

MEMORANDUM

To: Steve Ledoux, Town Manager
From: Stephen D. Anderson, Town Counsel
Re: Revised Executive Session Procedures under the New Open Meeting Law
Date: May 23, 2010

Effective July 1, 2010, the new Open Meeting Law (“New OML”) takes effect.¹ The New OML revises the purposes for which a public body may go into executive session; the procedures by which a public body enters executive session; the votes and minutes taken in executive session; and ongoing review requirements with respect thereto. Pending any more definitive guidance from the Attorney General’s Office, the following is a brief summary of these new executive session provisions:

Purposes of an Executive Session

Under the New OML, there are 10 bases for entering executive session, most of which will appear familiar but with variations from the prior OML.

- (1) To discuss the reputation, character, physical condition or mental health, rather than 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...;²
- (2) To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
- (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;
- (4) To discuss the deployment of security personnel or devices, or strategies with respect thereto;
- (5) To investigate charges of criminal misconduct or to consider the filing of criminal complaints;

¹ See Chapter 28 of the Acts of 2009, §§ 17-20 and 106 (amending G.L. c. 30A, to add §§ 18-25).

² Under this provision, the individual to be discussed in such executive session “shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the session be open.”

- (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 public body;
- (7) To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;
- (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;
- (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;³ or
- (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.

Procedure for Entering Executive Session

A public body may meet in closed session for one or more of the purposes listed above provided that:

1. the body has first convened in an open session;
2. a majority of members of the body have voted to go into executive session and the vote of each member is recorded by roll call and entered into the minutes;

³ Under this provisions, 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 “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.”

3. before the executive session, the chair shall state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called;
4. the chair shall publicly announce whether the open session will reconvene at the conclusion of the executive session; and
5. accurate records of the executive session shall be maintained pursuant to the new OML requirements (see below).

Attached to this memorandum is a sample motion procedure to enter executive session under the New OML.

Minutes and Votes of an Executive Session under the New OML

The public body must create and maintain accurate minutes of all executive sessions, setting forth:

- the date, time and place,
- the members present or absent,
- a summary of the discussions on each subject,
- a list of documents and other exhibits used at the meeting,
- the decisions made and the actions taken at each meeting,
- the record of all votes.

Any vote taken at an executive session must be recorded by roll call and entered into the minutes.

All documents and other exhibits, such as photographs, recordings or maps, used at an executive session shall, along with the minutes, be part of the official record of the session and be maintained accordingly.

The minutes of any valid executive session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session, may be withheld from disclosure to the public in their entirety under the public records law as long as publication may defeat the lawful purposes of the executive session, but no longer. Special rules apply to determining whether such materials are covered by the attorney-client privilege or the exemptions under the public records law, and counsel should be consulted in the event of a public records request for any such executive session materials.

The public body, or its chair or designee, shall, at reasonable intervals, review the minutes of executive sessions to determine if the provisions of the New OML warrant continued non-disclosure. Such determination shall be announced at the body's next meeting and such announcement shall be included in the minutes of that meeting.

Upon request by any person to inspect or copy the minutes of an executive session or any portion thereof, the body:

- shall respond to the request within 10 days, and
- shall release any such minutes not covered by an exemption or the attorney-client privilege.

If the body has not performed a recent reasonable interval review, the body shall perform the review and release the non-exempt minutes, or any portion thereof, not later than the body's next meeting or 30 days, whichever first occurs. The public body shall not assess a fee for the time spent in its review.

Conclusion

To simplify matters for the transition to the New OML, attached is a set of Procedure and Motions to follow for executive sessions under the New OML.

Procedure for Entering Executive Session
Under the New Open Meeting Law (Effective 7/1/10)

To meet in closed (executive) session under the New Open Meeting Law, please observe the following procedure:

1. First convene in open session.
2. Make and second one of the Motions (or a combination of the Motions) on the attached list:
 - a. A Motion stating one valid ground is sufficient to enter executive session.
 - b. If more than one ground for entering executive session pertains to the same matter, each ground should be stated in the Motion.
 - c. Example: “I move to enter executive session to discuss A and B.”
 - d. Discussion on the Motion should include the items listed in item 3 below.
3. Before the vote to enter executive session, the chair should state:
 - a. The purpose for the executive session,
 - b. All subjects that may be revealed “without compromising the purpose for which the executive session was called”
 - c. The mandatory statements for that type of motion as set forth on the attached chart.
4. Vote on the Motion to Enter Executive Session
 - a. A majority of members must vote to go into executive session.
 - b. The vote of each member must be recorded by roll call and entered into the minutes.
5. If an executive session will cover two or more unrelated matters, repeat the above process for each separate matter.
6. The chair must publicly announce whether the open session will reconvene at the conclusion of the executive session.
7. Accurate records of the executive session must be maintained pursuant to the new OML requirements (see below).
 - a. If separate matters are addressed in executive session, the Minutes should clearly reflect where one matter leaves off and the next matter begins, and which documents relate to which matter.

Attached is a sample motion for each legitimate purpose for entering into executive session under the New OML.

Sample Motions for Entering Executive Session
Under the New Open Meeting Law

| PURPOSE | MOTION | CHAIR'S STATEMENT |
|---------------------------------------|--|--|
| Reputation or Character | I move to enter executive session to discuss the reputation or character, of an individual. | |
| Physical or Mental Condition | I move to enter executive session to discuss the physical condition or mental health of an individual. | |
| Discipline or Dismissal | I move to enter executive session to discuss the discipline or dismissal of a public officer, employee, staff member or individual. | |
| Complaints or Charges | I move to enter executive session to discuss complaints or charges brought against a public officer, employee, staff member or individual. | |
| | | |
| Preparation for Nonunion Negotiations | I move to enter executive session to conduct strategy sessions in preparation for negotiations with nonunion personnel. | |
| Nonunion Negotiations | I move to enter executive session to conduct contract negotiations with nonunion personnel. | |
| Collective Bargaining Strategy | I move to enter executive session to discuss strategy with respect to collective bargaining. | Chair declares: "An open meeting may have a detrimental effect on the bargaining position" of the Board. |
| Collective Bargaining | I move to enter executive session to conduct collective bargaining sessions. | |
| | | |
| Litigation Strategy | I move to enter executive session to discuss strategy with respect to litigation. | Chair declares: "An open meeting may have a detrimental effect on the litigating position" of the Board or Commission. |
| Mediation (Litigation) | I move to enter executive session to meet or confer | Chair declares: "The parties to the mediation are _____; the issues |

| PURPOSE | MOTION | CHAIR'S STATEMENT |
|---------------------|---|---|
| | with a mediator with respect to litigation. | involved in the mediation are _____; and the purpose of the mediation is _____. No action will be taken by [the Board or Commission] with respect to those issues without deliberation and approval for the action at an open session.” |
| Mediation (Other) | I move to enter executive session to meet or confer with a mediator with respect to a decision on public business. | Chair declares: “The parties to the mediation are _____; the issues involved in the mediation are _____; and the purpose of the mediation is _____. No action will be taken by [the Board or Commission] with respect to those issues without deliberation and approval for the action at an open session.” |
| Security Matters | I move to enter executive session to discuss the deployment of security personnel or devices, or strategies with respect thereto. | |
| Criminal Matters | I move to enter executive session to investigate charges of criminal misconduct or to consider the filing of criminal complaints. | |
| Real Property | I move to enter executive session to consider the purchase, exchange, lease or value of real property. | Chair declares: “An open meeting may have a detrimental effect on the negotiating position” of the Board or Commission. |
| Compliance with Law | I move to enter executive session to comply with, or act under the authority of, any general or special law. | |
| Federal Aid | I move to enter executive session to comply with, or act under the authority of federal grant-in-aid requirements. | |

| PURPOSE | MOTION | CHAIR'S STATEMENT |
|-------------------------------------|--|--|
| Preliminary Screening of Applicants | I move to enter executive session to consider or interview applicants for employment or appointment by a preliminary screening committee. | Chair declares: "An open meeting will have a detrimental effect in obtaining qualified applicants, and the meeting is not to consider or interview applicants who have passed a prior preliminary screening." |
| Energy Matters | I move to enter executive session to discuss trade secrets or confidential, competitively-sensitive or other proprietary information concerning an energy supplier, municipal aggregator or cooperative. | Chair declares: "Disclosure of the trade secrets or confidential, competitively-sensitive or other proprietary information will adversely affect the ability to conduct business in relation to other entities making, selling or distributing electric power and energy." |