



The Commonwealth of Massachusetts

Office of the Secretary of State
State House, Boston, MA 02133 (617) 727-2800

Michael Joseph Connolly, Secretary

February 17, 1984

Dear City/Town Clerks:

As Secretary of State, I am responsible for ensuring that those individuals elected or appointed to state governmental bodies are informed of the Open Meeting Law which applies to them. As City or Town clerk for your municipality, you have a corresponding responsibility for notifying local public officials of their duties under the law. Often times, my office receives inquiries from citizens and officials concerning this law at the state, county and municipal levels. Although I am not empowered to render binding legal opinions, I feel that some information should be provided to you in the hope that it will assist you and your municipality in complying with this law.

Massachusetts has three parallel Open Meeting Laws, each aimed at a different level of government. The one that applies to municipalities can be found in sections 23A and 23B of Chapter 39 of the General Laws. A copy is attached. The statute is broadly phrased to apply to every board, commission, committee or subcommittee of the municipality. Such governmental bodies must adhere to the requirements of the Open Meeting Law whenever they convene within the definition of "meeting" at section 23A. No chance or social gatherings may be used to circumvent the purposes of the Open Meeting Law. Except in an emergency, notice of such meetings must be posted in the municipal's clerk's office or on the official municipal bulletin board forty-eight (48) hours in advance of the meeting. The notice must contain the date, time and place of the meeting. Emergency meetings are limited to the handling of sudden, generally unexpected matters demanding immediate action.

All meetings must be open to the public except for those relating to limited purposes for which the governmental body may hold an executive session. Members of the public may tape record an open meeting as long as they do not interfere with the conduct of the meeting. Before going into executive session, the governmental body must: convene in open session; vote to go into executive session by recorded roll call vote; and state the executive session purposes and whether the meeting will be reconvened in open session.

Accurate records of all meetings, both public and executive session, must be kept by the official record custodian of the board or commission. At a minimum, the minutes must reflect the date, time, place, members present or absent and any action taken. Votes taken in executive session must be recorded roll call votes and incorporated into the minutes of such executive session. Minutes of

open meetings are public records and must be disclosed upon request. Executive session minutes, however, may be withheld from public disclosure for only so long as disclosure would defeat the lawful purpose for which the executive session was called.

The Supervisor of Public Records, who is within my office, is responsible for seeing that the minutes of meetings are properly maintained pursuant to Chapter 66 of the General Laws and that minutes are disclosed unless they fall within exemption (a) to the definition of public records. G. L. c. 4, s.7(26). The Supervisor can assist municipal counsels in discharging their responsibilities by rendering advisory opinions on the public record status of minutes or any other governmental record. The enclosed brochure and regulations, 950 C.M.R. 32:00, explain how to obtain public records advisory opinions. Questions on particular provisions of the municipal and county open meeting laws should be directed to the appropriate district attorney.

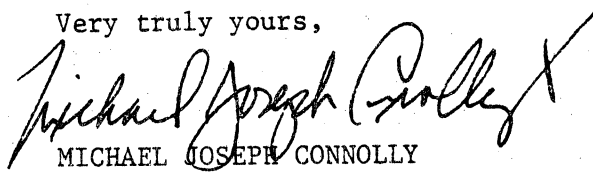
Executive sessions may be held only for the following purposes:

- (1) to discuss the reputation, character, physical condition or mental health of an individual provided that the individual is accorded notice and certain rights.
- (2) to consider complaints against an individual provided that the individual is accorded notice and certain rights;
- (3) to discuss collective bargaining or litigation strategy if open discussion may have a detrimental effect on the position of the governmental body and to conduct collective bargaining sessions.
- (4) to discuss security measures;
- (5) to investigate alleged criminal misconduct or to discuss filing criminal complaints;
- (6) to consider the purchase, exchange, lease or value of real property if open discussion may have a detrimental effect on the position of the governmental body; and
- (7) to comply with the provisions of any general or special law or federal grant-in-aid requirements.

Any justice of the Supreme Judicial Court and the appropriate superior court has jurisdiction to enforce the Open Meeting Law. The primary responsibility for enforcing the Open Meeting Law at the municipal level lies with the appropriate district attorney, by any three registered voters or by the Attorney General in certain instances.

Of course, the full discussion and interpretation of law as significant as the Open Meeting Law is difficult. My office has recently sent additional information to all city solicitors and town counsels in the hopes of better informing municipal officials of their responsibilities under the law. I hope this information has been useful to you. If you have any additional questions or concerns please feel free to contact my office.

Very truly yours,



MICHAEL JOSEPH CONNOLLY
Secretary of State

THE OPEN MEETING LAW¹

Chapter 39, Section 23A of the Massachusetts General Laws

Section 23A. The following terms as used in sections twenty-three B and twenty-three C shall have the following meanings: --

"Deliberation", a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction.

"Emergency", a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

"Executive session", any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.

"Governmental body", every board, commission, committee or subcommittee, of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority.

"Made Public", when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body.

"Meeting", any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

"Quorum", a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body.

Section 23B. All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section.

¹A compilation of the Open Meeting Law as amended by Chapter 372 of the Acts of 1978.

No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section.

No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.

Nothing except the limitation contained in this section shall be construed to prevent the governmental body from holding an executive session after an open meeting has been convened and a recorded vote has been taken to hold an executive session. Executive sessions may be held only for the following purposes:

(1) To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual, provided that the individual involved in such executive session has been notified in writing by the governmental body, at least forty-eight 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:

(a) to be present at such executive session during discussions or considerations 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.

(2) To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of

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- (c) to speak in his own behalf.
- (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 governmental body, and to conduct collective bargaining sessions.
- (4) To discuss the deployment of security personnel or devices.
- (5) To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.
- (6) To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.
- (7) To comply with the provisions of any general or special law or federal grant-in-aid requirements.

This section shall not apply to any chance meeting, or a social meeting at which matters relating to official business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction, or advisory power.

Except in an emergency, a notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts, and the notice or a copy thereof shall, at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to such meeting be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town. The secretary of a regional school district committee shall be considered to be its clerk and he shall file the notice of meetings of the committee with

the clerk of each city or town within such district and each such clerk shall post the notice in his office or on the principal official bulletin board of the city or town and such secretary shall post such notice in his office or on the principal official bulletin board of the district. If the meeting shall be of a regional or district governmental body, the officer calling the meeting shall file the notice thereof with the clerk of each city and town within such region or district, and each such clerk shall post the notice in his office or on the principal official bulletin board of the city or town. The notice shall be printed in easily readable type and shall contain the date, time, and place of such meeting. Such filing and posting shall be the responsibility of the officer calling such meeting.

A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public; provided, however, that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer. All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions.

A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting.

Upon qualification for office following an appointment or election to a governmental body, as defined in this section, the member shall be furnished by the city or town clerk with a copy of this section. Each such member shall sign a written acknowledgement that he has been provided with such a copy.

The district attorney of the county in which the violation occurred shall enforce the provisions of this section.

Upon proof of failure by any governmental body or by any member of officer thereof to carry out any of the provisions for public notice or meetings, for holding open meetings, or for maintaining public records thereof any justice of the supreme judicial court or the superior court

sitting within and for the county in which such governmental body acts shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provisions at future meetings. Such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney of the county in which the city or town is located. The order of notice on the complaint shall be returnable no later than ten days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of such complaint the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by Section eleven A $\frac{1}{2}$ of Chapter 30A, by section nine G of chapter thirty-four or by this section. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

Any such order may also, when appropriate, require the records of any such meeting to be made public, unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized. The remedy created hereby is not exclusive, but shall be in addition to every other available remedy.

The rights of an individual set forth in this section relative to his appearance before a meeting in an executive or open session, are in addition to the rights that an individual may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements, and the exercise or nonexercise of the individual

rights under this section shall not be construed as a waiver of any rights of the individual.

This compilation of The Open Meeting Law prepared in August, 1978 by the Office of the Secretary of State, Public Records Division, Room 1701, One Ashburton Place, Boston, MA 02108; (617) 727-2832.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

*Law Dept
City Clerk*

MUNICIPAL LAW MEMO
NO. 17. February, 1984.

SUBJECT: OPENING SUBCOMMITTEE MEETINGS

SUMMARY.

Is a subcommittee of your municipal board or commission subject to the Open Meeting Law?

"Of course," you say, since "subcommittee" is expressly included in the definition of the "governmental bodies" covered by the Open Meeting Law.

When the subcommittee meets only to make a report and recommendations to its parent body, is that meeting subject to the Open Meeting Law?

"No," most municipal officials have said, reasoning that such a subcommittee has no power to make a "decision" on any public business, the parent body having reserved that power to itself.

"Wrong," says the court in this case. When your subcommittee makes a report of facts to its parent body, it necessarily makes a "decision" as to what those facts are. When your subcommittee makes a recommendation to its parent body, it necessarily makes a "decision" as to what that recommendation ought to be.

Therefore, this case says, all of your subcommittees must, in such situations, hold open meetings, give public notice of those meetings, and maintain accurate public records of the proceedings.

We would be cautious of the court's aside, not essential to the decision, about "pushing notes to each other across the table" not being a "deliberation." In many a meeting, surely, a "deliberation" consists largely of an exchange and perusal of written memoranda and summaries, with little in the way of an oral summation before the vote is taken. In such a case, a court

might well give to "verbal exchange" a strict dictionary meaning, i. e., an exchange "expressed in words, whether written or spoken," instead of treating "verbal" as synonymous with "oral".

The overarching principle, in any event, is that "the open meeting law is designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based."

NIGRO v. CONSERVATION COMMISSION OF CANTON
17 Mass. App. Ct. 433 (1984)

Excerpts:

GRANT, J. ... (T)he only questions remaining for decision on this appeal are... whether a three-member subcommittee of the seven-member conservation commission... of the town of Canton is required by the first, sixth and seventh paragraphs... of G. L. c. 39, s. 23B (the Open Meeting Law)... to hold open meetings, to give notice of its meetings, and to maintain accurate records thereof. (Such records are "public records" under) G. L. c. 39, secs. 5A... and 17C....

... (I)t appears that the subcommittee in question is concerned in some way with the implementation or the enforcement of the so-called conservation easement which the town of Canton owns in the Prowse Farm.... According to the chairman of the commission, ... the subcommittee's jurisdiction extends making factual investigations, reporting its findings to the full commission, and making verbal recommendations as to actions which should be taken by the commission. Nothing more appears as to the functions or duties of the subcommittee. There is no dispute that the subcommittee has not in the past complied with the notice and records requirements of the sixth and seventh paragraphs of S. 23B.

The answers to our questions turn on the proper construction of the definitions of the terms "Deliberation," "Governmental body" and "Meeting" which are set out in G. L. c. 39, s. 23A, ... and particularly on the proper construction of the word "decision" as employed in the first and third of those definitions. We start with the definition of "Governmental body" and find that it includes "every board, commission, committee or subcommittee of any... city... or town, however elected, appointed or otherwise constituted..." As there is no such legal entity as a "subcommittee of (a)... city... or town," the only way to avoid stripping "subcommittee" of all meaning in its present context is to read "Governmental body" to include a "subcommittee of any board, commission or committee of any city or town." This

construction is consistent with the statutory history of the word "subcommittee" (in earlier versions of this section.) So far there is no real dispute among the parties.

Their positions diverge when it comes to the proper construction of the terms "Deliberation" and "Meeting." ... ("Deliberation") is defined as "a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction".... The term "Quorum" is also defined in G.L.c.39, s.23A.... ("Meeting") is defined as "any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business... over which the governmental body has jurisdiction... is discussed or considered...".... This definition concludes by providing that a "(m)eeting" "shall not include any on-site inspection of any project or program." Some of the difficulty in this case appears to have stemmed from the commission's or the subcommittee's failure to distinguish between the (subcommittee's) inspections and its subsequent formulation of findings and recommendations.

As we have already noted, the "jurisdiction" of the subcommittee extends to making factual investigations and reporting its findings and making recommendations to the full commission. Except in the unlikely event that the members constituting the statutory quorum conduct their exchanges of ideas by convening and then pushing notes to each other across the table, they cannot perform their intended function without engaging in what a layman would regard as deliberation at a meeting.

All of which brings us to the meaning of the word "decision" as it is employed in the definitions of "Deliberation" and "Meeting."... We think it too clear for discussion that a three-member subcommittee cannot make a decision which the law entrusts to a seven-member commission..., and we have no quarrel with the distinction between a recommendation which the subcommittee can make and a decision which can only be made by the requisite majority of the full commission.

We think, however, that... the commission's arguments fail to come to grips with the the actual language of the definitions of "Deliberation" and "Meeting." Once we accept the proposition that a subcommittee is one form of "(g)overnmental body" and then reread the other relevant definitions, it is readily apparent that the Legislature contemplated that a subcommittee itself can "arrive at a decision" (definition of "Deliberation") or "make a decision" (definition of "Meeting") on any matter which the parent body can and does entrust to the subcommittee.

Comes now the question whether the particular subcommittee in this case is making "decisions" within the meaning of the statutory definitions. We think it axiomatic that any report of

facts which the subcommittee may make to the full commission after conducting whatever investigation may be appropriate in the circumstances is necessarily grounded on one or more decisions as to what the facts are. And, of course, the subcommittee cannot formulate a recommendation without deciding what it should be.

... (I)n accordance with the provisions of the eleventh paragraph of G. L. c. 39, s. 23B, a new judgment is to enter which orders the members of the subcommittee to comply in the future with the applicable requirements of the first, sixth and seventh paragraphs of that section whenever the subcommittee engages in making findings of fact which are to be reported to the commission or in formulating recommendations to the commission....

Comm. from Paul E. Healy, City Clerk, transmitting a copy of Law Memo #17 from Amy S. Anthony, Secretary to the Exec. Office of Communities & Development Re: requirements of subcommittee meetings of municipal boards & commissions together with the decision in the case of Nigro v. Conservation Commission of Canton, 17 Mass. Appeals Court 433 (1984).

In City Council,

February 27, 1984

- P. Healy

on

File -



The Commonwealth of Massachusetts

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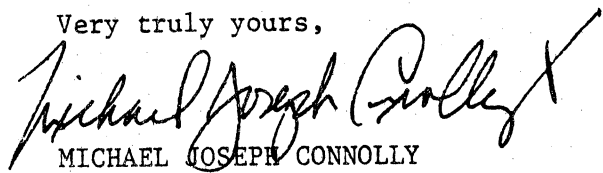
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The district attorney of the county in which the violation occurred shall enforce the provisions of this section.

Upon proof of failure by any governmental body or by any member or officer thereof to carry out any of the provisions for public notice or meetings, for holding open meetings, or for maintaining public records thereof any justice of the supreme judicial court or the superior court

sitting within and for the county in which such governmental body acts shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provisions at future meetings. Such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney of the county in which the city or town is located. The order of notice on the complaint shall be returnable no later than ten days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of such complaint the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by Section eleven A $\frac{1}{2}$ of Chapter 30A, by section nine G of chapter thirty-four or by this section. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

Any such order may also, when appropriate, require the records of any such meeting to be made public, unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized. The remedy created hereby is not exclusive, but shall be in addition to every other available remedy.

The rights of an individual set forth in this section relative to his appearance before a meeting in an executive or open session, are in addition to the rights that an individual may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements, and the exercise or nonexercise of the individual

rights under this section shall not be construed as a waiver of any rights of the individual.

This compilation of The Open Meeting Law prepared in August, 1978 by the Office of the Secretary of State, Public Records Division, Room 1701, One Ashburton Place, Boston, MA 02108; (617) 727-2832.

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Comm. from Paul E. Healy, City Clerk, transmitting a comm. from Michael Joseph Connolly, Secretary of State Re: Open Meeting Law & text of Chapter 39, Section 23A as amended by Chapter 372 of the Acts of 1978.

In City Council,

February 27, 1984

*2/27/84
Placed on file
Copies to all Boards
Commissions
Committees*