

Open Meeting Law Guide



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF ATTORNEY GENERAL
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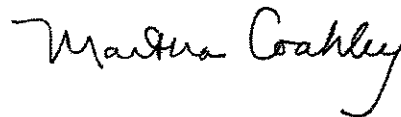
Dear Massachusetts Residents:

On July 1, 2010, the Attorney General's Office assumed responsibility for the enforcement of the Open Meeting Law (OML) from the state's District Attorneys. We believe that transferring all enforcement to one central statewide office will allow for greater consistency and will ensure that local officials have access to the information they need to comply with the law.

Our office is committed to ensuring that the changes to the Open Meeting Law will provide for greater transparency and clarity – both of which are hallmarks of good government. We are focused on providing educational materials, outreach and training sessions to ensure that all members of the public understand the law.

Whether you are a town clerk or town manager, a member of a public body, or an involved resident, I want to thank you for taking the time to understand the Open Meeting Law. We strive to be a resource to you, and encourage you to contact the Division of Open Government at (617) 963-2540 or visit our website at www.mass.gov/ago/openmeeting for more information.

Cordially,

A handwritten signature in cursive script that reads "Martha Coakley".

Martha Coakley
Massachusetts Attorney General

Attorney General's Open Meeting Law Guide

Overview

Purpose of the Law

The purpose of the Open Meeting Law is to ensure transparency in the deliberations on which public policy is based. Because the democratic process depends on the public having knowledge about the considerations underlying governmental action, the Open Meeting Law requires, with some exceptions, that meetings of public bodies be open to the public. It also seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently.

AGO Authority

The Open Meeting Law was revised as part of the 2009 Ethics Reform Bill, and now centralizes responsibility for statewide enforcement of the law in the Attorney General's Office (AGO). G.L. c. 30A, §19 (a). To help public bodies understand and comply with the revised law, the Attorney General has created the Division of Open Government. The Division of Open Government provides training, responds to inquiries, investigates complaints, and when necessary, makes findings and takes remedial action to address violations of the law. The purpose of this Guide is to inform elected and appointed members of public bodies, as well as the interested public, of the basic requirements of the law.

Certification

Within two weeks of qualification for office, all members of public bodies must complete the attached Certificate of Receipt of Open Meeting Law Materials certifying that they have received these materials, and that they understand the requirements of the Open Meeting Law and the consequences for violating it. The certification must be retained where the body maintains its official records. All public body members should familiarize themselves with the Open Meeting Law, Attorney General's regulations, and this Guide.

Open Meeting Website

This Guide is intended to be a clear and concise explanation of the Open Meeting Law's requirements. A more in-depth explanation of the law along with up-to-date regulations, training materials, advisory opinions and orders can be found on the Attorney General's Open Meeting website, <http://www.mass.gov/ago/openmeeting>.

Local and state government officials, members of public bodies and the public are encouraged to visit the website regularly for updates, as well as to view additional Open Meeting Law materials.

What meetings are covered by the Open Meeting Law?

With certain exceptions, all meetings of a public body must be open to the public. A meeting is generally defined as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” As explained more fully below, a deliberation is a communication between or among members of a public body.

These four questions will help determine whether a communication constitutes a meeting subject to the law:

- 1) is the communication between members of a **public body**;
- 2) does the communication constitute a **deliberation**;
- 3) does the communication involve a matter within the body’s **jurisdiction**; and
- 4) does the communication fall within an **exception** listed in the law?

What constitutes a **public body**?

While there is no comprehensive list of public bodies, any multi-member board, commission, council, authority, committee or subcommittee within the Executive branch of state government, or within any county, district, city, region or town, which has been established to serve a public purpose, is subject to the law. The law includes any multi-member body created to advise or make recommendations to a public body, and also includes the board of any local housing or redevelopment authority, and the governing board or body of any authority established by the Legislature to serve a public purpose. The law excludes the Legislature and its committees, bodies of the judicial branch, and bodies appointed by a constitutional officer for the purpose of advising a constitutional officer.

Boards of selectmen and school committees are certainly subject to the Open Meeting Law, as are subcommittees of public bodies, regardless of whether their role is decision-making or advisory. Neither individual government officials, such as a mayor or police chief, nor members of their staffs, are “public bodies” subject to the law, and so they may meet with one another to discuss public business without needing to comply with Open Meeting Law requirements.

What constitutes a **deliberation**?

The Open Meeting Law defines deliberation as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction.” Distributing a meeting agenda,

scheduling or procedural information, or reports or documents that may be discussed at the meeting will not constitute deliberation, so long as the material does not express the opinion of a member of the public body. E-mail exchanges between or among a quorum of members of a public body discussing matters within the body's jurisdiction may constitute deliberation, even where the sender of the email does not ask for a response from the recipients.

To be a deliberation, the communication must involve a quorum of the public body. A quorum is usually a majority of the members of a public body. Thus, a communication among less than a quorum of the members of a public body will not be a deliberation, unless there are multiple communications among the members of the public body that would together be a communication among a quorum of members. Courts have held that the Open Meeting Law applies when members of a public body communicate in a manner that seeks to evade the application of the law. Thus, in some circumstances, communications between two members of a public body, when taken together with other communications, may be a deliberation.

What matters are within the **jurisdiction** of the public body?

The Open Meeting Law applies only to the discussion of any "matter within the body's jurisdiction". The law does not specifically define "jurisdiction." But as a general rule, any matter of public business on which a quorum of the public body may make a decision or recommendation would be considered a matter within the jurisdiction of the public body.

What are the **exceptions** to the definition of a meeting?

There are five exceptions to the definition of a meeting under the Open Meeting Law.

1. Members of a public body may conduct an onsite inspection of a project or program; however, they cannot deliberate at such gatherings;
2. Members of a public body may attend a conference, training program or event; however, they cannot deliberate at such gatherings;
3. Members of a public body may attend a meeting of another public body provided that they communicate only by open participation; however, they cannot deliberate at such gatherings;
4. Meetings of quasi-judicial boards or commissions held solely to make decisions in an adjudicatory proceeding are not subject to the Open Meeting Law; and,
5. Town Meetings are not subject to the Open Meeting Law. See G.L. c. 39, § 9.

What are the requirements for filing and posting meeting notices?

Except in cases of emergency, a public body must provide the public with notice of its meeting 48 hours in advance, excluding Saturdays, Sundays and holidays. Notice of emergency

meetings must be posted as soon as reasonably possible prior to the meeting. Notices must be posted in a manner that is accessible to disabled persons to the extent required by federal and state law.

- For local public bodies, meeting notices must be filed and available to the public in the office of the municipal clerk. Notices may be posted on a bulletin board, in a loose-leaf binder or on any electronic display (e.g. television, computer monitor, or an electronic bulletin board), provided that the notice is conspicuously visible to the public at all hours in or on the municipal building in which the clerk's office is located. In the event that the meeting notices posted in the municipal building are not visible to the public at all hours, then the municipality must either post notices on the outside of the building or follow one of the alternative posting methods approved by the Attorney General.
- For regional or district public bodies and regional school districts, meeting notices must be filed and posted in the same manner required of local public bodies, in each of the communities within the region or district.
- County public bodies must file meeting notices in the office of the county commissioners and post notice of the meeting in a manner conspicuously visible to the public at all hours at a place or places designated by the county commissioners for notice postings.
- State public bodies must file meeting notices by posting the notice on a website in accordance with procedures that can be found on the Attorney General's Open Meeting Website, www.mass.gov/ago/openmeeting.

Alternate Posting Methods for Local Public Bodies

For local public bodies, the Attorney General has determined that the following alternative methods will provide more effective notice to the public, provided that all meeting notices posted under an alternative method shall include the same content as required by section 29.03(1)(b) and shall also be available during hours when the clerk's office is open in the manner required by subsection 29.03(2)(a):

- (1) public bodies may post notice of meetings on the municipal website, **AND**, post notice or provide Internet access in an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;
- (2) public bodies may post notice of meetings on cable television, **AND**, post notice or provide cable television access in an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;
- (3) public bodies may post notice of meetings in a newspaper of general circulation in the municipality, **AND**, post notice or a copy of the newspaper containing the meeting notice at an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;

- (4) public bodies may place a computer monitor or electronic or physical bulletin board displaying meeting notices on or in a door, window, or near the entrance of the municipal building in which the clerk's office is located in such a manner as to be visible to the public from outside the building, or;
- (5) public bodies may provide an audio recording of meeting notices, available to the public by telephone at all hours.

The clerk of the municipality must inform the AGO of its notice posting method, and update the Division of any future change. All public bodies shall consistently use the most current notice posting method on file with the AGO.

What information must meeting notices contain?

Meeting notices must be posted in a legible, easily understandable format; contain the date, time and place of the meeting; and list the topics that, as of the time the notice is filed, the chair reasonably anticipates will be discussed at the meeting. The list of topics must be sufficiently specific to reasonably inform the public of the issues to be discussed at the meeting. While not required under the Open Meeting Law, public bodies are encouraged to make a revised list of topics to be discussed available to the public in advance of the meeting if the body intends to discuss topics that come up within the 48 hour period before the meeting.

When can a public body meet in executive session?

While all meetings of public bodies must be open to the public, certain topics may be discussed in executive, or closed, session. Before going into an executive session, the chair of the public body must:

- First convene in open session.
- State the reason for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called.
- State whether the public body will reconvene at the end of the executive session.
- Take a roll call vote of the body to enter executive session.

While in executive session, the public body must keep accurate records and must take a roll call vote of all votes taken and may only discuss matters for which the executive session was called.

The Ten Purposes for Executive Session

The law defines ten specific Purposes for which an executive session may be held, and emphasizes that these are the only purposes for which a public body may enter executive session.

The ten Purposes for which a public body may vote to hold an executive session are:

- 1. To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties.**

This Purpose is designed to protect the rights and reputation of individuals. Nevertheless, it appears at least that where a public body is discussing an employee evaluation, considering applicants for a position, or discussing the qualifications of any individual, these discussions should be held in open session to the extent that that the discussion deals with issues other than the reputation, character, health, or any complaints or charges against the individual. An executive session called for this Purpose triggers certain rights on the part of an individual who is the subject of the discussion. The individual's right to choose to have his or her dismissal considered at an open meeting takes precedence over the general right of the public body to go into executive session.

While the proposed imposition of disciplinary sanctions by a public body on an individual fits within this Purpose, this Purpose does not apply if, for example, the public body is deciding whether to lay off a large number of employees because of budgetary constraints.

- 2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;**

Collective Bargaining Sessions: These include not only the bargaining sessions but also include grievance hearings that are called for under a collective bargaining agreement.

- 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 public body and the chair so declares;**

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 public body, 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 Purpose. The showing that must be made is that the open discussion may have a detrimental impact on the collective bargaining process; the body is not required to demonstrate or specify a definite harm that would have arisen. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session may be detrimental to the public body's bargaining or litigating position.

Litigation Strategy: Discussions concerning strategy with respect to ongoing litigation obviously fit within this Purpose, but only if an open meeting may have a detrimental effect on the litigating position of the public body. Discussions relating to potential litigation are not covered by this exemption unless that litigation is clearly and imminently threatened or otherwise demonstrably likely. That a person is represented by counsel and supports a position adverse to the public body's does not by itself mean that litigation is imminently threatened or likely. Nor does the fact that a newspaper reports a party has threatened to sue necessarily mean imminent litigation.

Note: A public body's discussions with its counsel do not automatically fall under this or any other Purpose for holding an executive session.

4. **To discuss the deployment of security personnel or devices, or strategies with respect thereto;**
5. **To investigate charges of criminal misconduct or to consider the filing of criminal complaints;**

This Purpose permits an executive session to investigate charges of criminal misconduct and to consider the filing of criminal complaints. Thus it primarily involves discussions that would precede the formal criminal process in court. Purpose 1 is related, in that it permits an executive session to discuss certain complaints or charges, which may include criminal complaints or charges, but only those that have already been brought. Also, unlike Purpose 5, Purpose 1 confers certain rights of participation on the individual involved, as well as the right for the individual to insist that the discussion occur in open session. To the limited extent that there is overlap between Purposes 1 and 5, a public body has discretion to choose which Purpose to invoke when going into executive session.

6. **To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body;**

Under this Purpose, as with the collective bargaining and litigation Purpose, an executive session may only be held where an open meeting may have a detrimental impact on the body's negotiating position with a third party. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session may be detrimental to the public body's negotiating position.

7. To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;

There may be provisions in certain statutes or federal grants which require or specifically allow that a public body consider a particular issue in a closed session. Additionally, as the following section discusses, where Purpose (8) does not apply, Purpose (7) may nevertheless apply to the initial stage of a hiring process.

8. To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that 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, to consider and interview applicants who have passed a prior preliminary screening;

This Purpose permits a hiring subcommittee of a public body or a preliminary screening committee to conduct the initial screening process in executive session. This Purpose 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. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session will be detrimental to the public body's ability to attract qualified applicants for the position.

9. To meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity, provided that:

(i) any decision to participate in mediation shall be made in an open session and the parties, issues involved and purpose of the mediation shall be disclosed; and

(ii) no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session

10. To discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided:

- a. in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to G.L. c. 164 § 1F,
- b. in the course of activities conducted as a municipal aggregator under G.L. c. 164 § 134, or
- c. in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to G.L. c. 164 § 136,
- d. when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy

May a member of the public body participate remotely?

The Attorney General is authorized under the Open Meeting Law to permit remote participation by members of a public body not present at the meeting location. This issue is under consideration by the AGO, which will be seeking public comment. While the issue is under consideration, remote participation by members of public bodies is not permitted under the Open Meeting Law.

What public participation in meetings must be allowed?

Under the Open Meeting Law, the public is permitted to attend meetings of public bodies but is excluded from an executive session that is called for a valid purpose listed in the law. Any member of the public also has a right to make an audio or video recording of an open session of a public meeting. A member of the public who wishes to record a meeting must first notify the chair and must comply with reasonable requirements regarding audio or video equipment established by the chair so as not to interfere with the meeting. The chair is required to inform other attendees of such recording at the beginning of the meeting.

While the public is permitted to attend an open meeting, an individual may not address the public body without permission of the chair. An individual is not permitted to disrupt a meeting of a public body, and at the request of the chair, all members of the public shall be silent. If after clear warning, a person continues to be disruptive, the chair may order the person to leave the meeting, and if the person does not leave, the chair may authorize a constable or other officer to remove the person.

What records of public meetings must be kept?

Public bodies are required to create and maintain accurate minutes of all meetings, including executive sessions. The minutes, which must be created and approved in a timely manner, must state the date, time and place of the meeting, a list of the members present or absent, and the decisions made and actions taken including a record of all votes. While the minutes must also include a summary of the discussions on each subject, a transcript is not required. No vote taken by a public body, either in an open or in an executive session, shall be by secret ballot. All votes taken in executive session must be by roll call and the results recorded in the minutes. In addition, the minutes must include a list of the documents and other exhibits used at the meeting. While public bodies are required to retain these records in accordance with records retention laws, the documents and exhibits listed in the minutes need not be physically stored with the minutes.

The minutes, documents and exhibits are public records and a part of the official record of the meeting. Whether records are subject to disclosure under the Open Meeting Law will depend on whether the records are from an open session or an executive session.

Open Session Meeting Records

The Open Meeting Law requires public bodies to create and approve minutes in a timely manner. The law requires that existing minutes be made available to the public within 10 days upon request, whether they have been approved or remain in draft form. Materials or other exhibits used by the public body in an open meeting are also to be made available to the public within 10 days upon request.

There are two exemptions to the open session records disclosure requirement that pertain to: 1) materials (other than those that were created by members of the public body for the purpose of the evaluation) used in a performance evaluation of an individual bearing on his professional competence, and 2) materials (other than any resume submitted by an applicant which is always subject to disclosure) used in deliberations about employment or appointment of individuals, including applications and supporting materials.

Executive Session Meeting Records

Public bodies are not required to disclose the minutes, notes or other materials used in an executive session where the disclosure of these records may defeat the lawful purposes of the executive session. Once disclosure would no longer defeat the purposes of the executive session, minutes and other records from that executive session must be disclosed unless they are within an exemption to the Public Records Law, G.L. c. 4, § 7, cl. 26, or are attorney-client privileged. The public body is also required to periodically review the executive session minutes to determine whether continued non-disclosure is warranted, and such determination must be included in the subsequent meeting minutes. A public body must respond to a request to inspect or copy executive session minutes within 10 days of request and promptly release the records if they are subject to disclosure. If the body has not performed a review to determine

whether they are subject to disclosure, it must do so prior to its next meeting or within 30 days, whichever is sooner.

What is the Attorney General's role in enforcing the Open Meeting Law?

The Attorney General's Division of Open Government is responsible for enforcing the Open Meeting Law. The Attorney General has the authority to take and investigate complaints, bring enforcement actions, issue advisory opinions and issue regulations.

The Division of Open Government regularly seeks feedback from the public on ways in which it can better support public bodies to help them comply with the law's requirements, and will provide online and in-person trainings on the Open Meeting Law. The Division of Open Government will also respond to information requests from public bodies and the public.

The Division of Open Government will take complaints from members of the public and will work with public bodies to resolve problems. While any member of the public may file a complaint with a public body alleging a violation of the Open Meeting Law, a public body need not, and the Division of Open Government will not, investigate anonymous complaints.

What is the Open Meeting Law complaint procedure?

Step 1: Filing a Complaint with the Public Body

A complaint must be filed in writing with a public body within 30 days of the date the alleged violation, or if the alleged Open Meeting Law violation could not reasonably have been known at the time it occurred, then within 30 days of the date it should reasonably have been discovered. The complaint must be filed using the Open Meeting Law complaint form available on the Attorney General's website. Public bodies, or in the case of local public bodies the municipal clerk, should provide members of the public with a copy of the complaint form upon request.

Step 2: Public Body's Response

Within 14 business days of the date on which the complaint was filed, the public body must review the complaint and send to the AGO a copy of the complaint along with a description of any action taken to resolve the issue that was raised by the complaint. Within seven business days of the date that the complaint was filed, the public body may request additional information from the person making the complaint if necessary to resolve the complaint. The person making the complaint shall provide the additional information to the public body within 10 business days, and the public body shall have 10 additional business days (total 24 business days from the date complaint was originally filed) to act on the complaint and notify the AGO. The public body may request additional time to consider taking remedial action and must make that request in writing to the AGO, to the Attention of the

Director of the Division of Open Government. The AGO may, at its discretion, grant additional time to the public body if it determines there is a showing of good cause to grant the extension.

Step 3: Filing a Complaint with the Attorney General

If the person who brought the complaint is not satisfied with the action taken by the public body, that person may file a copy of the complaint, along with any other materials the person making the complaint believes are relevant, with the AGO. The AGO may decline to investigate complaints that are filed with the Attorney General more than 90 days after the alleged Open Meeting Law violation, unless an extension was granted to the public body or the person making the complaint demonstrates good cause for the delay.

Step 4: Attorney General's Investigation

After reviewing a complaint and supporting materials, the AGO will determine whether there is reasonable cause to believe that the Open Meeting Law has been violated, and if so, whether to conduct a formal investigation. The AGO may request additional information from the person making the complaint. In the event that the AGO opens a formal investigation, the public body shall provide the Attorney General with such information and documents as may be requested. The AGO has the authority compel the production of documents, take oral testimony, and convene a hearing as may be necessary. The AGO will resolve complaints within a reasonable period of time, generally 90 days.

Step 5: Attorney General's Findings

The AGO will make findings, and where a violation has occurred, may order remedial action. If the AGO determines, after investigation, that the Open Meeting Law has been violated unintentionally, then the AGO will resolve the investigation by informal action or by formal ruling for more significant violations. The AGO may order remedial action by the public body directing immediate and future compliance with the law, attendance at a training session, release of records, or other appropriate action.

Where the AGO seeks to reinstate an employee or nullify the action of a public body as a remedy for the violation, the AGO will ordinarily convene a hearing to take testimony from witnesses to determine the appropriate remedy. If the AGO has reasonable cause to believe that the Open Meeting Law has been violated intentionally, the AGO may convene a hearing to determine whether the violation was intentional, whether the public body, one or more of its members, or both, were responsible, and whether to impose on the public body a civil penalty of up to \$1,000 for each violation.

Public bodies and members of the public should consult the Attorney General's [Open Meeting Website](#) for the most up-to-date procedural regulations and other materials related to the law.

Will the Attorney General's Office provide training on the Open Meeting Law?

The Open Meeting Law directs the AGO to create educational materials and provide training to public bodies to foster awareness of and compliance with the Open Meeting Law. The AGO has established an Open Meeting Law website, www.mass.gov/ago/openmeeting, on which government officials and members of public bodies can find the statute, regulations, opinions, training materials and a schedule of in-person and online training. The AGO will provide regional trainings for members of public bodies and will hold periodic online webinars. For those who cannot attend live training sessions, the Attorney General's website will provide training materials and answers to frequently asked questions.

Contacting the Attorney General

If you have any questions about the Open Meeting Law or anything contained in this guide, please contact the Division of Open Government at the Attorney General's Office. The AGO also welcomes any comments, feedback, or suggestions you may have about the Open Meeting Law or this guide.

Division of Open Government
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