ("COI")



**“ALWAYS DO RIGHT. THIS WILL
GRATIFY SOME PEOPLE AND
ASTONISH THE REST”**

MARK TWAIN

Conflict of Interest Law



- The Conflict of Interest Law (“COI”).
 - General Laws, Chapter 268A
 - 930 CMR 5.00; 6:00
- The COI is designed to:
 - Prohibit and prevent conflicts between private interests and public duties;
 - Foster integrity in public service; and
 - Promote public trust and confidence in government.
- The COI imposes restrictions on:
 - What the employee does on-the-job, after hours, and after leaving public service.

Penalties for COI Violations



1. Civil penalty of up to \$10,000 and up to \$25,000 for bribery cases.
2. Order to repay the economic advantage gained by the violation.
3. Restitution to injured parties
4. Criminal prosecution.

Municipal Employee



- “Municipal Employee” is a broadly defined term, meaning anyone performing services for a city or town or holding a municipal position, whether paid or unpaid, full-time or part-time.
- It includes:
 - Elected officials
 - Volunteers
 - Consultants
 - An employee of a private firm under contract to the city or town

“Special Municipal Employees”



- This designation recognizes the need not to unduly restrict volunteers and part time employees.
- Made by Select Board, City Council, or by charter.
- Eligible if :
 - Unpaid, or
 - Part-time but allowed to have another job during normal working hours, or
 - If not paid for working more than 800 hours during preceding 365 days.

“Special Municipal Employees” (Continued)



- If designated, special municipal employee may:
 - be paid by others,
 - act on behalf of others, and
 - act as attorney for others on matters before boards other than their own.
- Must not have participated in the matter as part of municipal position.
- The matter must not be, or within the past year have been, under official responsibility.

On-the-Job Restrictions



- (a) Bribes
- (b) Gifts and gratuities
- (c) Misuse of position
- (d) Self-dealing and nepotism
- (e) False claims
- (f) Appearance of conflict
- (g) Confidential information

(a) Bribes



- A bribe means: giving, offering, receiving, or asking for anything of value in exchange for the employee's official actions.
- Asking for and taking bribes is prohibited.
- A bribe involves a corrupt intent – the employee agrees to do or not do some official act, and the giver intends to influence the employee to act or not act.

(b) Gifts and Gratuities



- Accepting anything valued at \$50 or more:
 - Because of official position, or
 - To reward past official actions, or
 - To influence future official actions
- For example: meals, entertainment, event tickets, sport admissions, travel.
 - Certain travel expenses and fees for educational programs are covered by regulatory exemption.
- Violations can be cumulative. A number of smaller gifts together worth more than \$50 can violate the COI.

(c) Misuse of Position



- Using official position to secure for self or another something not entitled to, or causing this to happen.

(d) Self-dealing & Nepotism



- Participating as a municipal employee in a matter in which employee or employee's family or business organization has a direct or foreseeable financial interest.
- Family includes spouse, and the parents, children, siblings of both employee and spouse.
- Employer includes current or prospective, and business in which employee is director, officer, trustee, or employee.
- Participation includes discussing, voting, delegating.

(d) Self-dealing & Nepotism (continued)



- Financial interest can be:
 - Large or small
 - Positive or negative.
- Not included:
 - Financial interests that are remote, speculative or not sufficiently identifiable.
- Abstention:
 - In many cases a municipal employee may be able to comply with the COI by simply abstaining, without having to give a reason for not participating.

(e) False Claims



- Presenting a false claim to employer for a payment or benefit, or causing someone else to do so.

(f) Appearance of Conflict



- Acting in a manner that would cause a reasonable person to conclude that the employee can be improperly influenced.
- Relationships and affiliations could prevent employee from acting fairly and objectively in official duties.
- Violation can be avoided by public disclosure of the facts to appointing authority.

(g) Confidential Information



- Improperly disclosing or personally using confidential information obtained through the job.

After Hours Restrictions



- a) Second paid job.
- b) Divided loyalties.
- c) Inside track.

(a) Second Paid Job



- An employee generally may not have a direct or indirect financial interest in a contract made by the municipality.
- With certain exceptions an employee is prohibited from having a direct contract or, deriving any financial benefit from, a contract which the municipality has with another person or entity.
- Outside employment contracts are included.

(b) Divided Loyalties



- Receiving pay from anyone other than the city or town to work on a matter involving the city or town is a violation of the COI.
- Acting as agent or attorney for anyone other than the city or town in a matter involving the city or town is prohibited, whether or not paid.
 - Includes contacting municipality by phone, in person, in writing, serving as spokesperson, acting as liaison.
- Employee may always represent own interests, even before own board.

(c) Inside Track



- Being paid by city or town, directly or indirectly, under some second arrangement in addition to primary job, unless an exemption applies.
- Interest in a municipal contract, including second municipal job.
- Having an indirect financial interest in a contract that the city or town has with someone else.
- Prohibits “inside track” to further financial opportunities not available to others.

After Leaving Municipal Employment



- a) The “Forever Ban”
- b) The “One Year Cooling-off Period”
- c) Partners

Forever Ban & One Year Cooling off Period



Matters Outside Area of Official Responsibility :

- From date of separation, a former employee may represent and be paid by third party without limitation.

Matters Within Area of Official Responsibility:

- Employee participated in matter: former employee is banned forever.
- Employee did not participate in matter: employee is banned for one year on any matter within official responsibility during the two years prior to the date of separation.

Partners



- Business partners of municipal employees are subject to restrictions during employment and after service ends.

Where to Find Help



- Ethics Commission Website
www.mass.gov/ethics
- Contact Information:
 - State Ethics Commission
One Ashburton Place, Room 619
Boston, MA 02108
Phone (617) 371-9500
Fax (617) 723-5851
- Attorney of the Day
(617) 371-9500