
The Open Meeting Law

**Town of Concord
Select Board Meeting**

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The Basics

- All Public Bodies must post notice of any Meetings.
- Meetings (and deliberations within them) must be open to the public, unless there is a valid purpose for Executive Session.
- Minutes must be kept for *all* Meetings, and published in timely fashion.

Key Definitions

- "Public Body"
- "Meeting"
- "Deliberation"



Public Body

This Means :

- Every board, commission, committee or subcommittee
- Created, elected, appointed or otherwise constituted
- Established to serve a public purpose
- Including advisory sub-committees (such as search committees).

But not Town department staff meetings or informal bodies that assist staff in the conduct of his/her duties.

Meeting

- “A deliberation by a public body with respect to any matter within the body’s jurisdiction.”
 - *Exceptions:* attendance of a quorum at...
 - a **public or private gathering** (social, training or conference)
 - an **on-site inspection**
 - a **meeting of another public body**
 - “a meeting of a [state] **quasi-judicial board** or commission held for the **sole purpose of making a decision** required in an **adjudicatory proceeding**”
 - **Town Meeting** (but matters should not be deliberated outside of public view)
- ... as long as the public body does not deliberate.***

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.”
- Includes communications with a quorum via **Email**, Text, Blogs, You-Tube, Twitter, Facebook, Skype, Chat Rooms.
 - Cannot circumvent requirements with similar, separate emails or other communications; that is prohibited **serial communication**.

Exceptions to Deliberation

OK to communicate outside of a meeting (*i.e.*, use email) to distribute:

- Meeting agenda (w/o rationale)
- Scheduling information
- Procedural information
- Reports or documents

. . . provided "no opinion of a member is expressed."

Distribution of Documents for Meeting:

Boelter v. Board of Selectmen of Wayland (2018 SJC) – clarified when sending documents is “deliberation”:

- Court held that any circulation of documents containing opinions of members, even if there is no back-and-forth among members, constitutes “deliberation,” to which public must be permitted access.
 - Distribution of evaluation forms prepared by BOS members, together with a composite evaluation form prepared by the Chair, in advance of meeting where final evaluation was to be discussed **violated** OML because they contained the opinions of individual board members.
- SJC created a rule allowing distribution of such documents as long as they are contemporaneously posted online and available to the public.

Recommendations on How to Distribute Documents:

1. Use Staff:

- Only materials authored or edited by board members are affected by these rulings. Memos and recommendations by staff or from outside sources may be distributed.
- Staff may also act as the receptor of documents containing opinions from members, as long as s/he does not distribute to members prior to meeting (*i.e.*, changes to minutes).
- If no staff, delegate to individual board members

2. Post/Make Public Simultaneously

- Where a board member has authored or edited a document to be discussed at a public meeting, the best practice ***in most cases*** will be to post the document with the agenda for the meeting. This satisfies the *Boelter* rule.
- This does not obligate the Public Body to allow public comment.

Recommendations on How to Distribute Documents (cont.):

3. Beware of Email

- Circulating drafts via email or through sharing platforms like Dropbox or Google Docs should be *presumed* to be an OML violation.
- Feedback or edits involving multiple board members still have to be carried out in public, or through the compilation method using staff, after publication.
- Less than a quorum can still communicate outside of a meeting, but avoid email for this purpose. It is too easily forwarded, running into the serial communication problem.

Notice and Posting Rules

- Town Clerk posts notice – Concord’s approved alternative method of website posting.
- Required Content
 - Date, time, place of the meeting
 - Date and time notice was posted
 - **Topics the Chair “reasonably anticipates”** (Agenda items).
 - Must be sufficiently specific to advise public of the issues to be discussed.
 - *But what does that mean?!*
 - Boilerplate disclaimer is not enough
 - Chair does *not* need to guess at what items might arise. But, AG advises to avoid discussing a controversial or important topic until it has been properly noticed.

Meeting Procedures

Chair Controls

- Public participation:
 - With Chair's permission, address meeting.
 - At Chair's request, be silent.
 - If continued disruption after clear warning:
 - Chair may **order the person to leave**.
 - If the person doesn't leave, Chair may **remove** them from the meeting.

Electronic Recording

- **Public has a right to record meeting**
- Requirements
 - Notify chair
 - Chair informs public at outset
 - Chair reasonably regulates to avoid disruption

Remote Participation

- Participation by members of a Public Body in a meeting by telephone or other media now allowed per AG's regulation, if Select Board votes to adopt for all Town public bodies.
- Must have:
 - (1) physical quorum;
 - (2) Chair physically present;
 - (3) all must be audible; and
 - (4) all votes must be roll call.



Image courtesy of Cisco.com

Requirements for Minutes

- **Was:**

- Date
- Time
- Place
- Members Present
- Discussion of Actions
- Record of all Votes

- **Now *also* includes:**

- Summary of Matters Discussed
- List of Documents "Used"
- Name of remote participants



Open Session Minutes

- Meeting minutes
 - Must create and approve in a “timely manner”
 - New AG Regs = within 30 days or 3 regular meetings (whichever is later)
- These are Public Records subject to disclosure within 10 days of request (unless specifically exempt)
 - **Minutes, even if still in draft form**
 - **Notes, recordings, materials used to prepare minutes**
 - Documents and exhibits used

Executive Session Procedure

1. Convene in open session
 - must be on the meeting notice, even if only holding an Executive Session.
2. **Chair must publicly state** the purpose for the executive session and **all subjects that may be discussed without compromising the purpose** and announce whether open session will reconvene at end of executive session.
3. Take roll call vote of members (majority vote; record in minutes)
4. Maintain accurate minutes of executive session
5. Take all votes by roll call (no secret ballots)
6. **Only discuss purpose for which executive session is lawfully called.**

Executive Session Purposes

1. Discuss reputation, character, health, discipline, charges, complaints, but not professional competence of individual.
2. Conduct strategy sessions in preparation for negotiations, to conduct collective bargaining sessions or contract negotiations, with nonunion personnel.
 - Contract must be approved in open session.
- 3. Discuss strategy for collective bargaining or litigation.***
4. Security personnel or devices
5. Criminal misconduct
- 6. Acquisition of real property***

Executive Session Purposes (cont.)

7. Comply with law or grant-in-aid requirement
- 8. Preliminary Screening for employment***
9. Confer with mediator on litigation or decision
10. Trade secrets in the course of activities conducted by a public body as an energy supplier

**** Only if holding an open meeting would have a detrimental effect and the chair so declares on record beforehand***

Executive Session Minutes

- Disclose once doing so will no longer defeat executive session purpose *unless*
 - Exempt from public records law or
 - Attorney-client privileged
- **Review periodically** to determine continued need for confidentiality
 - **What is Periodically?** Depends on how often the Public Body holds Executive Sessions. If frequent, we recommend once a quarter. If rare, review should be 30-60 days after the Executive Session.
 - Can be by Chair or Public Body
 - Include determination in subsequent meeting minutes
- If requested by the public, this review must occur at next meeting or within 30 days, whichever comes first.

Certification

- AG Certification
 - Within 2 weeks of qualification for office
 - Obtained by appointing authority or Town Clerk
- **Please note:** By attending today, you have what you need to fill-out and sign the Certification. Please see Town Clerk.

Complaint Process **Self-Correction**

STEP 1 - Person Files Complaint

- Must file two copies: one with Town Clerk, another with the Public Body, **within 30 days** of discovery of alleged violation.

STEP 2 - Public Body Must Respond

- **Review complaint, send copy to AG, describe actions taken to resolve issues**
 - Within 14 business days
 - 24 business days if additional info needed, and further extension possible in the discretion of AG

Town Counsel should be notified to assist in the response.

Escalated Complaint Process

STEP 3 - File Complaint with AG

- **Within 90 days** after alleged OML violation (or discovery thereof)
- AG to respond in reasonable period of time, with a stated goal of 90 days from receipt of complaint (may be longer).

AG's Enforcement Tools

STEP 4

- Investigate
- Request additional information
- Conduct hearing
- Issue subpoenas
- Take testimony

STEP 5 - Determine whether violation occurred

STEP 6 - Determine whether it was intentional

Intentional Violation

- 1. “Act or omission**
- 2. By a public body or a member**
- 3. That knowingly violates the OML”**
 - Repeated conduct where “body or member has previously been informed by receipt of decision from a court...or by the [AG]” that the conduct violates the OML is an “intentional violation” of the law (940 CMR 29.02).

Keep in Mind: Many enforcement decisions by AG cite this as a warning on first infraction against future conduct.

Attorney General Remedies

- Compel OML compliance
- Compel release of minutes or other materials
- Compel OML training attendance
- Nullify action taken in violation of OML
- Reinstate employee and make whole
- Impose civil penalty for intentional violation
 -  Up to \$1,000 per violation
 - Imposed on public body
 - If intentional, the matter will be referred to a full hearing to determine if fine is appropriate.
 - File suit to compel compliance with AG's Order, if not followed by Public Body.



Appeals to Court

- Public Body Appeal of AG's Order:
 - To Superior Court within 21 days of AG's order
 - Stays AG's order
 - **But Note:** No right for complaining party (public) to appeal the AG's Decision if there is a decision in favor of the Public Body.

- Complainant's Appeal to Court (*instead of to AG*)
 - **AG or 3 or more voters**
 - Superior Court
 - Remedies same as AG's + All other remedies available to Superior Court
 - Burden of proof: on defendants (***i.e., you***)