

# Open Meeting Law, Public Records Law and the Use of Technology

Town of Wilmington

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# Municipal Use of Social Media – Legal Issues

- Open Meeting Law, G.L. c.30A, §§18-25
  - Communications among a quorum of board members on social media can constitute an open meeting law violation
  - Click here for a discussion of the OML and social media:  
<http://www.k-plaw.com/wp-content/uploads/2017/01/Open-Meeting-Law-and-Social-Media-Potential-Pitfalls.pdf>
- Public Records Law, G.L. c.66, §10
  - Records retention
  - Policy to retain copies of social media pages and posts
    - Current guidance recommends taking a periodic “snapshot” of the social media sites in order to meet records retention obligations
  - Do not post information that is not public record

# Open Meeting Law – Overview

## Massachusetts Open Meeting Law - G.L. c. 30A, §§ 18-25

- Purpose of OML is to eliminate the secrecy surrounding deliberations and decisions on which public policy is based
- Applies to “a **deliberation** by a public body with respect to any matter within the body’s jurisdiction,” with certain exceptions:
  - A quorum at an on-site inspection **so long as members don’t deliberate**
  - Attendance by a quorum at a conference, training program, or other event **so long as members don’t deliberate**
  - Attendance by a quorum at meeting of another governmental body that has complied with the requirements of the OML **so long as the visiting members communicate only by open participation** in the meeting and do not deliberate

# Open Meeting Law – Deliberation

Deliberation: “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...”

- Specifically includes:
  - E-mail and text messages
  - Serial conversations
  - Beware of social media posts
- Specifically excludes:
  - Distribution of agenda and meeting materials, reports, or documents that may be discussed, so long as no member expresses an opinion on the document
  - Scheduling information

## Application of OML to E-mail

- E-mail is now explicitly addressed in the OML.
- A quorum may not use e-mail to share their ideas, feelings, opinions, beliefs, whether serially or in a single e-mail, on board business, and may not use a non-member to avoid law
- **Practical approaches to avoid violations:**
  - Beware of “reply to all” on emails
  - Limit use of e-mail to scheduling purposes, and try to avoid using e-mail to undertake Town business
  - Assume that e-mail may be forwarded to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog
  - Don't ask for or express opinions, ideas, feelings, beliefs or impressions in an e-mail to other members

## Deliberation – Social Media

- Use of social media is also subject to the OML
- Alternative electronic communications have become more prevalent, including blogging, instant messaging, texting, social networking such as Facebook, and Twitter

### **Practical approaches to avoid violations:**

- Do not direct comments to other members of body
- If matter directly involves issue pending before body, consider not engaging
- Be thoughtful about manner in which comments are made
- Consider using separate accounts for campaign purposes and following election
- Remember that applicants have due process rights; if the Town is involved in a matter adjudicating the rights of others, only discuss matter at the hearing

# Open Meeting Law – Remote Hearings During COVID-19

## Notice under OML - Remote Hearings under COVID-19

- Governor's Executive Order relieves public bodies from in-person public meetings, provided that public has **adequate, alternative means of access** to the hearing
- "Adequate, alternative means" of public access includes:
  - telephone, internet, or satellite enabled audio or video conferencing
  - any other technology that enables public to follow proceedings in real time
- Notice must include **clear instructions** for accessing meeting remotely
  - 1) Zoom link or call-in number;
  - 2) Or, to minimize Zoom-bombing, notice may require the public to call in to obtain access information so long as the notice includes clear contact information and the public can obtain access for duration of the meeting (cannot be required to register in advance; someone monitoring call)
  - All votes by **roll call**



# Open Meeting Law – Remote Hearings During COVID-19

- As with meetings conducted in the normal course, public participation is not required in general business meetings of a public body. If, however, the public body allows public participation or if the meeting is a public hearing, members of the public must be able to communicate with the body and be heard by other members of the public.
- A public body may choose to have only the members of the body attend the meeting in person and prohibit attendance by members of the public.
- The Attorney General takes the position that if any members of the public are permitted to attend in person, there must be enough room for all members of the public to attend in person. The Attorney General does not allow public bodies to allow only some members of the public to attend in person.
- If allow in-person attendance and cannot comply with social distancing requirements, *meeting must be postponed* or moved to a larger location.

# Open Meeting Law – Remote Hearings During COVID-19

- When meetings are conducted virtually, the meeting notice must provide instructions as to how the public can view and participate in the meeting.
- At the start of the meeting, the chair must announce the name of the member or members who are participating remotely; such information must also be recorded in the meeting minutes.
- All votes taken in a virtual meeting must be by **roll-call vote**, even if the vote is unanimous.
- Members of the public body must be clearly audible to each other and to members of the public at all times.

# Open Meeting Law – Remote Hearings During COVID-19

- All other provisions of the Open Meeting Law apply, meaning that notice must be posted at least forty-eight hours prior to the meeting, the notice must contain a detail list of topics the chair anticipates will be discussed, executive session must be identified and for a permissible purpose and minutes must be kept.
- Should the public body encounter technical problems while meeting remotely, the person chairing the meeting may decide how to address the technical difficulties, but is encouraged wherever possible to suspend discussion while reasonable efforts are made to correct any problem that interferes with a remote participant's ability to hear or be heard clearly.
- If technical difficulties result in a remote participant being disconnected from the meeting, that fact and the time at which the disconnection occurred must be noted in the meeting minutes.

## Conducting the Meeting - Recording

- Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute).
  - In the Covid-19 OML environment, the Chair should make a limited statement at the beginning of each meeting about the remote nature of the meeting.
- Recording by individuals:
  - Must inform the Chair;
  - Chair must make required announcement;
  - Chair may reasonably regulate recordings (placement, operation of equipment)

# Public Records Law – What is a Public Record?

- All records made or received by a public entity are considered public records subject to records retention requirements and mandatory disclosure upon request.
- The Public Records Law analyzes the **CONTENT** of a record, not the form.
- Includes e-mails and other electronic communications, even if sent or received from a personal e-mail account.
- Volunteers and the records they make and receive are not “exempt”
- Use of municipal e-mail addresses or creation of specific e-mail address for public role can address records retention issues.
- Public entities that use social media should be aware that social media posts by the members of the public entity are subject to the same requirements as other electronic records.

# Public Records Requests

- Request may be made in person, or in writing, whether by mail, request form at “counter”, or by e-mail or fax.
- Records Access Officer (“RAO”) must respond within ten (10) business days – not calendar days (Saturdays, Sundays and legal holidays do not count; days Town Hall is closed DO count, however).
- If full response, including provision of records, cannot be made within 10 business days, RAO must respond to the requester in writing.
- If the response does not provide all requested records, detailed written response is required.
- Must list specific exemptions and provide detailed explanation of application of exemption to requested record.

# Public Records Requests - Response

- Must respond within 10 BUSINESS days; failure to do so means NO FEE MAY BE ASSESSED
- Work with the Records Access Officer (RAO)
- Duties include assisting requesters, records custodians, preparing guidelines to enable requesters to make “informed” requests, including a listing of categories of records
- A full list of required elements for response appear on next slide(s), and requires:
  - Confirming receipt
  - Identifying correct custodian/RAO if not correct
  - Outlining what will be withheld, if known, and reason why
  - Explaining reason for inability to provide the same within the timeframe
  - When a response is expected

## Public Records Requests – Required Elements of Response

1. Confirm receipt and date of request;
2. Identify requested records or categories of records not within possession or custody of RAO; identify agency, municipality, RAO or custodian with custody, if known;
3. Identify records that RAO intends to withhold and/or redact, detailing with specificity reasons therefor and asserting applicable exemptions;
4. Identify records produced or intended to be produced and, if necessary, a detailed statement describing why response time in excess of 10 business days is required;
5. Identify anticipated timeframe for production – cannot exceed 25 business days after receipt of request without extension – and provide detailed explanation of how request unduly burdens other responsibilities, including, magnitude or difficulty of request, size of office, office hours;



## Public Records Requests – Required Elements of Response

6. If more than 25 days response time is anticipated, notify requester of possible/actual petition to Supervisor for extension of time and include request for requester's voluntary assent to additional time;
7. Suggest a modification of request if appropriate to reduce estimated response time and cost;
8. Itemized good faith estimate of fees, if fees will be charged; if municipality has more than 20,000 residents then it cannot charge for the first two (2) hours of search time; and
9. Statement informing requester of the right of administrative appeal to the Supervisor of Records under 950 CMR 32.08(1), and the right to seek judicial review of any unfavorable decision by commencing a civil action in the superior court pursuant to G.L. c.66, §10A(c).

## Timing for Responses

- Records or initial response within 10 business days
- If initial written response provided, additional 15 business days to provide the records, for a total of 25 business days from receipt of original request to provide full response
- RAO may, within 20 business days of receipt of request, petition the Supervisor of Records for additional time, not to exceed an additional 30 business days “for good cause shown”
- Requestor can grant additional time, and such grant should be confirmed in writing
- If request is in writing, request is deemed received on the first business day following receipt; oral request is deemed received on the day it was made

## Application of OML and PRL to Use of Social Media

- Do these laws apply to municipal/personal use of social media? Yes or No?
- Is there a particular set of rules to follow? Yes or No?
- What are common violations and why? Ideas?

# Municipal Use of Social Media – Best Practices

- **Consider adopting a Town-wide social media policy (or reviewing an existing policy)**
  - Develop a policy that will set forth clear expectations and guidelines for the use of social media by employees in their official capacities
  - Interplay with municipality's regulation of use and public employees' rights under First Amendment and collective bargaining issues
  - Draft policy can be found here: <http://www.k-plaw.com/pdf/Sample%20social%20media%20policy.pdf>
- **Releases**
  - Consider requiring releases before posting pictures on social media sites

# Municipal Use of Social Media - Best Practices

- Determine social media administrators – only certain people should have access to and be authorized to post on municipal social media sites
- Provide training to social media administrators
  - Administrators/moderators need to have an understanding of the legal considerations so that posts do not run afoul of relevant laws and the municipal policies
  - Also important legal considerations when reviewing content/comments posted by the public

## Personal Use of Social Media – On the Job

- **Consider adopting generally applicable Acceptable Use Policy**
  - Public use of internet/social media (in places like the Library)
  - Personal use of internet/social media (on Town equipment, private equipment)
- **Consider including notice that users have no right to privacy**
  - Limit the ability of employees to claim privacy interests in their electronic communications. Consider specifically stating in the Acceptable Use Policy and/or employee handbook that employees have no right to privacy with the municipality's technology devices, information systems and electronic communications, and all are subject to monitoring and inspection by municipal administrators

## Personal Use of Social Media - Risks

- **Beware - Violations of the OML and PRL**
  - Do not directly reference other board members
  - Do not reply to posts by other board members
  - Consider not engaging in posts where other board members have responded
  - Retention of social media content
- **Beware - Violations of Due Process**
  - Do not participate in discussions of matters that are or may be pending before your board
  - Taking a position before a matter is heard can lead to claims of bias, even if disclosures are filed
- **Beware - Discrimination**
  - Americans with Disabilities Act
  - Failure to provide equal access to government; not all people have internet access

## Personal Use of Social Media – Practical Steps

- If you will use social media, make sure to differentiate between any “official site” you might use, and a “private” site, such as a campaign site
- If you post on social media in your “personal” capacity, make sure you so indicate
- Use your municipal e-mail address rather than a private e-mail address for “official business”
- Use social media in your “official capacity” for public announcements, emergency alerts, event reminders
- DO NOT debate or discuss matters with members of the public if such matters are or could be pending before the Board



## Personal Use of Social Media – Practical Steps

- Establish clear rules for constituents and post them on the page
- Monitor page for improper use by the public and ensure that matters that could constitute violations of state and federal law are deleted
- Consult with counsel if there are concerns about a particular participant's use of the page
- Consider building “new” page for project specific issues
- Consider asking municipality to build a page if matter becomes too controversial or there are too many issues raised
- Remember that as a member of a multiple member body you cannot “speak for” the body unless you are authorized by a majority of the members to do so!!

# Additional Resources

- Attorney General's Office:  
<http://www.mass.gov/ago>
- Attorney General's Open Meeting Law Website:  
<http://www.mass.gov/ago/government-resources/open-meeting-law/>
- Social Media Legal Guidance Toolkit:  
<https://www.mass.gov/guides/social-media-legal-guidance-toolkit#-training-agency-social-media-participants->



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# Questions?

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