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January 20, 2010

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: The New Open Meeting Law – An Overview

On July 1, 2009, Governor Patrick signed into law Chapter 28 of the Acts of 2009, entitled "An Act to Improve the Laws Relating to Campaign Finance, Ethics and Lobbying." The Act made extensive changes to the lobbying laws and Chapter 268A, the Conflict of Interest Law (we issued Memoranda on the Chapter 268A changes dated September 3 and November 6, 2009), as well as an overhaul of the Open Meeting Law. However, the portions of the Act relative to the Open Meeting Law ("the Law") were expressly designated to go into effect on July 1, 2010. Prior to that date, it is anticipated that the Office of the Attorney General will issue detailed educational materials, regulations, and guidance regarding the manner in which the law will be implemented. Given the importance of the Law to all municipal boards, however, board members and other municipal officials should begin familiarizing themselves with these important changes.

As of July 1, 2010, the current Open Meeting Law provisions, G.L. c.39, §§23A-23C will be repealed. The revised Open Meeting Law will be found at G.L. c.30A, §§18-25. Some of the important differences are highlighted below. We will provide separate memoranda, however, regarding new requirements for taking and maintaining minutes and the transition of enforcement authority from the District Attorneys to the Attorney General.

1. Definitions

The revised Law contains some significant changes to defined terms, highlighted below:

- "Deliberation" is communication between or among a quorum of a public body.
  - Explicitly includes communications by e-mail and other written medium;
  - The following are specifically excluded from the definition, provided no opinions of members are expressed:
    - distribution of a meeting agenda;
    - scheduling information; or
    - distribution of other procedural meeting materials, or reports or documents that may be discussed at the meeting.

It is significant that the Law specifically refers to "email" as constituting deliberation. Be advised, however, that similar types of electronic communication, such as blogging,

electronic chatrooms, and social networking sites will also likely fall within the scope of the new definition if a quorum of the public body is involved.

- "Meeting" is a deliberation by a public body.
  - specifically excludes:
    - on-site inspections, provided there is no deliberation;
    - attendance by a quorum of a public body at a conference of training program, or a media, social or other event, provided that the members do not deliberate;
    - attendance by a quorum, without posted notice, at a meeting of another governmental body that has complied with the notice requirements of the Open Meeting Law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion by the host body, and do not deliberate;
    - a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision in an adjudicatory proceeding brought before it.

The latter exception represents a significant change from the current Open Meeting Law. A "quasi-judicial" body is one that holds a public hearing to make a determination affecting an individual's rights or privileges – for example, hearings on applications for licenses or permits. Under the current Law, there has been no ability of such a board to meet in executive session to make a decision following the public hearing on a licensing or permitting matter. Under the new statute, however, such a convening of the board does not even fall within the definition of a "meeting" for purposes of posting notice, taking minutes, etc. It remains to be seen how the Attorney General will interpret this exception, and a permit applicant (for example) might be expected to complain about a "private" gathering of board members to make and prepare a decision. Boards may prefer to continue to make such decisions in an open meeting, or delegate the drafting of a decision to an individual, while the new language is interpreted by the Attorney General. You should be aware of this significant change in the definition of "meeting," however, as well as the potential issues that may arise if a public body chooses to utilize this exception for quasi-judicial matters.

- Governmental Body
  - now known as a "public body";
  - includes any multiple-member body "within" any town (as compared to a governmental body "of" any town). It appears that this change was specifically designed to eliminate a judicially created exception that a committee appointed by a single official [Mayor, Town Manager, Superintendent of Schools] to be advisory to that official was not a governmental body subject to the Open Meeting Law. With the new Law, virtually any board, committee, subcommittee or other multiple-member body within a municipality will be subject to the Open Meeting Law.

2. Notice

Certain notice requirements have been revised and are summarized below:

- Any public meeting (except for emergencies) must still be posted at least 48 hours in advance of the meeting. It should be noted, however, that in addition to Sundays and holidays not being counted, *Saturdays* cannot be counted for this purpose under the new Law. This means, for example, that for any meeting scheduled for a Monday evening at 7:00 p.m., notice must be posted not later than 7:00 p.m. on the preceding Thursday.

- Notice of any open meeting shall include "a listing of topics that the chair reasonably anticipates will be discussed at the meeting." Many boards already have a practice of posting an agenda as part of the notice, although agendas were not required under G.L. c.39, §23B. Under the new Law, a list of anticipated topics must be included. Boards will still be able to accommodate last-minute and/or unforeseen matters (i.e., not anticipated), as the Law does not prohibit a board's consideration of such matters. Boards may wish to include in their posted agendas entries for "New Business" and "Old Business" to provide notice to the public that matters not specifically named on the agenda may be handled.

- Notice must be posted in a manner "conspicuously visible to the public at all hours in or on the municipal building in which the clerk's office is located." (emphasis added). While the new Law expressly recognizes electronic posting (i.e., on a city or town website), it also requires posting in a form visible at all hours to passers-by at City or Town Hall. For those buildings that do not already post written notices in a glass case or on the front door, some visible posting location must be devised to comply with this new requirement.

3. Remote Participation

Most District Attorneys have interpreted the current Open Meeting Law as prohibiting participation by a board member by electronic means, such as speaker phone, teleconferencing or videoconferencing. The new Law provides that the Attorney General may permit such remote participation, but only by issuing a regulation or a "letter ruling" setting forth the permitted procedure. It is likely that the Attorney General will allow some form of remote participation, but the Law provides that all members and the public must be able to hear each other and that there must be a quorum of the body physically present in the room. The Law also prohibits the chair from participating remotely. In our opinion, this means that if the chair is not present, the vice-chair or another member designated as temporary chair should run the meeting from the meeting room. Remote participation should not be used until authorized by the Attorney General.

4. Public Recording

Just as the current Open Meeting Law allows members of the public to make audio or video recordings of open meetings (provided such recording does not interfere with the meeting), the new Law also permits this practice. The new Law requires that the person desiring to record a meeting notify the chair, however, and that the chair inform everyone in the room of the recording. This provision addresses the conflict between the current Open Meeting Law that permits recording and the so-called "Anti-Wire Tap" law [G.L. c.272, §99], which prohibits the recording of an individual without his or her knowledge.

5. Executive Sessions

In general, the new Open Meeting Law does not make significant changes in the circumstances that authorize the holding of an executive session. Exemptions (1) and (2) [concerning the discussion of individuals] will be combined into one exemption, while exemption (3) [concerning the discussion of litigation or collective bargaining strategy] will be divided into two exemptions. One notable new provision, however, concerns the form of a motion to go into executive session for certain purposes. Under the current Law, many boards have voted to enter executive session by referring only to the number of the exception in G.L. c.39, §23B (for example," meet in executive session for Purpose 3") or quoting the purpose from the statute ("to discuss litigation strategy"). Under the new Law, if the board intends to discuss strategy concerning collective bargaining or litigation, the acquisition, lease or value of real property, or to consider or interview applicants for employment, the chair must not only state this purpose but must also expressly state that conducting the business in open session will have a detrimental effect on the public body's strategic or negotiating position. A failure to do so could lead to the Attorney General finding that the session was improper and trigger the enforcement process.

The changes to the Open Meeting Law summarized above were adopted by the General Court as part of a sweeping effort to promote ethics and transparency in all levels of government. Municipal boards are used to dealing with the restrictions and procedures of the existing Open Meeting Law and most of these will continue as is after July 1st. Instead of the District Attorneys, however, the Attorney General will now be enforcing all provisions, and all municipal officials need to become acquainted with the differences over the next few months and be prepared to comply with them beginning in July 2010.

Very truly yours,

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