

OPEN MEETING LAW and PUBLIC RECORDS ACT

Lexington, Massachusetts

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OPEN MEETING LAW

The Basics

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

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, working groups, informal working groups, bodies formed to assist staff in the conduct of his/her duties, or individuals representing a public body at another meeting (*Pearson v. Bd. of Selectmen of Longmeadow*, 49 Mass. App. Ct. 119, 123 (2000))
- **Frequent Issue:** Any subcommittee (meaning 2 or more people) of a public body is itself a public body that must comply with the OML.

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 **Email**, Text, Blogs, You-Tube, Twitter, Facebook, Skype, Chat Rooms
- 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
- However, make sure that the members of the public body **do not share opinions or substantive comments** on documents distributed to the body via:
 - Attachments to emails
 - Shared documents (e.g., GoogleDocs)
 - Successive comments by sub-quorum elements shared with the rest of the body (“serial deliberation”)

Advice: Do not share opinions in any form on distributed material; keep it to yourself until you get to the meeting

Information Sharing Outside of Public Meetings

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.
- 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. 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.

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.

So, you are a...

- ✓ **Public Body**
- ✓ Wanting to **Deliberate**
- ✓ In a **Meeting**.

WHAT DO WE HAVE TO DO?

Notice and Posting Rules

- 48 hours ahead
 - Excluding Saturdays, Sundays, and Holidays
 - Email to Town Clerk to post notice on website
- 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 all items that might arise. But, AG advises to avoid discussing a controversial or important topic until it has been properly noticed
- Recommended:
 - statement on accessibility
 - If emergency, then post Notice ASAP

Meeting Procedures

- Best practices for Chair:
 - Schedules and presides over the meeting
 - Sets agenda and ensures posting
 - Ensures compliance with OML (including informing of recording and special regulations for pandemic)
- Rules for moderating public participation (where applicable): The Chair may:
 - Designate the **time** for public comment;
 - Set **time limits** for public comments; and
 - Prohibit commenters from **disrupting** each **other**

Common Misunderstanding: the Open Meeting Law does not mean public **must** be allowed to participate; however, the Mass. Constitution prohibits content-related censorship or control of a meeting. *See Barron v. Kolenda*, 203 N.E.3d 1125, SJC-13284 (March 7, 2023)

Remote Participation

Remote participation is now allowed through **March 31, 2025**

(2023 Mass. Acts c. 2, § 40)

Requirements for Minutes

- Must include:
 - Date
 - Time
 - Place
 - Members Present
 - Summary of Discussions
 - List of documents (incl. exhibits) **used**
 - Record of all Votes
 - Actions taken



Executive Session Procedure

1. Convene in open session – this 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 to enter (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.**

NOTE - *These are not merely “technicalities”; many of the AG’s enforcement actions deal with Executive Session violations.*

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.***
 - Interpreted narrowly; only pending or future threatened litigation or strategy.
4. Security personnel or devices
5. Criminal misconduct
6. **Acquisition of real property***
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 as declared***

Approval of Minutes

Open Session Minutes

- Must create and approve in a “timely manner” (AG Regs = within 30 days or 3 regular meetings)
- 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
 - Should go on website as soon as approved

NOTE: if passed, an amendment to the State Administrative Procedure Act would require meetings to be approved within 30 days, or at the next meeting, whichever is later

Executive Session Minutes

- Disclose once doing so will no longer defeat executive session purpose *unless*
 - Exempt from public records law or attorney-client privilege
- **Review periodically** to determine continued need for confidentiality
 - What is Periodically?
 - Depends on how often the Public Body holds ES. If frequent, we recommend once a quarter. If rare, review should be 30-60 days after the ES.
 - Can be by Chair (by delegation) or Public Body
 - Include determination in subsequent meeting minutes

Complaint Process

- **STEP 1 - Person Files Complaint**
 - Must file 2 copies: 1 with Town Clerk, 1 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.**
 - Remedial action will not be evidence of a violation
 - Within 14 business days
 - Further extension possible in the discretion of AG.

Note: *Town Counsel should be notified to assist in the response.*

Escalated Complaint to AGO

- **STEP 3** - File Complaint with AG (or go to Court)
 - **Within 90 days** after alleged OML violation (or discovery thereof)
 - AG to respond in reasonable period of time, goal of 90 days from receipt (may be longer).
- **STEP 4**
 - Investigate
 - Conduct hearing
 - Issue subpoenas
 - Take testimony
- **STEP 5** – AGO determines whether violation occurred and whether it was intentional



"I don't like this complaint department."

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).
 - Where a member “has read and understands the requirements of the open meeting law and the consequences of violating it.” *See AG Enforcement Action OML 2011-26 (Certification).*

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

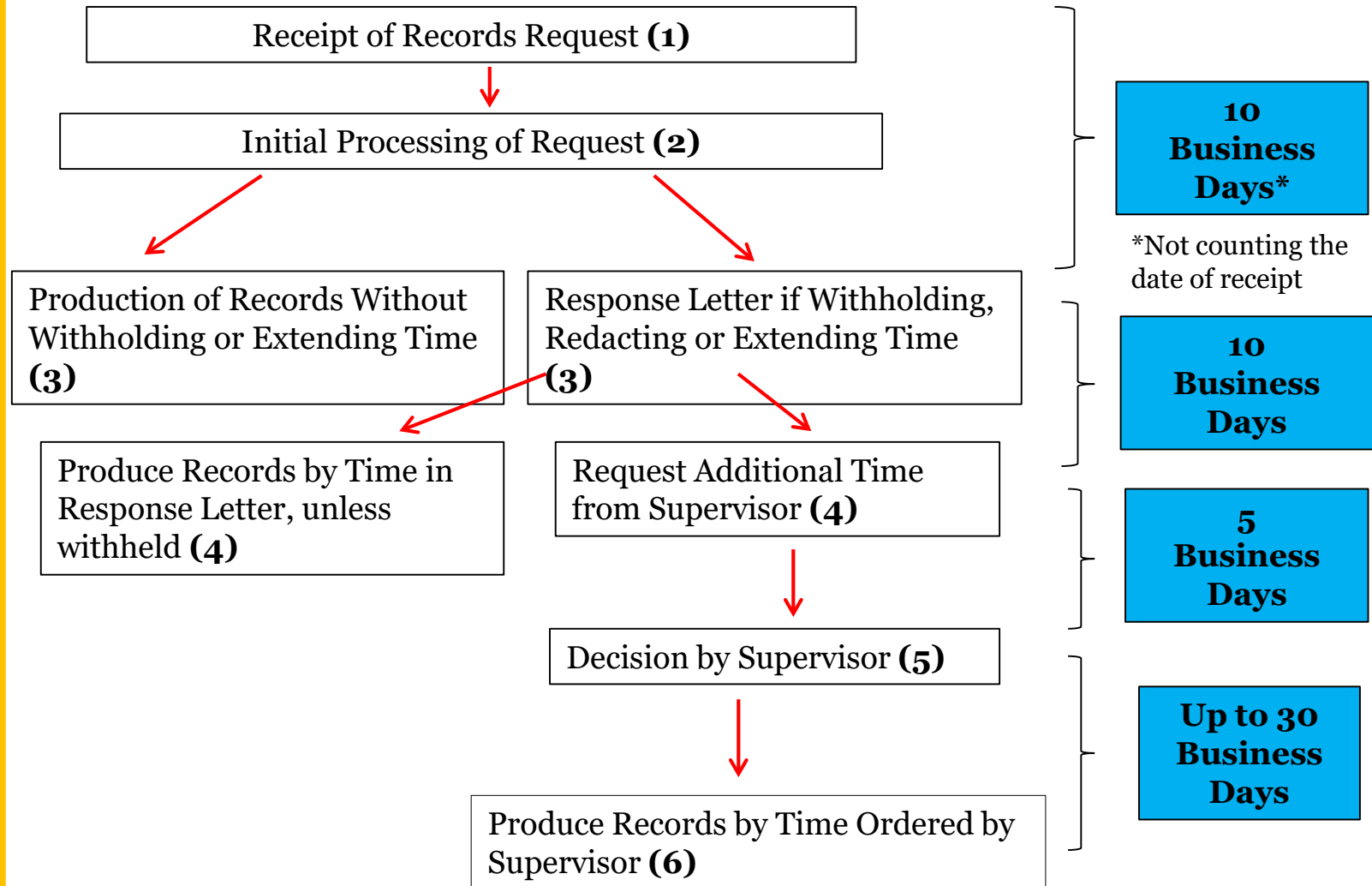
An Ounce of Prevention ...

GENERAL GUIDELINES – IF YOU HAVE:

- Posting problem —————> Postpone the meeting
- Item not listed on Notice —————> if important, save it for later
- Receive problematic email —————>
 - Gently remind board member individually not to do so
- Receive or see pattern of problematic emails
 - Ask Town Manager to handle issue
- Discussion strays off topic in executive session
 - Speak up; get back on topic

PUBLIC RECORDS

Flow Chart of Response Process



Striking the Right Balance in Release of Government Records

Protecting Exempt Material

- Records are presumed public – including all communications with constituents
- Enumerated exemptions narrowly construed
- In response, specifically claim exemptions per state law
- Release reasonably identifiable, non-exempt portions of partially exempt record, redact exempt material

Attorney-Client Privilege

- Any communication of legal advice between attorney for the Town and employees of the Town.
- Have Town Counsel review to confirm

Seek Advice

If you have any questions about:

- Whether a document is a public record
- Whether an exemption applies
- Whether redaction or withholding is appropriate
- Response procedures, formats, or timelines
- Seeking fees
- Interactions with the Supervisor of Public Records

Talk to Town Counsel

- Noncompliant towns are subject to escalating penalties, potentially including fee waivers, requester's attorneys' fees, and punitive damages

What is Personally Identifiable Information

Not Always Easy to Segregate

E.g., Champa v. Weston Public Schools, 473 Mass. 86 (2015)

Public school refused to release settlement agreements related to special education students, claiming exemption for personally identifiable information under Family Educational Rights and Privacy Act (FERPA).

Trial Court ordered records released with students' names and disabilities redacted.

Supreme Judicial Court overruled in part, instructing school to release records after **redacting information that may identify an individual not only from public's viewpoint, but also by those familiar with individual**. Such private information may include student's family, disability, progress, needs, special program and services, school placement and other information that would indirectly identify the student.

Best Records Management Practices:

Electronic Records

- Retention/production of records from personal accounts and devices
 - ✓ Require all public records received/created on personal account/devices be forwarded to public accounts
 - ✓ Employees/Board members responsible for segregating personal records from public records
 - ✓ Employees (both paid and voluntary) must transfer public documents maintained on private servers to public servers upon leaving
- Social media and text messages
 - ✓ Understand impermanence of messages
 - social media site archiving tool
 - ✓ Develop a retention strategy
 - save messages to public repository
 - ✓ Beware to avoid violations of OML
 - avoid serial communication through email or text messages
 - avoid texting during public meetings

Best Records Management Practices:

Be Prepared for Record Requests

- Post to website commonly requested records (minutes, reports)
- Involve technology support staff
 - ✓ Understand what is available and searchable
 - ✓ Ensure dialogue between legal and IT advisors to integrate legal requirements with technical capacities
- Consider software to track requests and responses
 - ✓ Dates received and responses due
 - ✓ Response templates
 - ✓ Fees estimated and collected or waived
 - ✓ Persons Responsible
- Encourage officials, employees, and staff to use Town-issued emails and/or phones for all Town-related communication. However, if a personal device or email is used, even for one message, those messages are likely public record. Ensure that you are retaining them as required by the [Secretary of the Commonwealth's Municipal Records Retention Schedule](#), §§ 01.019-.022.

TOWN EMAIL

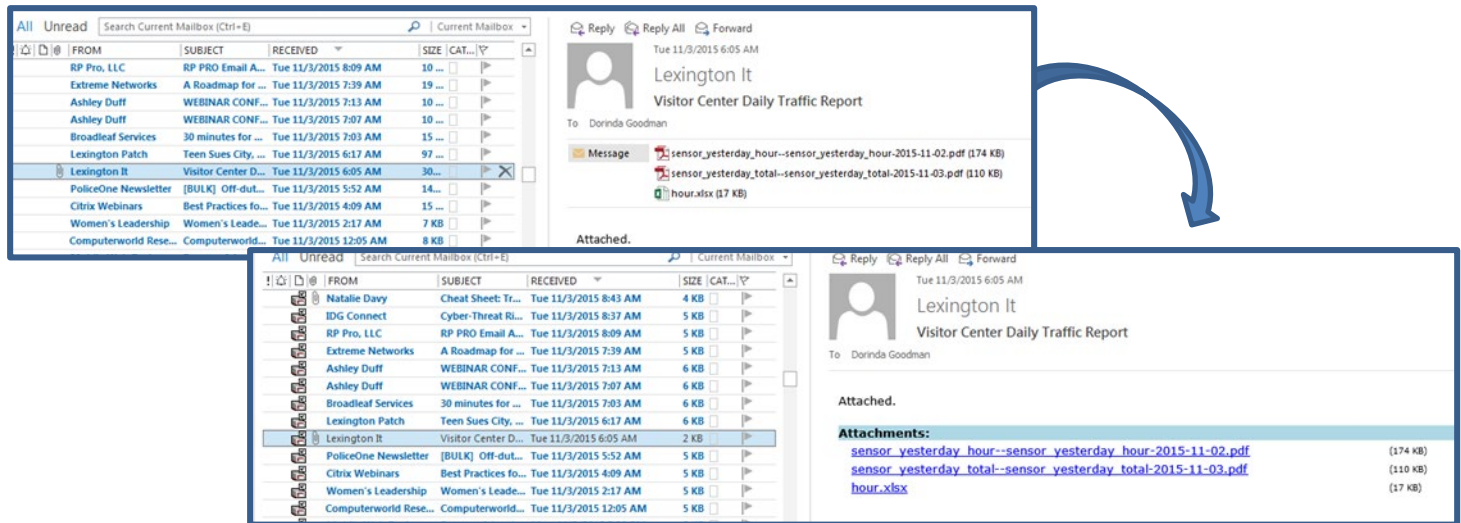
Best Records Management Practices:

Use the Town email address if you have one

- If you have a Town email address (named similar to the committee or commission)
 - ✓ Use it instead of a personal email address for all Town-email communication
 - The Town can ensure email is automatically archived
 - The Town email archive is easily searchable
 - Helps to keep your personal email out of the discovery process
 - Gives the public an official way to communicate with boards committees and commissions
 - Provides consistency when Chairs change and transitions the info
- If you do not have a Town email address (some small Town committees do not have a named account)
 - ✓ Make sure a Town email address is in the email tread as a **To** or **CC** address. (This email can be of a Town staff member or the generic Committees@lexingtonma.gov address)
- If you receive an email to a personal email address
 - ✓ **Forward** it to an appropriate Town email address or **CC** a Town email address in the response to ensure it is archived. Preferably, Forward it and continue the email exchange from the Town email address.

Town Email Archiving:

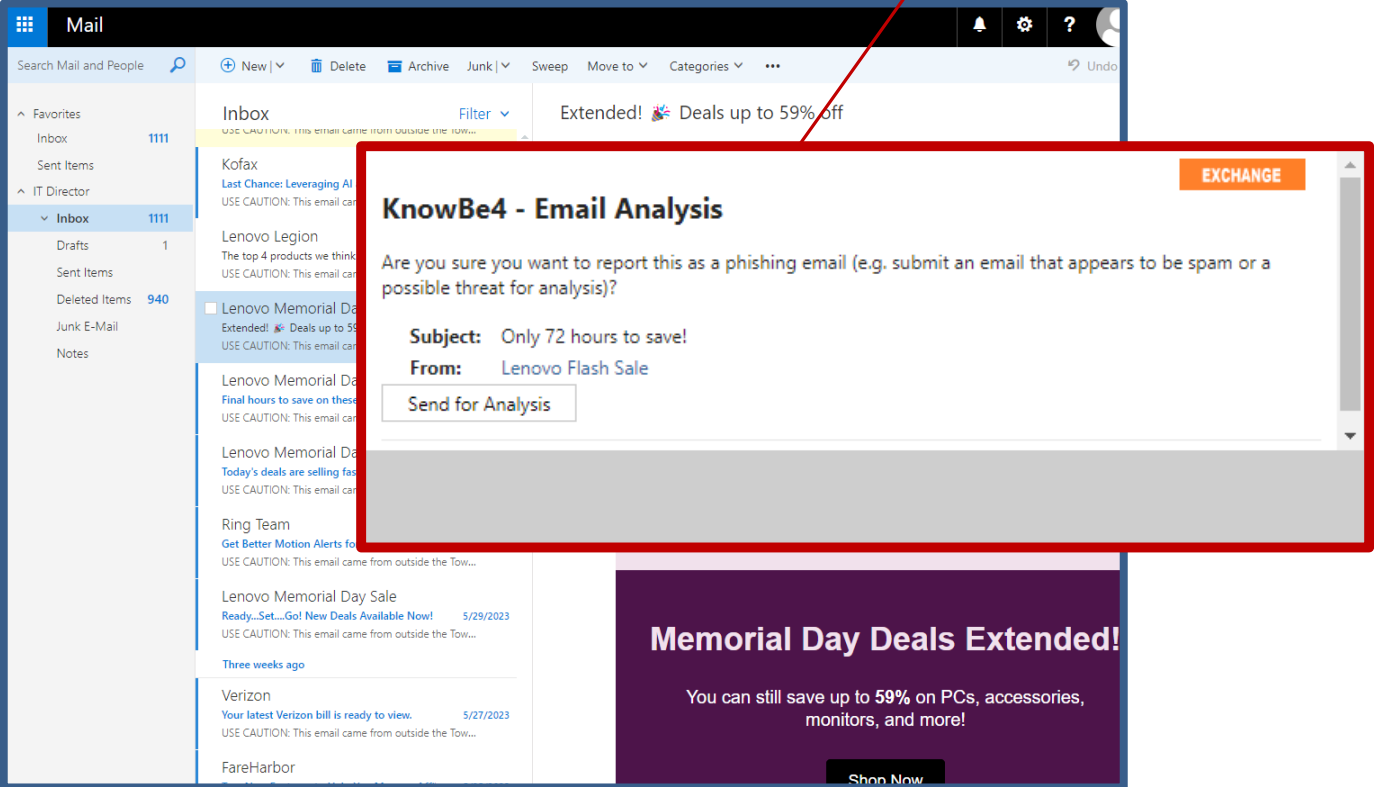
- **All** incoming and outgoing Municipal email is automatically archived at the moment of transit. The user cannot permanently delete email. (e.g. they can delete it from their email mailbox, but it will remain in the Town archive system)
- Email archiving is also used to reduce user mailbox sizes. When an email is 6 months old it becomes 'stubbed' and is actually more of a shortcut to the archived version. Therefore, the email may look a little different but it is still fully accessible in its original form.



Email

Safety, Security and Appropriate use

- Report Suspicious or Questionable emails using **Phish Alert**. Never click on any email that is suspicious.



The screenshot shows a Microsoft Outlook interface. The inbox contains several emails, including one from 'Lenovo Memorial Day' with the subject 'Extended! Deals up to 59% off'. A red-bordered dialog box titled 'KnowBe4 - Email Analysis' is overlaid on the suspicious email. The dialog box contains the following text:

EXCHANGE

KnowBe4 - Email Analysis

Are you sure you want to report this as a phishing email (e.g. submit an email that appears to be spam or a possible threat for analysis)?

Subject: Only 72 hours to save!

From: Lenovo Flash Sale

Below the dialog box, a promotional banner for 'Memorial Day Deals Extended!' is visible, featuring the text 'You can still save up to 59% on PCs, accessories, monitors, and more!' and a 'Shop Now' button.

Email

Safety, Security and Appropriate use

There are some additional security features associated with Town Email that are visible in the body of the email

- The first one will help to identify email that is from an outside source. This helps label items that are potentially phishing or spoofing or simply a higher cybersecurity risk.

USE CAUTION: This email came from outside the Town of Lexington. Do not click links, open attachments or respond to the email unless you recognize the sender, you are expecting the communication and you know the content is safe.

NOTE: This email originated from an approved external Town of Lexington resource. If the email looks different from normal communications, please contact the IT Department and do not trust the email or its contents until we have verified that it is still safe.

* These messages will only be visible if the email is external and will not appear on internal (@lexingtonma.gov) emails.

- The second is an appended message to all outgoing email stating that email may be a public record.

When writing or responding, please be aware that the Massachusetts Secretary of State has determined that most email is a public record and, therefore, may not be kept confidential.

Email

Safety, Security and Appropriate use

- Items that **DO NOT BELONG** in Town Email
 - Deliberation/Violation of Open Meeting Law
 - PII (Personally Identifiable Information)
 - Large file attachments
 - Personal communications
- This is a Town official email address and use must comply with the applicable current Town policies. Please read the policies for details.
- If you believe that an email contains confidential or sensitive information, please include the word **Confidential** at the start of the subject line in order to flag it during a discovery and this will be taken into consideration should the email be discovered and extracted in an email discovery.
- If you believe there is a security issue with your email or any account you may use as part of your role with the Town, contact the Town **immediately**.

QUESTIONS ?



ANDERSON
KREIGER