MEETINGS AND MINUTES GUIDE FOR BOARDS, COMMISSIONS AND COMMITTEES "INCLUDING EXECUTIVE SESSION QUICK INDEX MOTIONS GUIDE"

NOTE- THIS GUIDE IS ADAPTED FOR THE NEW OPEN MEETING LAW WHICH WENT INTO EFFECT JULY 1, 2010

Compliments of your municipal legal counsel and the Massachusetts Municipal Lawyers Association

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 guide 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 also contains an Executive Session Quick Index Motion Guide with reasons permitting an Executive Session. It is by no means all inclusive. When problems are anticipated or arise, you should contact your municipal legal counsel for guidance.

All meetings must be in Open Session, unless one or more of the following exceptions apply. **To go into Executive Session, you must 1. ALREADY BE IN OPEN SESSION; 2. USE ROLL CALL VOTE TO GO INTO EXECUTIVE SESSION; 3. CHAIR MUST SPECIFY THE SPECIFIC REASON OR REASONS FOR THE EXECUTIVE SESSION (SEE BELOW) AND STATE ALL SUBJECTS THAT MAY BE REVEALED WITHOUT COMPROMISING THE PURPOSE FOR WHICH THE EXECUTIVE SESSION WAS CALLED; 4. FOR REASONS 3, 6 AND 8 CHAIR MUST ALSO STATE THAT OPEN SESSION WILL HAVE A DETRIMENTAL EFFECT AND 5. CHAIR MUST SPECIFY IF YOU INTEND TO RECONVENE IN OPEN SESSION.**

If you do not intend to go back into Open Session, you need not say so, but it is helpful and advisable to do so. If you fail to state that you will resume in Open Session, you can not do so. 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 holidays. 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.

The posting of the notice for the meeting must include the date, time and place of the meeting. Under the new law, it must also now contain a listing of the subjects which the chair reasonably anticipates will be discussed. Thus, it is important to be sure that in the notice the subjects anticipated to be discussed, which at a minimum would include the items on any agenda, must be listed. As the notice now must include those subjects to be discussed, many boards use the agenda as the posting notice as well since it would already list subjects anticipated to be discussed. It is important to be sure that the notice lists all such subjects which the chair reasonably anticipates to be discussed. The notice must be visibly available at all times.

Note that in some instances there are special conditions which must exist to be in Executive Session. These include requirements in some instances to notify the subject (unless notice is waved) of the Executive Session in advance of the meeting, and to inform the subject the he/she has a right to be present, to speak, to have a legal representative present to advise the person and to be able to make an independent record of the meeting. 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. Depending on the exemption used, the subject of the meeting may also have the right to require the meeting to be in Open Session. 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 or discussion 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 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 to 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 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, a complaint to the Attorney General's Division of Open Government and/or a civil action can be taken against the Board of Committee in violation. The result can be a Judge and/or the Attorney General in some cases issuing an order against the Board of Committee relative to their conduct, invalidating the action taken and imposing a civil fine against the governmental body of up to $1,000.00 dollars. Most problems which result in court action can be avoided. When in doubt, or if it does not seem right, consult with your municipal legal counsel.

REASONS FOR EXECUTIVE SESSION AND QUICK INDEX GUIDE FOR MOTIONS FOR EXECUTIVE SESSION.

What follows is a listing of the statutory exceptions, together with a suggested motion, which should be modified as appropriate. You can combine more than one exception if applicable. Accurate minutes are to be kept and maintained of all meetings, including Executive Sessions. THIS CAN ALSO SERVE AS AN EXECUTIVE SESSION QUICK INDEX GUIDE FOR YOU. It is very important to properly state the reason for the Executive Session; a failure to do so can result in the session being declared invalid with the result that all matters within the session become public. ***You should also consult with your municipal counsel as to the ability to meet in Executive Session or other session with legal counsel for the purposes of obtaining legal advice.***

REMEMBER, YOU MUST 1. ALREADY BE IN OPEN SESSION; 2. USE ROLL CALL VOTE TO GO INTO EXECUTIVE SESSION; 3. CHAIR MUST SPECIFY THE SPECIFIC REASON OR REASONS (SEE BELOW) AND STATE ALL SUBJECTS THAT MAY BE REVEALED WITHOUT COMPROMISING THE PURPOSE FOR WHICH THE EXECUTIVE SESSION WAS CALLED; 4. FOR REASONS 3, 6 AND 8 CHAIR MUST STATE THAT OPEN SESSION WILL HAVE DETRIMENTAL EFFECT AND 5. CHAIR MUST SPECIFY IF YOU INTEND TO RECONVENE IN OPEN SESSION.

1. 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.
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

2. 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 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.]
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

3. **Exemption 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 THAT 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 LITIGATING POSITION OF THE BODY.]
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

4. 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.***
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

5. 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.
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

6. 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 that 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.]***
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

7. 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. [specify law, i.e. "to wit the attorney-client privilege"]***
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

8. 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.]***
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

9. 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.
Note that before the motion is made, there must be a separate vote in open session to participate in the mediation, with the parties, issues involved and purpose of the mediation disclosed.
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

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.]
CHAIR TO STATE SUBJECTS TO BE REVEALED IN ES UNLESS IT WILL COMPROMISE PURPOSE OF ES.

Note: You may also be able to meet in a closed or private session with an attorney for the purpose of obtaining legal advice. This should be discussed with your municipal legal counsel prior to doing so.

MINUTES

Accurate minutes are to be kept and maintained of all meetings. The law requires the minutes to set forth: (a) the date; (b) the time); (c) the place; (d) the members present or absent; (e) the actions taken; (f) a summary of the discussion of all matters discussed at the meeting; (g) a listing of all documents used at the meeting; 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 of committee. They must have a summary of matters discussed.

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 minutes 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 provides specific rules for when Executive Session minutes need to be reviewed and approved for release. You should consult with your municipal legal counsel relative to same.

Minutes in Executive Session need to be informative, as well as record any action taken. This past year the AG's Office advised that there must be sufficient detail in the minutes to reflect the summary of the discussion- not just a line that the Board discussed x matter.

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

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. The minutes must contain a list of the documents used at the meeting, which also become part of the official record.

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 Guide* present 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 municipal legal counsel to discuss it further. An ounce of prevention is worth an avoided complaint or law suit.

REMEMBER- AS MUCH AS THE PUBLIC'S BUSINESS AS CAN BE CONDUCTED IN OPEN SESSION SHOULD BE DONE IN OPEN SESSION. EXECUTIVE SESSION IS THE EXCEPTION AND SHOULD BE USED 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. Laws are often amended, new laws passed and court decisions interpret laws. That is why it is important to consult with an attorney for legal advice. The law encourages meetings to be in open as much as possible. Any exceptions to open meetings should only be used when necessary. You should consult with your municipal legal counsel as to the applicability of the law to a particular situation. This guide is published by the City Solicitors and Town Counsel Association, 115 North Street, Suite 3, Hingham, MA 02043; 781-749-9922; fax- 781-749-9923; www.massmunilaw.org; jlampke@massmunilaw.org . © 2015.1.21.15

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