Open Meeting Law – Preparing a Meeting Notice

Prepared for the Massachusetts Municipal Association Meeting, January 2020

The Open Meeting Law requires the chair of the public body to prepare a meeting notice listing those topics that the chair "reasonably anticipates" will be discussed at the meeting. The Attorney General's Division of Open Government ("Division") interprets this requirement in a consistently strict manner. This memorandum seeks to summarize some of the more significant decisions regarding notice violations from the Division and courts. The Division's decisions can be found on its website at http://www.mass.gov/ago/government-resources/open-meeting-law/.

Law and Regulations

The Opening Meeting Law requires that the notice be posted forty-eight (48) hours in advance of the meeting, excluding Saturdays, Sundays and legal holidays. The notice must include, along with the date, location, and time of the meeting, "a listing of topics that the chair reasonably anticipates will be discussed at the meeting." G.L. c.30A, §20(b). [emphasis added].

Regulations promulgated by the Attorney General provide further that public bodies are required to list such topics with "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." 940 CMR 29.03.

In 2017, the Attorney General promulgated new regulations permitting town or city websites to serve as "all hours" posting locations. 940 CMR 29.02. A city or town adopting the website method of posting notice must file a written notice of adoption with the Attorney General, 940 CMR 20.03(1)(c), and post a written notice in city or town hall describing the website and how to access it. 940 CMR 29.03(2)(b)(2). The city or town must also "make every effort to ensure that the website is accessible to the public at all hours," and if it becomes unavailable for any reason access must be restored within six (6) business hours or the meeting re-posted for another date and time. 940 CMR 20.03(7). In order for the website to be the official posting location, the chief executive officer of the municipality must approve the same.

Division of Open Government Determinations

The Division takes the position in a series of decisions that the matters included on the meeting notice must be itemized in specific detail, rather than listing only boilerplate headings or setting forth simple statements of the subject matter anticipated to be discussed. In drafting such topics, therefore, the specific items to be discussed must be individually listed and identified; if it is anticipated that votes may be taken, such information may also be included on the meeting notice. To the extent that the chair of the public body is

aware of any particular speakers or presentations, it is likely that the Division would find that such information must also be listed on the meeting notice. Further, if the chair anticipates that an executive session might be needed, the meeting notice must include an item for such purposes, containing such detail as can be provided without compromising the purpose for the executive session, as well as whether an open session will resume after the executive session. Specific examples follow.

1. Recurring General Business Items

In OML-2016-167, Swansea Board of Selectmen (December 6, 2016), the Division reiterated the need for specificity when posting notices of public meetings. The Board of Selectmen had noticed two items to be discussed, "Annual Re-Appointments" and "Trash Fee Abatements". The Division concluded that such items were not sufficiently detailed for the public to be informed as to what would occur at the meeting. In particular, these notice items were deemed insufficient on their face because they did not list the candidate for reappointment or for the particular abatements requested.

> ***Practical Implications: These are just some examples of boilerplate headings that are not permitted. It is likely appropriate to assume that the terms "Old Business", "New Business", "Administrator's Update", "Reappointments", "License Renewals", and the like, can no longer be used to provide notice of particular matters that can be reasonably anticipated by the chair of a public body. Instead, if such notice items are used, below them must appear a list of the specific details of the topics to be discussed.***

In OML-2013-46, Dighton Police Station Building Committee (April 16, 2013), the Division received a complaint that a notice including the item "RFP for professional service" did not contain sufficient specificity to provide the public with an understanding of the topic that would be discussed. While there were additional facts that made the overall notice confusing, including that the original posted included the wrong date and required re-posting, the Division ultimately decided that the term, "professional services" was too vague to sufficiently notify the public of the particular service that would be sought. Of note, the Division also cautioned public bodies against using acronyms in a meeting notice, even if such acronyms are common, "municipal government vernacular." See also OML-2015-116, Barnstable County Board of Regional Commissioners (August 14, 2015) (Division again cautioned against using acronyms in notices of public meetings).

> ***Practical Implications: A meeting notice must be tailored towards a public audience that is unfamiliar with the matters to be discussed, rather than to the municipal employees and parties that often attend such meetings. The overall circumstances concerning the meeting and the topic at issue will be considered when determining if the notice was sufficient. Further, it now appears well established that the use of acronyms should be avoided in meeting notices.***

2. Form of Notice

In Town of Swansea v. Maura Healey, Civil Action No. 2017-3269-E (Suffolk Sup. Ct. October 29, 2018), the Superior Court held that the Division's determination of how a notice should be posted and the level of detail

required was arbitrary because the Division applied subjective criteria to determine whether a notice was sufficiently detailed. This is one of few court decisions establishing a limit on the Division's authority to enforce the Open Meeting Law.

The Town had used a certain bulletin board to post its notices and, when a public meeting was to involve an unusually large number of appointments, it directed residents to obtain a full list of appointments from the Town Clerk. The Division approved that notice practice, and the Town continued to follow that process for a few meetings. When a shorter notice was posted that could fit on the bulletin board, however, directing the reader to the Town's website, the Division concluded that that notice violated the Open Meeting Law. The Superior Court found such arbitrary approvals of notices based on factors not included in the Open Meeting Law were beyond the authority of the Division and quashed the Division's decision.

> ***Practical Implications: The Division now consistently requires all notices contain all the information required by law, so cities and towns should not attempt to use summary notices or to direct residents to the Town Clerk to obtain a full list of meeting items. That being said, notices directing residents to visit websites is still permitted when the website serves as the official means of notice posting.***

3. Verbiage

In OML-2019-102, Massachusetts Board of Building Regulations and Standards (August 14, 2019), the Division concluded a notice item stating the Board would "discuss" a letter was insufficiently detailed since the Board ultimately discussed and voted on the items addressed by the letter. The President of the Massachusetts Federation of Building Officials sent the Board a letter reporting that the town of Douglas was considering replacing its building inspector with an inspection company, which the author considered to be a violation of law. At the meeting in which the letter was discussed, the Board discussed the letter and then voted to send the town of Douglas a guidance letter in relation to replacing its building inspector with an inspection company. The Board argued it did not put any more detail in the notice because it did not have any more information with regards to the allegations contained in the letter, and did not want to summarize or repeat false information in the notice. The Division disagreed, concluding that the Board had more verifiable information than it provided in the notice and should have included in its meeting notice that the letter under discussion pertained to the town of Douglas and its building inspector. Further, even if the Board in fact notified the Town, the notice is intended to notify the public, not only the subject of the items discussed.

> ***Practical Implications: To ensure that a notice item is complete, it should include both the subject of the item and the public body's reasonably anticipated actions in relation thereto. While a public body must, of course, remain neutral on contested agenda items before the meeting at which such items are discussed, the body must also provide detailed, accurate, and sufficient notice to the public of the items to be discussed.***

4. Executive Session Notices

In OML-2017-49, Peru Board of Selectmen (March 28, 2017), the Division considered whether the Board provided a public officer, who was the subject of a complaint to be discussed in executive session, with sufficient notice and opportunity to be heard. The Division also considered whether the notice "Executive Session to discuss strategy with respect to ongoing litigation" was sufficient to invoke the litigation exception to the Open Meeting Law, G.L. c. 30A, §21(b)(3), and enter executive session to discuss a pending appeal before the Appellate Tax Board. The Division concluded that, while the Board provided verbal notice to the subject of the complaint discussed in executive session, it did not provide written notice as required by G.L. c. 30A, §21(a)(1). Further, while the Division noted its willingness to defer to the public body's determination of the necessity of withholding the details of the litigation, it decided the evidence before it did not provide any reason that disclosing the identity of the litigation in this instance would compromise the purpose of going into executive session, "as it was a publicly filed appeal." In the absence of such a reason, the executive session notice must identify the particular litigation discussed in executive session.

Practical Implications: A public employee that is the subject of a complaint must be notified in writing no later than forty-eight (48) hours before that they will be discussed in executive session and be provided the opportunity to speak on their own behalf. Further, when invoking the so-called litigation exception to the Open Meeting Law, the particular litigation to be discussed must be disclosed unless the public body can specifically identify reasons that disclosing such information would compromise the municipality's litigation strategy.

5. Discussion of Particular Permits or Renewals

In OML-2011-11, Freetown Soil Conservation Board (February 15, 2011), the Division considered whether an agenda item entitled "Renewal of Fall Soil Permits" was sufficient notice to allow the Soil Conservation Board to act on particular permit renewals. The Division noted that where the Chair reasonably anticipated action on specific permits, the individual permits were required to be listed with "the details of those specific permits, including the name of the applicant and the location under consideration." The Division suggests the meeting notice should have taken the following form:

Renewal of Fall Soil Permits

#496 [Name of Applicant], 5 acres on the south side of the Assonet River

#497 [Name of Applicant], 53 Dr Braley Road

#499 [Name of Applicant], 5 acres on Braley Road

#498, [Name of Applicant], 4 acres on Chace Road

#500, [Name of Applicant], AA Will Quarry

Practical Implications: Form of Notice Items - This case, and those that have followed it, is of particular importance to land use boards, those boards that grant annual licenses or permits, and those that make annual appointments. In all such cases, the meeting notice, to the extent possible,

must list the particular licenses, permits or appointments to be acted upon, as well as detailed information about the applicant (i.e., name and address for land use applications, and, to the extent applicable, applicant names for appointments). If the meeting notice does not list on the meeting notice itself each such item individually, it may refer to an attached list, or, if the website is the proper posting location, include a link to the complete list.

6. Negotiations with Non-Union Personnel

In OML-2011-15, Melrose School Committee (May 1, 2011), the Division considered whether the following meeting notice was sufficient: "To conduct strategy sessions in preparation for negotiations and, if appropriate, to conduct contract negotiations with nonunion central office administrative personnel." Although the person with whom the School Committee would be negotiating was likely obvious to persons familiar with the facts, the Division concluded that the notice must also include the name of that person. The Division stated, "Providing the public with this additional information would not have been detrimental to the Committee's negotiating position, particularly as [the individual] was aware of the session and had been invited to attend for the contract negotiation portion."

Practical Implications: This case makes clear that when a board intends to enter executive session for the purpose of negotiating with non-union personnel, the name and office of the non-union personnel must be included in the meeting notice. The same reasoning is equally applicable to notice items for conducting negotiations with collective bargaining units.

In OML-2011-32, Templeton Board of Selectmen (July 26, 2011), the Division considered whether the following meeting notice was sufficient to allow discussion in executive session of charges against a public officer: "Complaint of charges against a public officer, employee, staff member or individual. May go into Executive Session under exemption #1 under the Open Meeting Law." The Division found that the notice was sufficient, but stated further:

> Given the lack of detail contained within the meeting notice, a member of the public could have had questions about the exact nature of the discussion anticipated by the public body. However, the meeting notice complied with the letter of the Open Meeting Law because it stated the reason for the anticipated executive session, while balancing the privacy rights of the individual who was the subject of the complaint.

Practical Implications: A board entering executive session pursuant to exemption (1) may, and often must, omit from the meeting notice the name of the individual to be discussed. The ability to utilize such exemption, however, includes a requirement that the public body otherwise preserve the privacy rights of that individual by not disclosing private information concerning that person.

Summary

Summary, the Open Meeting Law now requires that detailed meeting notices be prepared, listing all of the particular items to be discussed at the meeting. The level of specificity required is to be judged from the perspective of an individual who is unfamiliar with the municipality and the action to be taken, and the

notice must be sufficiently specific for any member of the general public to anticipate what might be discussed at the meeting. Preparation of a properly detailed meeting notice will ensure that the public body's hard work is not undermined by technical challenges to its compliance with the Open Meeting Law.

Please contact Attorney Janelle M. Austin (jaustin@k-plaw.com) or any member of our Government Information and Access group at 617-556-0007 with any further questions concerning meeting notices or the Open Meeting Law generally.

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