

Appendix F - Massachusetts Open Meeting Law

I. Who is subject to the Law?

The Law applies to all "governmental bodies" which are defined 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." Mass. Gen. L. ch. 39, § 23A.

- A. The Law does not apply to individual public officers such as mayors or chiefs of police and their assistants.
- B. A governmental body cannot circumvent the Law by delegating public business to a subcommittee. That is, subcommittees are equally subject to the Law as are full committees.
- C. Subcommittees appointed by any governmental body are covered by the Law. As long as a body however constituted, is carrying out delegated functions or responsibilities of the parent body, the convening must be open to the public. Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433 (1984).

II. What is a "meeting" for purposes of the Law?

A "meeting" is defined as "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." Mass. Gen. L. ch. 39, § 23A.

- 1. "Deliberation" is defined as "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." Mass. Gen. L. ch. 39, § 23A.
- 2. A "quorum" is defined as "a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body." Mass. Gen. L. ch. 39, § 23A.
- 3. The Law does not apply to "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. However, such meetings cannot be used to circumvent the letter and spirit of the Law

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. The facts suggest that the chance or social meeting may have been used to circumvent the requirements of the Law.*

4. Where members of a town board meet to discuss public business in private even where the members do not intend to vote on, or make a final decision on issues, this action constitutes a "meeting" under the Law. Thus, if there is a simple "exchange of views" by a simple majority of the members of a board on a public issue, then the board must comply with the requirements of the Law. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465 (1989); District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985).
5. Discussion by telephone among members of a governmental body on an issue of public business within the jurisdiction of the body is a violation of the Law.

III. Procedures required by the Law

A. Notice requirements

1. The Law provides that:
"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." Mass. Gen. L. ch. 39, § 23B.
2. A governmental body may comply with the 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 at the regularly scheduled time and place.
3. A governmental body does not satisfy the notice requirement by posting notice indicating a range of times within which the board may meet.
4. The notice requirements do not apply to "emergency" meetings. An 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.
5. In the event that it becomes necessary to adjourn or extend a meeting to another time, the Law's notice requirements apply to the adjourned or extended meeting. Accordingly, it is 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.

B. Minutes of Meetings

1. The Law requires every governmental body to maintain accurate records of its open meetings, setting forth the time, date, place, members present or absent and action taken at each meeting.

2. "Action taken" includes discussion or consideration of issues, even if no vote is taken or no determination is made with respect to any issue or subject considered.
3. No verbatim transcript of the proceedings is required.
4. The records or minutes of every meeting are public records from the moment they are made. As public records, meeting records or minutes must be made available to the public at reasonable times and in a reasonable place. The governmental body must permit the records to be copied, although it may charge a reasonable copying fee.
5. The minutes of an executive session are also public records. Executive session minutes may be withheld from public inspection as long as publication of the minutes would defeat the lawful purposes of the executive session. Once the need for secrecy has passed, the records must be released.

C. Conduct of Meetings

1. All meetings of a governmental body are open to the public and any person shall be permitted to attend such meetings unless the governmental body (a) validly decides to hold executive session for one of the nine purposes outlined in the Law and (b) follows the prescribed procedures for holding such an executive session.
2. In order to enter into executive session, the governmental body must first convene an open meeting. In order to convene an open meeting, there must be a quorum present. A majority of the members of the governmental body must vote to go into executive session. This has been interpreted to mean a majority of the members present, rather than a majority of the members voting.

Example: *On a five member board with two members abstaining from a vote, if two members vote to enter into an executive session and one member votes against entering into executive session, the motion fails and an executive session would be in violation of the statute.*

3. The vote of each member must be recorded on a roll call vote and entered into the minutes of the meeting.
4. The presiding officer must cite the purpose for the executive session and whether the governmental body will reconvene in open meeting after the executive session is completed.
5. 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.

IV. Executive Session

- A. Definition. The Law defines an executive session as "any meeting of a governmental body which is closed to certain persons for deliberation on certain matters."
- B. Procedure for entering into Executive Session. The Law provides that:

"[n]o 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." Mass. Gen. L. ch. 39, § 23B.
- C. Exceptions. The Law provides nine purposes or exceptions to holding a meeting in executive session. Where there is an express exception to a statute, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985).

- 1. **Exception One** - To discuss the "reputation, character, physical condition or mental health rather than professional competence" of a particular individual. This exception is designed to protect individuals' rights and reputation. Thus, where a governmental body is considering applicants for a professional job position, the applicant's professional competence cannot be discussed in an executive session based on this exception. This exception is designed to enable a public body to engage in candid discussion about the character and reputation of an individual who is the subject of potential action by that public body.

If the public body wishes to discuss an individual's character and reputation, the individual is entitled to the following rights:

- a. The right to be present during discussions or considerations that involve him or her;
 - b. The right to have counsel present to advise the individual, but not to participate actively in the executive session;
 - c. To speak in his/her own behalf;
 - d. To receive written notice at least forty-eight hours in advance of the proposed executive session; and
 - e. To request that the meeting be open rather than closed.
- 2. **Exception Two** - "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."

As with the first exception, this exception is designed to balance individuals' privacy rights with the public's right of access. The Law provides an individual whose discipline or dismissal is to be discussed with the same rights listed in Exception One, above.

3. **Exception Three** - "To discuss strategy relating to collective bargaining or to 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."
 - a. To determine whether a governmental body may discuss collective bargaining or litigation strategy in executive session, the test is whether the discussion is directly related to the governmental body's collective bargaining position in ongoing or imminent negotiations. If challenged, the governmental body must show that an open meeting might have a "detrimental effect" on its bargaining or litigating position.
 - b. For purposes of the Law, "collective bargaining sessions" include not only the bargaining sessions but also any grievance hearings that are called for under the terms of a collective bargaining agreement.
4. **Exception Four** - "To discuss the deployment of security personnel or devices. "
5. **Exception Five** - "To investigate charges of criminal misconduct or to discuss the filing of criminal complaints."

General complaints or charges against individuals are governed by the second exception to the open meeting law. Governmental bodies must carefully distinguish between instances which are covered by exception two rather than exception five.

Example: *A school committee meets to discuss the discipline of a student who has assaulted another student. If the committee is meeting to discuss exclusion of the student without intending to explore a criminal option, the school committee should not use exception five to go into executive session.*

6. **Exception Six** - "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."

This exception recognizes that public discussion of negotiations might increase the eventual price paid by the government. As with the collective bargaining and litigation exception, the governmental body must show that an open meeting might have an adverse impact on the body's negotiating position with a third party.

7. **Exception Seven** - "To comply with the provisions of any general or special law or federal grant-in-aid requirements."

Certain statutes or the conditions in certain federal grants require that particular issues be discussed in executive session. This exception is intended to prevent the Law from disqualifying cities and towns from obtaining such grants if the terms of the grant require confidentiality.
8. **Exception Eight** - "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."

a. In order to enter into executive session under exception eight, the subcommittee must satisfy two requirements: first, the subcommittee must demonstrate that an open meeting will have a detrimental effect in obtaining qualified applicants. This can be accomplished in one of two ways: the subcommittee may go into executive session if an applicant indicates his/her preference that the meeting not be held in open session or if the subcommittee speaks with the candidates and asks them whether they object to holding the meeting in open session. Second, the subcommittee must demonstrate that applicants to be interviewed in executive session have not already "passed a prior preliminary screening." This means that once the subcommittee has completed its screening, which may include more than one step and may or may not include interviews, and has voted to recommend a candidate or candidates to the full committee, the process may not be repeated in executive session by the full committee. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465 (1989).

b. However, where a superintendent appoints a selection committee for a new high school principal to assist him in nominating candidates, courts have determined that the Law does not apply because the selection committee is not a "governmental body" within the meaning of the Law. The court determined that the Law did not extend to committees which were not appointed by a "governmental body" and not otherwise constituted pursuant to statute, ordinance or by-law. Connolly v. School Committee of Hanover, 409 Mass. 232 (1991). Note: Connolly should not be broadly construed. If the facts in Connolly were altered slightly, the result might well be different.

9. **Exception Nine** - "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 exception, passed in December, 1994, exempts mediation sessions from the Open Meeting Law's requirements provided that the decision to enter into mediation is made in open session and that the governmental body does not take any action concerning the issue or issues submitted to mediation until it has deliberated and approved such action in an open meeting.

V. Enforcement

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

B. Legal proceedings

1. Three or more registered voters, as well as the Attorney General or the District Attorney may bring suit to enforce the Law by filing a complaint in Superior Court or the Supreme Judicial Court alleging a violation of the Law by any governmental body. Such a suit is to be heard within ten (10) days. The body charged with violating the Law has the burden of proving that the violation alleged did not occur by a preponderance of the evidence.
2. Typically, the District Attorney's office receives a complaint and the matter is referred to an Assistant District Attorney. The complainant is asked to reduce the complaint into written form. The District Attorney makes a preliminary evaluation of the legal and factual basis for the complaint. If the allegations would constitute a violation of the Law, the ADA will inquire in writing to the governmental body asking that the body provide the DA's office with a response indicating the body's version of the facts and its view concerning the legality of the disputed actions.

C. Remedies

1. Upon proof in a suit that a governmental body or any of its members have violated any provision of the Law, a court may enter an order requiring compliance with the Law at future meetings.
2. The court may also enter an order invalidating any action taken at any meeting in which the Law was violated.
Note: A governmental body which violates the Law may cure its violation by holding a subsequent meeting which complies with the Law if the meeting is held prior to the commencement of an action. Benevolent & Protective Order of Elks, Lodge No. 65 v. City Council of Lawrence, 403 Mass. 563 (1988).
3. The court may require that records of any meeting held under the Law be made public unless it is determined that secrecy of the records should be maintained.
4. Under a new amendment, civil fines can be instituted against the governmental body in an amount no greater than one thousand dollars for each meeting held in violation of this section.