

Meetings and Minutes Guide for Boards, Commissions & Committees

Courtesy of the City Solicitors & Town Counsel Association

This past July, 2009, the Legislature enacted c. 28 of the Acts of 2009. While captioned an 'ethics' law and resulting in changes to the lobbying and ethics laws, this law also contained major revisions to the Open Meeting Law and Public Records Law. Even the statutory cite so many local officials are used to, G.L. c.39, sections 23-23D, has been changed, as sections 23-23C have been stricken and as amended under the new law added to G.L. c. 30A. The Open Meeting Law is now codified for all levels of government under G.L. c.30A, sections 18-25.

Other significant changes include the consolidation for enforcement and advisory guidance on the Open Meeting Law under the Attorney General and no longer under the various District Attorneys, new procedures for notices of an conducting public meetings, new enforcement authority and procedures, authority for the Attorney General to issue advisories and regulations and much more well beyond the scope of this memo.

This advisory from the CSTCA is a revision and updating of its popular handout on 'Meetings and Minutes Guide for Boards, Commissions and Committees', reflecting many of the key changes in the Open Meeting Law and Public Records Law as a result of c. 28 of the Acts of 2009. There will be frequent training programs on how to conduct the public's business under the new law. No doubt issues and problems will arise. It is expected that the Attorney General will issue advisories and regulations that will facilitate the following of the new law.

This memo does not address all the issues. You are encouraged to contact your local municipal counsel to discuss the many changes in the laws, which will affect the way that local government operates.

Most public business can and should be conducted in Open Session. In addition, accurate records are to be kept of a board's, commission's or committee's meetings. There are instances however where a closed, or Executive Session is appropriate. 'Executive Sessions' are the exception, not the rule. For a variety of reasons, problems may arise in going into Executive Session. This overview is intended to provide you with a general understanding of the Open Meeting Law and the requirements for maintaining accurate records of your meetings. It is by no means all inclusive. When problems are anticipated or arise, you should call your municipal legal counsel for guidance.

An *Executive Session Quick Index Guide* is attached. It is an excerpt from this memo of the statutory reasons you can go into Executive Session, as well as suggested motions which have been included in this memo. Note that the *Quick Index Guide* is not a detailed explanation of the terms of the law. It should be used in conjunction with the memo as needed and by following the legal advice of our municipal attorney.

All meetings must be in Open Session, unless one or more of the following exceptions apply. To go into **Executive Session, you must (a) first meet in Open Session; (b) vote by roll call vote to go into Executive Session; (c) Chair must specify the specific reason or reasons (see below); stating all subjects that may be revealed without compromising the purpose for which the executive session was called; (d) Chair must specify whether you intend to reconvene in Open Session.** While in Executive Session, you can only discuss matters coming within the reason(s) stated for the Executive Session.

Unless your meeting is an appropriate emergency meeting (for a 'sudden, generally unexpected occurrence or set of circumstances demanding immediate action', G.L. c.30A, section 18), the meeting must have been properly posted at least 48 hours in advance (excluding Saturdays, Sundays and legal holidays – note the addition of Saturdays as a day not counted). Thus, if your meeting was not properly posted, you could not convene it in open session to go into Executive Session. Many problems arise with the improper posting of meetings. Be sure to check prior to the meeting.

Note that in some instances there are conditions which must exist to be in Executive Session. These include requirements in some instances to notify the subject of the Executive Session in advance of the meeting, to allow the person to be present and to speak and to have a legal representative present to advise the person. While the law provides that the advisor is not there to speak, common courtesy and issues of fundamental fairness warrant you allowing the person's attorney to speak. Another condition is that the Open Session may have a detrimental effect on the litigation, negotiating or bargaining position or be detrimental in obtaining qualified candidates if interviews of initial applicants are done in Open Session.

A safe guideline to follow is to treat all persons before you with the same courtesy and fair treatment you would expect and want if you were before a board or committee. This may be difficult at times, as some people may be very disagreeable and in some instances purposely try to make you commit an error upon which they can base an

appeal or other legal action. If things start to get too heated, take a break. If necessary call your local municipal legal counsel.

The presiding officer of a meeting has control of the meeting and no one can speak without being first recognized by the presiding officer. While the presiding officer also has the authority to order the police to remove and detain any person who is disruptive, it is urged you never do so. Such action is bound to lead to complications and possible claims. If someone becomes disruptive and does not heed the presiding officer's directives to stop, the better practice would be to take a recess and even to adjourn the meeting. In almost all such instances, after a recess the person usually stops the disruptive conduct. Ordering people removed from a meeting is fraught with danger.

If there is a violation of the Open Meeting Law, civil and/or administrative action can be taken against the Board or Committee in violation. The result can be a Judge or the Attorney General issuing an order against the Board or Committee relative to their conduct, invalidating the action taken and imposing a civil fine against the governmental body of up to \$1,000. Most problems which result in court action can be avoided. When in doubt, or if it does not seem right, call legal counsel.

What follows is a listing of the statutory exceptions, together with a suggested motion, which should be modified as appropriate. *You should also consult with your local municipal counsel as to the ability to meet in Executive Session or other session with legal counsel for the purposes of obtaining legal advice.*

EXCEPTION 1.

To discuss the reputation, character, physical condition or mental health rather than the 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 provided that the individual involved in such executive session has been notified in writing by the governmental body, at least 48 hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights, in addition to any other rights he or she may have under contract or other laws or sources:

- a) to be present at such executive session during deliberations which involve that individual
- b) to have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation in said executive session
- c) to speak in his own behalf
- d) to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense [(d) is a new requirement]

-Suggested Motion – *Move to go into Executive Session to discuss the reputation, character, physical condition or mental health of an individual, and to reconvene in Open Session.*

Suggested Motion – *Move to go into Executive Session to consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual and to reconvene in Open Session.*

EXCEPTION 2.

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

-Suggested Motion – *Move to go into Executive Session to conduct strategy sessions in preparation for negotiations with nonunion personnel, and to reconvene in Open Session.*

-Suggested Motion – *Move to go into Executive Session to conduct collective bargaining sessions, with nonunion personnel and to reconvene in Open Session.*

-Suggested Motion – *Move to go into Executive Session to conduct contract negotiations with nonunion personnel, and to reconvene in Open Session.*

-[Note – it may be appropriate and necessary to combine all three into one motion.]

EXCEPTION 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;

-Suggested Motion – *Move to go into Executive Session to discuss strategy with respect to collective bargaining and that the Chair declare that an open meeting may have a detrimental effect on the bargaining position of the body, and to reconvene in Open Session. [NOTE: CHAIR MUST SEPARATELY DECLARE THAN AN OPEN MEETING MAY HAVE A DETRIMENTAL EFFECT ON THE BARGAINING POSITION OF THE BODY.]*

-Suggested Motion – *Move to go into executive Session to discuss strategy with respect to litigation, and that the Chair declare that an open meeting may have a detrimental effect on the litigating position of the body,*

and to reconvene in Open Session. [NOTE: CHAIR MUST SEPARATELY DECLARE THAT AN OPEN MEETING MAY HAVE A DETRIMENTAL EFFECT ON THE BARGAINING POSITION OF THE BODY.]

EXCEPTION 4.

To discuss the deployment of security personnel or devices, or strategies with respect thereto;

-Suggested Motion – *Move to go into Executive Session to discuss the deployment of security personnel or devices or strategies with respect thereto, and to reconvene in Open Session.*

EXCEPTION 5.

To investigate charges of criminal misconduct or to consider the filing of criminal complaints;

-Suggested Motion – *Move to go into Executive Session to investigate charges of criminal misconduct or to consider the filing of criminal complaints, and to reconvene in Open Session.*

EXCEPTION 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 governmental body.

-Suggested Motion – *Move to go into Executive Session to consider the purchase, exchange, lease or value of real property, and that the chair declare than an open meeting may have a detrimental effect on the negotiating position of the body and to reconvene in Open Session. [NOTE: CHAIR MUST SEPARATELY DECLARE THAT AN OPEN MEETING MAY HAVE A DETRIMENTAL EFFECT ON THE NEGOTIATING POSITION OF THE BODY.]*

EXCEPTION 7.

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

-Suggested Motion – *Move to go into Executive Session to comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements, and to reconvene in Open Session.*

EXCEPTION 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; [NOTE: THE MOTION FOR THIS EXEMPTION CAN ONLY BE MADE BY THE PRELIMINARY SCREENING COMMITTEE. THE PRELIMINARY SCREENING COMMITTEE MAY WISH TO GO INTO EXECUTIVE SESSION TO CONSIDER – THE APPLICATIONS OR INTERVIEW PEOPLE OR BOTH; YOU CAN ADAPT THE MOTION TO SERVE YOUR NEEDS.]

-Suggested Motion – *Move to go into Executive Session to consider [and if applicable-] and interview applicants for employment or appointment and that the chair declare that an open meeting will have a detrimental effect in obtaining qualified applicants, and to reconvene in Open Session. [NOTE: CHAIR MUST SEPARATELY DECLARE THAT AN OPEN MEETING MAY HAVE A DETRIMENTAL EFFECT IN OBTAINING QUALIFIED APPLICANTS.]*

EXCEPTION 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;

-Suggested Motion – *Move to go into Executive Session to meet or confer with a mediator and to reconvene in Open Session.*

EXEMPTION 10.

To discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided 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 section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164 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;

-Suggested Motion – *Move to go into Executive Session to discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided 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 section 1F of chapter 164. [or if applicable – in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164; or if applicable – in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164] and to reconvene in Open Session.]

[NOTE THAT THE GOVERNMENTAL BODY, MUNICIPAL AGGREGATOR OR COOPERATIVE MUST HAVE DETERMINED THAT DISCLOSURE WILL ADVERSELY AFFECT ITS ABILITY TO CONDUCT BUSINESS IN RELATION TO OTHER ENTITIES MAKING, SELLING OR DISTRIBUTING ELECTRIC POWER AND ENERGY.]

MINUTES

Accurate minutes are to be kept and maintained of all meetings, including Executive Sessions. The law requires that the minutes are set forth: (a) – the date; (b) – the time; (c) – the place; (d) – the members present or absent; (e) – a summary of the discussions on each subject; (f) – a list of documents and other exhibits used at the meeting; (g) – the decisions made and the actions taken at each meeting, including the record of all votes and for executive sessions, (h) – the votes, by recorded roll call votes.

Minutes need not be transcripts of everything said. They should accurately reflect what business was before the board or committee. Note that under the new law, minutes must also contain a summary of the discussions on each subject.

Open Session minutes become public records once made, not necessarily approved. Thus, even if the minutes have not been approved, they are subject to disclosure, unless an exemption applies.

Executive Session minutes remain confidential until the reason for the Executive Session no longer exists. Executive Session minutes should be approved just as Open Session for content. Such approval does not however authorize their release. You need to separately determine that the purpose of the Executive Session no longer exists. At that point, the minutes are public.

The law does not permit secret ballots in voting, nor does it sanction telephone votes or votes by proxy.

One of the most significant changes under the new law concerns documents used at a meeting. Now, such ‘documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.’ That means they now become part of the record of the meeting and must be maintained as such. This will present logistical and storage issues.

Papers presented at a meeting or hearing should be marked as being received on that date and time and initialed. If there is a matter involving a lot of documents coming in, such as a hearing, it is helpful to make a document list and assign each document a number.

Importance of the Record – Many matters before boards and committees are reviewable by a court on an appeal. In many of these matters, the appeal is based on the record developed before the board or committee. Thus it is very important to adequately develop a record which is going to reflect accurately what went on and most importantly, support your decision. The record can consist of testimony and exhibits. Be sure that the documents which need to be presented to sustain your decision have been introduced into the record. If something is not part of the record, it is not going to go before the judge and that may cause your decision to be reversed. Do not presume that because you may know something that it need not appear in the record as an exhibit.

This memo and the **Quick Index Chart** presents an overview of the law on meetings and minutes. There are many exceptions to the rules and other technical points. However, the above should give you sufficient guidance for most of the matters you are going to deal with. When in doubt or if you are uncertain about anything, call your local municipal counsel to discuss it further. An ounce of prevention is worth an avoided law suit.

REMEMBER – AS MUCH OF THE PUBLIC’S BUSINESS AS CAN BE CONDUCTED IN OPEN SESSION SHOULD BE DONE IN OPEN SESSION. EXECUTIVE SESSION IS THE EXCEPTION AND SHOULD BEUSED ONLY WHEN NECESSARY.

This material is provided as general information and does not constitute the providing of legal advice. Other legal requirements may be applicable to a particular situation. The law encourages meetings to be in open as much as possible. These exceptions to open meetings should only be used when necessary. You should consult with legal counsel as to the applicability of the law to a particular situation. This material is presented by the City Solicitors and Town Counsel Association as a public service. CSTC can be reached at 115 North Street, Suite 3, Hingham, MA 02043; 781-749-9922; fax – 781-749-9923; www.massmunilaw.org; Executive Director Email jlampke@massmunilaw.org January 2010, City Solicitors and Town Counsel Association – The Leading Bar Association for Municipal Attorneys in Massachusetts.