

OPEN MEETING LAW GUIDELINES



MIDDLESEX DISTRICT ATTORNEY'S OFFICE

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DISTRICT ATTORNEY**

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(Revised January, 2007)

INTRODUCTION

The Massachusetts Open Meeting Laws apply to governmental entities at the state, county, and local levels.¹ In general, these laws require that meetings of such entities be open to the public, that notice of such meetings be publicly posted, and that accurate records of the meetings be maintained and also available to the public.

The District Attorney is responsible for enforcing the Open Meeting Law (the "Law") in the county, cities, and towns within his District. However, since Middlesex County as a governmental entity was abolished on July 11, 1997, G. L. c. 34B, § 1, the Middlesex District Attorney is now responsible for enforcing the Open Meeting Law at the city and town levels only.

The purpose of these revised Guidelines is to explain the requirements of the Law and the procedures the Middlesex District Attorney's Office has adopted to handle both complaints alleging violations and requests for advice about the Law. The Open Meeting Law itself has been amended several times and there have been a number of appellate court decisions since the District Attorney's previous Open Meeting Law

¹ G. L. c. 30A, §§ 11A-11A 1/2 (state); G. L. c. 34, §§ 9F-9G (county); G. L. c. 39, §§ 23A-24 (municipal). See also G. L. c. 66, §§ 5A, 10, 15, 17C (public records).

Guidelines were distributed in 1984, 1987, 1989, 1993, 2001, and 2003. We hope that these revised Guidelines will continue to give officials in the towns and cities of Middlesex a tool to assist them in complying with the Open Meeting Law. We also hope that they will provide citizens with a better understanding of the responsibilities of their elected and appointed officials, and of their rights and the means of enforcing those rights under the Law.

ASSISTANCE, CONTACTS, AND INFORMATION

The Appeals Bureau of the District Attorney's office handles Open Meeting Law matters. For information about filing complaints or other matters concerning the Open Meeting Law, contact the Appeals Bureau at (617) 679-6540 and ask to speak to an Assistant District Attorney on the Open Meeting Law Team. Members of the press should first contact the Public Information Office at (617) 679-6522. These Guidelines also are available on the District Attorney's website, www.middlesexda.com. Additional copies of these Guidelines may be obtained by contacting the Appeals Bureau at the above number or in writing at the following address:

Appeals Bureau
Office of the Middlesex District Attorney
40 Thorndike Street
Cambridge, MA 02141
ATTN: Open Meeting Law Team

I. OVERVIEW AND SUMMARY OF THE OPEN MEETING LAW

In 1958 Massachusetts adopted its first Open Meeting Law applicable to governmental units at the state, county and municipal levels. St. 1958, c. 626. In fact, there were – and there continue to be – three separate laws, one applicable to each level of government (state, county and municipal), but the substance of the three laws has always been the same.² The first statute was fairly general in approach. After a series of amendments over the years, the Open Meeting Law was substantially revamped in 1975, adding for each level of government a set of definitions of terms used and making more specific the provisions governing closed meeting sessions and notices of meetings. There have been a number of amendments to the Law since 1975, but its general format and provisions have remained the same.

The Law governs those meetings of governmental bodies in which a quorum of the body convenes to deliberate on any public business or policy within its jurisdiction. The terms "meeting," "governmental body," "deliberation," and "quorum" are specifically defined in the Law. G. L. c. 39, § 23A.

The purpose of the Open Meeting Law is to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based. It accomplishes this purpose by requiring open discussion of governmental action at public meetings. The requirements of the Open Meeting Law grow out of the idea that the democratic process depends on the public having knowledge about the

² Although the Open Meeting Law applies to counties, G. L. c. 34, § 9F-9G, the abolition of Middlesex County in 1997 makes these Guidelines relevant only to the Open Meeting Law as it applies to municipal and district governments, G. L. c. 39, §§ 23A-24. Governmental entities at the state level are subject to the State Open Meeting Law, found at G. L. c. 30A, §§ 11A-11A 1/2. The Attorney General enforces the State Open Meeting Law.

considerations underlying governmental action, for without that knowledge people are not able to judge the merits of action taken by their representatives. The overriding intent of the Open Meeting Law is therefore to foster and indeed require open discussion of governmental action at public meetings.³ Yet the Law does recognize that public officials might be "unduly hampered" if all discussions by public officials were required to be open. As a result, it specifies nine specific circumstances, often referred to as "exemptions," in which the governmental body may meet in a closed session. These exemptions, however, are limited in number and narrow in scope. Indeed, the Supreme Judicial Court has held that the exemptions to the Open Meeting Law "must be strictly construed and narrowly applied in order not to frustrate the legislative purpose" of openness.⁴

For meetings covered by the statute, the Law sets forth specific procedures that must be followed. Most important is that the meeting be open to the public unless one of the exemptions applies, in which case the governmental body, after following certain preparatory procedures, may meet in an executive session (closed session). Other critical requirements are that records of all meetings (including executive sessions) be maintained and made available to the public, and that notice of all meetings be publicly posted.

The District Attorney is vested with the responsibility of enforcing the Law at the local level. However, the District Attorney, the Attorney General, or three or more registered voters may seek judicial remedies in the form of injunctive, declaratory, or

³ For the purposes of the Open Meeting Law, see Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978).

⁴ General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 806 n.9 (1999).

other appropriate relief. Such relief may include an order invalidating or rescinding past actions by a governmental body, an award of back pay, orders requiring public records to be maintained and released to the public, and a civil fine of not more than one thousand dollars for each meeting held in violation of the Law.⁵ Other remedies may be available as well; the Law states that its remedial provisions are not exclusive.⁶

Each new member of a governmental body must be given a copy of the Open Meeting Law by the city or town clerk, and must sign a receipt. G. L. c. 39, § 23B.

II. THE LAW'S REQUIREMENTS

A. Who is Subject to the Open Meeting Law

The Law applies to governmental bodies. These are entities defined at the local level as:

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; provided, however, that this definition shall not include a town meeting.

The Law thus governs collegial bodies or groups, such as boards of selectmen or school committees, but not individual officials such as a mayor or a police chief, or members of their staffs.

The Law also covers subcommittees appointed by any governmental board, commission or committee that is a governmental body.⁷ This includes not only subcommittees comprised of the parent governmental body's members, but also subcommittees or special purpose committees that may contain individuals who are not

⁵ The civil fine provision, added by St. 1993, c. 455, took effect in 1994.

⁶ G. L. c. 39, § 23B; c. 66, §17C. See Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 309-312 (1990).

⁷ See Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433, 436 (1984).

on the parent body, so long as the subcommittee or special purpose committee is carrying out delegated functions or responsibilities of the parent body.

Example: A local housing authority appoints a special committee composed of private citizens, representatives of the local planning board, the local conservation commission, and interested tenant groups to study and make recommendations to the authority on the design, placement, and tenant selection criteria for a low and moderate income housing project the authority is building. Since all the matters which have been delegated to the special committee are matters of public business and policy within the housing authority's jurisdiction and responsibility, the special committee itself is a governmental body and subject to the Law.

The fact that the jurisdiction of the subcommittee or special purpose committee extends only to making recommendations to the parent governmental body does not render the Law inapplicable.⁸

Example: A subcommittee of a local conservation commission, composed of three of the seven commission members, is delegated the task of making factual investigations of a local conservation problem, reporting its findings to the full commission, and making oral recommendations on what action the commission should take. Although the subcommittee's jurisdiction is limited to making recommendations to the commission, rather than binding decisions on behalf of the commission, the subcommittee still qualifies as a governmental body. Consequently, when the subcommittee convenes to discuss its investigations or propose recommendations, this is a meeting.⁹

⁸ See Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433, 436 (1984).

A single member of a governmental body cannot comprise a "subcommittee" of the same governmental body. Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 124 (2000).

Staff meetings called by individual town or city administrators are not "governmental bodies." Where an administrative official, such as a police chief or superintendent, appoints a group of citizens to provide advice on a matter within that individual administrator's own responsibilities, the group is generally not a governmental body. Connelly v. School Committee of Hanover, 409 Mass. 232, 235-238 & n.8 (1991).

Example: A school superintendent, with statutory responsibility to nominate and recommend to the school committee a candidate for high school principal, appointed a seven-member committee to assist him in that task. The committee screened 68 applicants, interviewed seven finalists, and chose one candidate to recommend to the superintendent, who accepted the recommendation and forwarded it to the school committee. All the committee's work was done in private. The Supreme Judicial Court held that, as the committee's only task was one delegated to it by the superintendent, and since that task was within the superintendent's own duties, the committee was not a "governmental body" and was not governed by the Open Meeting Law. Id. at 235-238. The Court noted, however, that if a committee were subject to the Open Meeting Law,

⁹ If, however, a special purpose committee exists only to review compliance with standards set by federal and state statutes, has no direct involvement in the development of public policy, and does not advise its parent body in decisions on public business, the committee does not hold "meetings" within the meaning of the Open Meeting Law and need not comply with the Law's requirements. Medlock v. Board of Trustees of the University of Massachusetts, 31 Mass. App. Ct. 495, 502-503 (animal research committee), further appellate review denied, 411 Mass. 1105 (1991).

having a town official nominally appoint its members would be seen as a subterfuge, and the committee would not be excused from complying with the Law. Id. at 238 n.8.

B. Meetings Covered by the Open Meeting Law

The Open Meeting Law applies to every meeting of a quorum of a governmental body, if any public business over which the governmental body has jurisdiction is discussed or considered. However, any on-site inspection of a project or program by a governmental body does not qualify as a meeting. A quorum is defined in the Law as a simple majority of the body unless otherwise defined by applicable constitution, charter, rule, or law.

Note: A governmental body engages in "deliberation" under the Law, and must comply with the Law's requirements, whenever a quorum engages in a "verbal exchange" on a matter within its jurisdiction, regardless of whether or not the discussion culminates immediately in an official vote. Thus, when a committee interviewed candidates for employment in closed session, the Law applied even though the members did not converse among themselves but merely questioned the candidates. The Supreme Judicial Court held that such interviews constituted "deliberation" under the Law. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 470-471 (1989).

A meeting of a governmental body subcommittee, which is itself a governmental body, is subject to the Law if a quorum of the subcommittee is present, even if that quorum is not sufficient to constitute a quorum of the parent governmental body.

Example: A school committee with nine members appoints a three-member subcommittee to screen applicants for the position of superintendent and make recommendations to the full committee. When two or more members of this

subcommittee meet together to discuss or deliberate on the matter assigned to it, this is a meeting covered by the Law even though less than a quorum of the full school committee is present.

When quorums of two governmental bodies meet jointly it is a meeting of each governmental body. If only one of the governmental bodies has a quorum present, it is a meeting only of that governmental body.

The Law does not apply to any "chance" or "social" meetings of a governmental body or members of the body at which matters relating to official business are discussed, so long as no final decision on such business is reached. The Law specifically states that chance or social meetings are not to be used to circumvent the letter or spirit of the Law by treating them as occasions to discuss or act on matters within the governmental body's jurisdiction, control, or advisory power.

Example: Two days after a so-called chance or social meeting at which members of a school committee discussed the closing of a school, the school committee convened in an open meeting and without discussion ratified a determination about the closing that had been reached at the earlier "chance" meeting. These facts suggest that the chance or social meeting may have been used in circumvention of the requirements of the Law.

Except for notice requirements, the Law applies to emergency meetings. Emergency is defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." The emergency in question must be one that relates directly to the functions and responsibilities of the governmental body convening the meeting; it cannot be an emergency brought on by the needs or requirements of a person or entity not related to the governmental body. In addition,

the emergency must be of such a nature that there is not time to wait forty-eight hours (the Law's prescribed notice period) to hold a meeting.

Example: A board of selectmen acting as the local licensing board convenes an emergency meeting because it has just been informed by the potential purchaser of a restaurant that unless the purchaser receives approval of the transfer of a liquor license that day, he will lose his option to purchase. This is not the type of emergency that justifies an emergency meeting because the circumstance calling for immediate action is the private financial interest of the purchaser, not an event or act relating to the licensing board's responsibilities. See also Pentecost v. Town of Spencer, 29 Mass. App. Ct. 991, 992 (1990) (resignation of Board of Assessors' clerk did not create an "emergency" under the Open Meeting Law).

Example: A series of severe rainstorms causes the Charles River to flood its banks in a particular town, creating a great potential for serious damage to many homes and businesses in the town. The selectmen call an emergency meeting to discuss what steps should be taken to control the flood and damage. These facts suggest the type of emergency that would justify an emergency meeting.

The Open Meeting Law applies to executive sessions (closed sessions) of a governmental body. As discussed in a separate section of these Guidelines, the Law defines when an executive session may be held and what special procedures apply to notice, attendance, minutes, etc. See Section on Executive Sessions below.

C. Procedures Required by the Law

1. Notice of Meetings

For each city and town, a notice of every meeting of any governmental body is to be filed with the clerk of the city or town, and the notice or a copy of the notice must be

publicly posted in the office of the clerk or on the principal official bulletin board of the city or town at least forty-eight hours (including Saturdays but not Sundays or legal holidays) before the meeting. For regional school district committees, the secretary of the regional school district is to file the notice of every meeting with the clerk of each city and town included within the district. Each such clerk must post the notice in his or her office or on the principal official bulletin board of the city or town. In addition, the regional school district's secretary must post the notice in his or her office or on the principal official bulletin board of the district.

For other types of regional or district governmental bodies, the officer calling the meeting is to file notice of the meeting with the clerk of each city and town within the region or district. The clerk must post the notice in his or her office or on the principal official bulletin board of the city or town.

The meeting notice is to be printed in easily readable type, and is to contain the date, time, and place of the meeting. The Open Meeting Law does not require the meeting notice to include the agenda of the meeting. However, if a governmental body includes an agenda with the meeting notice, the District Attorney recommends that the agenda be labeled "proposed" in the event that discussion deviates from those items listed in the proposed agenda.

Note: Under the Law, a governmental body may comply with these notice requirements by filing and posting in advance a printed schedule of its future meetings, so long as the day of the week, the time and place of each such meeting is listed, and so long as the governmental body does in fact meet regularly at the scheduled time and place. If such a schedule of future meetings is compiled and posted, there will be no need to file and post a separate notice of each meeting before that meeting is held. On

the other hand, a governmental body cannot rely on a pre-filed schedule of meeting days and times to satisfy the Law's notice requirements if in fact it does not regularly meet at the scheduled times. In such an instance, the filed schedule would provide no real notice at all, since there would be no way for a member of the public to know whether a meeting would or would not be held on a particular scheduled day.

a. Emergency Meetings: As indicated above (see Section B, Meetings Covered by the Open Meeting Law), when there is a need for an emergency meeting, the notice requirements of the Law do not apply. Nevertheless, any governmental body that calls an emergency meeting should give as much public notice as is possible in the circumstances.

Example: A board of selectmen determines on a Tuesday that it must hold an emergency meeting the next evening; the circumstances will not permit waiting a full forty-eight hours. In this situation, the selectmen should immediately file notice of the next day's emergency meeting with the town clerk and the clerk should immediately post the notice in his or her office.

Note: While the Open Meeting Law contains no specific provisions concerning notice to members of governmental bodies of their own meetings (which may be addressed in by-laws or internal procedures of a governmental body), the public notice provisions of the Law have been recognized as also serving to protect the members themselves. See Pentecost v. Town of Spencer, 29 Mass. App. Ct. at 992.

b. Adjourned Meetings: If it becomes necessary to adjourn or extend a meeting to another time, the District Attorney has interpreted the Open Meeting Law's notice requirements to apply to the adjourned or extended meeting. Therefore it will be necessary to adjourn the meeting to a date that will permit the governmental body to

cause notice to be filed and posted at least forty-eight hours in advance, unless the circumstances require the adjourned meeting to be an emergency meeting. To avoid delays caused by reposting, a governmental body may file and post meetings for consecutive dates if it is fairly expected that meetings will be held on the announced dates.

2. Minutes of Meetings

The Open Meeting Law (as well as the Public Records Law, G. L. c. 66, §§ 5A, 10, 15, 17C) requires every governmental body to maintain accurate minutes of all its meetings.

a. Content: At a minimum, minutes must set forth the date, time, and place of the meeting, the identity of the members present or absent, and all "action taken." The District Attorney has interpreted the term "action taken" to include not only votes and other formal decisions made at a meeting, but also discussion or consideration of issues for which no vote is taken or final determination is made. See New England Box Co. v. C & R Construction Co., 313 Mass. 696, 703 (1943). The minutes must record the votes and other official actions taken by the governmental body. See G. L. c. 66, § 5A. As such, each discussion held at the meeting must be identified; in most cases this is accomplished by setting forth a summary of each discussion held such that the public may have a sense of the issues considered at the meeting. A verbatim record of discussions is not required. See G. L. c. 66, § 5A.

The Law also requires that accurate minutes be maintained for every executive session. The contents of executive session minutes must mirror those required for open session meetings, with one additional requirement: every vote taken in executive session must be recorded in the minutes by "roll call." See Section D.3. below – Minutes

of Executive Sessions – for the Law's requirements relating to the contents and release of executive session minutes.

b. Form: The Open Meeting Law contains no provisions regarding the form in which minutes of meetings must be maintained. However, the longevity requirements for record preservation under the Public Records Law, G. L. c. 66, §§ 3-9, require that a governmental body eventually put its minutes into a written form.¹⁰ Such a requirement is also consistent with the Open Meeting Law's policy of providing ready access to legible minutes. For the same reason, typed minutes - though not required - are preferable.

Governmental bodies that have adopted the practice of tape recording their meetings should be reminded that they may not rely solely on the tapes to satisfy the record-keeping requirements of the Law. Rather, the tapes should serve as an aid (a desirable one) to the body in preparing its "hard copy" minutes. Similarly, the record-keeping requirement may not be satisfied simply by directing members of the public to individual files kept by subject matter. Separate, written minutes must be prepared and maintained.

c. Release: Both the Open Meeting Law and the Public Records Law include provisions that pertain to the release of minutes of meetings convened by governmental bodies. In general, the minutes of a meeting become public records from the moment they are created. This is true regardless of the form in which they may first

¹⁰ See Supervisor of Public Records Bulletin No. 2-92, January 21, 1992. Minutes of meetings are considered historical documents and thus must be permanently preserved. The Records Management Unit of the Secretary of State's office will assist governmental entities to ensure that their permanent records meet archival standards. The Unit may be reached at the Massachusetts Archives at Columbia Point, 220 Morrissey Blvd., Boston, MA 02125, (617) 727-2816.

appear, i.e., stenographic notes, handwritten notes, or tape recordings. The governmental body may not require that it vote to adopt or approve for release open session minutes before they may be released to the public, even though the minutes may be only in draft form at the time of the request. The body or custodian of the records may, of course, label the notes or cassette tape at the time of the release as being in "draft," "unofficial," or "unapproved" form, as may be appropriate. Once the notes or cassette tape have been transcribed into a permanent written form, the "draft" minutes may then be destroyed.

As public records, minutes must be made available to the public, upon oral or written request, at reasonable times and in a reasonable place. The request must be honored promptly, but no later than ten days from the date of the request. The governmental body must permit the minutes to be either inspected or copied, although it may charge a copying fee as established by the Public Records Access Regulations, 950 C.M.R. 32.06. For more detailed information about responding to a request for copies of minutes, assessment of fees, and the like, consult the Public Records Access Regulations, 950 CMR 32.00 et seq., promulgated by the Secretary of State's Office, Public Records Division. Release of executive session minutes is discussed in Section D below.

3. Conduct of Meetings

The Open Meeting Law is clear that all meetings of a governmental body are to be open to the public, and any person shall be permitted to attend any such meeting unless the governmental body (1) validly decides to hold an executive session for one of the nine purposes outlined in the Law and (2) follows the prescribed procedures for holding

such an executive session. The Law provides that "No votes taken in open session shall be by secret ballot." G. L. c. 39, § 23B, paragraph seven.

Except when a meeting is held in executive session, any person in attendance may record the meeting with a tape recorder or any other method of sonic reproduction, so long as no active interference with the conduct of the meeting arises as a result of the recording. The Law also allows any person attending an open meeting of a municipal or district governmental body to videotape the meeting from one or more fixed locations as determined by the governmental body, so long as there is no active interference with the meeting. G. L. c. 39, § 23B, paragraph eight. Because secret recordings of oral communications may violate the wiretap law, G. L. c. 272, § 99, any person taping a public meeting should not do so secretly, but should advise the chairperson in advance that he or she will be electronically recording the meeting.

Insofar as meetings of governmental bodies at the municipal or district level are concerned, the Law specifies that no person may address a meeting of the governmental body without permission of the presiding officer, and that all persons shall be silent at the request of the presiding officer. If a person persists in disorderly behavior in such a meeting after warning from the presiding officer, the officer may order him or her to withdraw from the meeting. If the disorderly person does not withdraw, the presiding officer may order a constable or other person to remove the offender and confine him or her in some convenient place until the meeting is adjourned. G. L. c. 39, § 23C.

4. Place and Time of Meetings; Access for the Disabled

Under a ruling issued jointly by the State Office on Disability and the Attorney General, all open meetings of governmental bodies must be accessible to persons with disabilities. The ruling was based on a number of federal and state civil rights statutes

and a provision of the state constitution, read in conjunction with the Open Meeting Law's requirements that meetings be "open to the public" and that "any person" be permitted to attend open meetings.¹¹

Under this ruling, all open meetings must be held in locations accessible by a wheelchair without the need for special assistance. If the town or city hall does not yet have such space, another location that is accessible must be found. Additionally, sign language interpreters for deaf or hearing-impaired persons must be provided, subject to reasonable advance notice.¹²

Additionally, meetings must be held in a location large enough to accommodate the number of people reasonably expected to attend. If an "overflow" crowd appears unexpectedly and a larger room is not available, a sound system should be set up to permit persons in the hallway to hear.

While the Open Meeting Law contains no express restrictions as to the time of meetings, it is recommended that meetings be held at times that are convenient to the public, and that meetings on weekends, holidays, or other inconvenient times be avoided.

¹¹ G. L. c. 30A, § 11A 1/2 (state); G. L. c. 39, § 23B (municipal). See § 504 of the Federal Rehabilitation Act of 1973, 29 U.S.C. § 794; the federal Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq.; the Massachusetts civil rights law, G. L. c. 93, § 103; the Massachusetts public accommodations law, G. L. c. 272, §§ 92A, 98, 98A; and the Massachusetts Constitution, Amendments, Article 114 (handicap discrimination), cited in Letter dated May 17, 1991 directed to Chief Executives of cities and towns from Attorney General and Massachusetts Office on Disability. The ruling is now further supported by the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and its regulations, 28 C.F.R. §§ 35.130, 35.149.

¹² The Massachusetts Commission for the Deaf and Hard of Hearing will assist with arrangements for a sign language interpreter. The Executive Office of the Commission is located at 150 Mount Vernon Street, 5th Floor, Dorchester, MA 02125, and can be reached at 1-800-882-1155.

5. The Use of Telephone and E-Mail

Discussions by telephone among a quorum of members of a governmental body on an issue of public business within the jurisdiction of the body are a violation of the Law. This is true even where individual telephone conversations involving a quorum occur in serial fashion.¹³ Similarly, "revolving door" meetings, in which a quorum of members participates in serial fashion, are meetings under the Open Meeting Law and must comply with all the Law's requirements.¹⁴

In light of the proliferation in the use of computers in recent years, it has become more common for persons, both at home and at work, to communicate through electronic mail, or "e-mail." Like private conversations held in person or over the telephone, e-mail conversations among a quorum of members of a governmental body that relate to public business violate the Open Meeting Law, as it is currently drafted, as the public is deprived of the opportunity to attend and monitor the e-mail "meeting." Thus, no substantive discussion by a quorum of members of a governmental body about public business within the jurisdiction of the governmental body is permissible except at a meeting held in compliance with the requirements of the Open Meeting Law.

Members of governmental bodies should also be cautious about communicating via e-mail one on one. This is because private, serial conversations may reach a quorum of members without the knowledge of all participants. Private, serial discussions of public business involving a quorum violate the Law regardless of the knowledge or intent of the parties.

¹³ See Harshbarger v. Board of Selectmen of Lexington, No. 88-3644 (Middlesex Super. Ct. August 18, 1989) (memorandum order granting summary judgment).

¹⁴ See McCrea v. Boston City Council, No. 05-1798 (Suffolk Super. Ct. March 27, 2006) (Boston City Council violated Open Meeting Law by deliberately shuttling councilors in and out of meeting to avoid quorum).

Certain housekeeping matters may, of course, be communicated outside of a meeting. Questions concerning meeting cancellations and scheduling often must be discussed outside of a meeting. Similarly, requests to put items on the agenda, so long as no substantive discussion occurs, are properly communicated outside a meeting.¹⁵ Likewise, documents may be distributed via e-mail to members of a governmental body, a practice that enhances efficiency by permitting advance review, on an individual basis, of materials to be discussed at an upcoming meeting. In all these situations, however, the utmost care should be taken not to utilize such communications to poll board members or otherwise engage in deliberations or substantive discussion on a matter within the governmental body's jurisdiction.

Additionally, whenever a member of a governmental body sends or receives an e-mail message, the District Attorney recommends that a hard copy be created and immediately placed in a central file, where it can be provided as a public record on request.

Despite the convenience and speed of communication by e-mail, its use by members of a governmental body carries a high risk of violating the Law. Not only do private e-mail communications deprive the public of the chance contemporaneously to monitor the discussion, but by excluding non-participating members such communications are also inconsistent with the collegial character of governmental bodies. For these reasons, the District Attorney recommends that e-mail messages among members of governmental bodies are best avoided except for matters of a purely housekeeping or administrative nature.

¹⁵ Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125 (2000).

D. Executive Sessions

1. Definitions

An executive session is defined in the Open Meeting Law as "any meeting of a governmental body which is closed to certain persons for deliberation on certain matters." The Law defines nine specific purposes for which an executive session may be held, often referred to as "exemptions" from the open meeting requirement, and emphasizes that this list of nine is an exclusive one. As stated previously, these exemptions "must be strictly construed and narrowly applied in order not to frustrate the legislative purpose" of openness.¹⁶ These nine purposes are discussed more fully below.

2. Procedures for Convening

a. Notice: No executive session may be held unless and until an open meeting of the governmental body, for which proper notice was given, has first convened. Written notice of a proposed executive session that will involve the discussion or consideration of an individual must be given to that individual at least forty-eight hours in advance. (See Section 5 below – Rights of Individuals).

b. Convening: Once an open meeting has been duly convened, a proper executive session may then convene only after a majority of the members of the governmental body vote to go into the session. The vote of each member must be recorded on a roll call vote and entered in the minutes of the meeting.¹⁷ In addition, the

¹⁶ General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 806 n.9 (1999).

¹⁷ The Appeals Court has interpreted this provision in conformity with the usual rule that action may be taken by a majority of a quorum. See District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 665-666 (a single vote to enter executive session, with two abstentions, could not constitute a

presiding officer must cite for the record the purpose (or purposes if there are more than one) of the executive session, and whether the governmental body will reconvene in an open meeting after the executive session is over.¹⁸

The governmental body must cite the purpose for which it is convening the session to ensure that executive sessions are not used as a subterfuge to retreat from open session meetings. See District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666 (1981). It is entirely appropriate for a governmental body to convene a single executive session for more than one purpose. In such a case, the governmental body must state each purpose for which the session is being convened, and once convened, only matters related to those stated purposes may be discussed.

In the interest of assisting governmental bodies in properly convening executive sessions, an example of an appropriate stated purpose is set forth below after each executive session exemption. These examples should, of course, be altered to fit the particular circumstance in question and are not meant to suggest that no other stated purposes will satisfy the requirements of the Law.

3. Minutes of Executive Sessions

Minutes or an equivalent record of every executive session must be kept. In terms of content, the requirements for executive session minutes mirror the

quorum of a majority of a three-member board), further appellate review denied, 383 Mass. 892 (1981).

¹⁸ A Superior Court judge has decided that an assistant superintendent's contract was invalid because it was adopted during an executive session convened for the incorrect announced purpose of "collective bargaining" strategy, rather than "contract negotiations with nonunion personnel." Witwicki v. Beverly School Committee, No. 92-3038 (Essex Superior Court, Decision and Order, January 14, 1993).

requirements for minutes of open meetings: they must set forth the date, time, place, members present or absent, and the action taken. (See above Section C.2. on Minutes of Meetings for a discussion of these requirements.) As with open session minutes, written minutes (preferably typed) are required. Unlike the case with open sessions, however, the public has no right to tape record or videotape executive sessions. In addition, minutes of executive sessions must include a record of every vote taken. All such votes must be recorded roll call votes.

Release of Executive Session Minutes: The minutes or record of every executive session become public records from the moment they are created; however, such minutes "may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer." G. L. c. 39, § 23B, paragraph seven; G. L. c. 34, § 9G, paragraph seven (emphasis added). Executive session minutes must accordingly be released as soon as the original purposes for secrecy under the Law no longer exist. The Law, however, is silent as to what factors should be considered in determining whether the original purposes for secrecy have passed. In some circumstances, executive session minutes may have to be released in a redacted form, where the reason for the secrecy on one topic continues, but has ceased as to another topic discussed at the same executive session.

Generally, members of the governmental body decide when to release the minutes of an executive session. Each governmental body should, however, adopt a policy requiring the periodic review of unreleased executive session minutes. Such a policy will help ensure that closed session minutes are kept secret only as long as needed and as authorized under the Law. The burden to show a continuing need for secrecy, based on the original, lawful purposes of the executive session, rests with the

governmental body. If the governmental body cannot meet this burden, the minutes must be released. Foudy v. Amherst-Pelham Regional School Committee, 402 Mass. 179, 184 (1988) (burden on governmental body to show that release of records would defeat these purposes).

Since, the reasons for secrecy will vary among the nine executive session exemptions, each will be discussed separately in the following section. Such discussion is intended as a general guide to assist governmental bodies in complying with the Open Meeting Law's requirement that executive session minutes must be made public as soon as the lawful purposes for secrecy are no longer extant. It should be stressed, however, that, if the minutes contain material that is required by another law to be kept private, the minutes (or applicable portions thereof) should not be released, even if there is no longer any need for secrecy based on the original purposes of the executive session. This is because, under G. L. c. 39, § 24, the Open Meeting Law shall be in force only so far as it is not inconsistent with the express provisions of any general or special law.

4. Purposes

The nine purposes or exemptions for which a governmental body may vote to hold an executive session are:

Exemption (1): To discuss the "reputation, character, physical condition or mental health rather than the professional competence" of a particular individual.

Stated Purpose Example

*The purpose of this executive session is to discuss the [reputation, character, physical condition, mental health – one or more as applicable] of [named person].***

**When citing the purpose for entering executive session, the governmental body need not name the person whose reputation, character, physical condition or mental health will be discussed if so naming that person might cause an unreasonable, substantial or serious interference with his or her right to privacy.

This purpose is designed to protect the rights and reputation of individuals. Some of the concepts included here -- physical condition, mental health -- are clear; others are less so. It is difficult, for example, to draw any bright lines between "professional competence" on the one hand, and "reputation" or "character" on the other. Nevertheless, it appears that at least where a governmental body is considering applicants for a professional job position, or where a governmental body is conducting a routine performance evaluation, the discussion would center on "professional competence" and could not be conducted in an executive session on the basis of this exemption.¹⁹ Likewise, written evaluations of a high-ranking public official that are prepared by individual committee members are, in the opinion of the District Attorney,

¹⁹ It is possible that another of the Law's exemptions would apply in certain cases. See Executive Session Sections 2(7) (other laws) and 2(8) (screening committees) below.

part of the deliberative process. Consequently, those individual performance evaluations constitute records of a meeting and should be appended to the minutes.

The Law affords certain rights to the individual who is the subject of the discussion at an executive session called for the purpose described here. For a discussion of these rights, see Section 5 below – Rights of Individuals.

Release of Exemption (1) Executive Session Minutes: Where the original executive session was held under exemption (1), the primary purpose for secrecy was to protect that individual's privacy and reputation. Thus, whether that legitimate reason for secrecy still exists depends on whether the person's privacy would be invaded or his or her reputation would be harmed by release of the minutes. Although there may be cases where the information contained in the minutes has been made public and release of the minutes would not be harmful to the individual's reputation and privacy, in most cases the governmental body will be able to show that release would defeat the purposes of the executive session and will be able to lawfully withhold the minutes from public release. Where the individual consents, however, the minutes must be released, unless there is another lawful basis for maintaining their privacy.

Since reputation and privacy rights generally do not survive after death, such minutes should usually be released after the individual is deceased. Even after death, however, any medical records contained in the minutes may be withheld from the public. See Globe Newspaper Co. v. Chief Medical Examiner, 404 Mass. 132, 135 (1989) (autopsy reports are exempted from public disclosure because they are "medical files or information" under G. L. c. 4, § 7(26) (c)).

Exemption (2): To consider the discipline or dismissal of, or to hear complaints or charges brought against a public officer, employee, staff member, or individual.

Stated Purpose Example

*The purpose of this executive session is to discuss the [discipline of, dismissal of, complaint brought against, the charge brought against – one or more as applicable] [named person].***

**When citing the purpose for entering executive session, the governmental body need not name the person whose discipline, dismissal, etc. will be discussed if so naming that person might cause an unreasonable, substantial or serious interference with his or her right to privacy.

Again the purpose of this exemption is to protect individual rights, as well as to promote the public interest in efficient personnel management. While the proposed imposition of disciplinary sanctions by a governmental body on an individual calls forth this section, the section does not apply if, for example, the governmental body is laying off a large number of employees because of budgetary constraints.²⁰ It is the District Attorney's view that routine performance evaluations not involving complaints, charges, or potential discipline, do not fall within this exemption, as they relate primarily to "professional competence."

As is true for an executive session called for the first purpose, an executive session called for this second purpose triggers certain rights on the part of an individual who is the subject of the discussion. See Section 5 below – Rights of Individuals. Those rights must be provided even if the dismissal hearing is being held pursuant to a collective bargaining grievance. Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 308 (1990).

²⁰ See Doherty v. School Committee of Boston, 386 Mass. 643, 647 (1982).

Release of Exemption (2) Executive Session Minutes: Where the original executive session was held under exemption (2), there were several reasons for secrecy: to protect the individual's reputation; to allow efficient personnel management; and to protect the public interest in maintaining morale of public employees. See Doherty v. School Committee of Boston, 386 Mass. 643, 646 (1982). If the discipline or charges are still pending, the minutes need not be released because the original purposes for secrecy are still extant.

If the discipline or charges have been resolved, or if no further action is to be taken, then the question becomes whether release of the minutes would defeat the original purposes for secrecy, i.e., whether the individual's reputation or privacy, or the public interest in maintaining morale among public employees, would be harmed by release of the minutes.²¹ Where the individual consents to the release of the minutes, and where no other legitimate basis for secrecy exists, the minutes must, of course, be released.

²¹ Additionally, in such a case it should be considered whether release of the minutes would cause an "unreasonable, substantial or serious" invasion of privacy. See G. L. c. 214, § 1B. Where the individual is not present to assert his privacy rights, however, the Supreme Judicial Court has ordered release of the minutes without consideration of this factor. Foudy v. Amherst-Pelham Regional School Committee, 402 Mass. 179, 184 n.9 (1988).

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 governmental body; to conduct strategy sessions in preparation for negotiations with nonunion personnel; and to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

Collective bargaining strategy:

Stated Purpose Example

*The purpose of this executive session is to conduct a collective bargaining session with the [named] union.***

**Since the governmental body must determine that an open meeting may have a detrimental impact on its bargaining position in order to convene an executive session under this purpose, it is a good practice to state on the record that a possible adverse impact may occur when the executive session is proposed and voted on.

Discussions with respect to collective bargaining strategy include discussions of proposals for wage and benefit packages or working conditions for union employees. The governmental body must show -- and, if challenged, carries the burden of proving -- that an open meeting may have a detrimental effect on its bargaining position to justify an executive session on the basis of this exemption. The showing that must be made is that the open discussion may have an adverse impact on the collective bargaining process; the body is not required to demonstrate or specify that a definite harm would have arisen.

Litigation strategy:

Stated Purpose Example

The purpose of this executive session is to discuss strategy with respect to litigation pending between [name of governmental body] and [named litigant].

Discussions concerning strategy with respect to ongoing litigation obviously fit within this purpose, but again only if an open meeting may have a detrimental effect on the litigating position of the governmental body. Discussions relating to proposed litigation are not covered by this exemption unless that litigation is clearly and imminently threatened.²² If the litigation is threatened and imminent rather than pending, the governmental body need not name the potential party or parties if doing so may have a detrimental effect on the litigating position of the governmental body convening the executive session.

Litigation is not necessarily "imminently threatened" simply because a person is represented by counsel and supports a position adverse to the governmental body's position. Nor does the fact that a newspaper reports that a party has threatened to sue mean imminent litigation.

Note: A governmental body's discussions with town counsel do not automatically fall under this or any other exemption.²³

²² See Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 352 (1983); Doherty v. School Committee of Boston, 386 Mass. 643, 648 (1982).

²³ See District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 632-634 (1985). Discussions relating to the hiring of independent legal counsel, however, may fall within the litigation strategy exemption if legal theories and strategy are discussed. See Fillipone v. Mayor of Newton, 392 Mass. 622, 624 (1984) (finance committee entitled to meet in private to consider appropriation for independent legal counsel for mayor, since discussion of conflict of interest likely to reveal city's legal theories).

Collective bargaining sessions:

Stated Purpose Example

The purpose of this executive session is to discuss strategy with respect to collective bargaining with the [named] union.

These include not only the bargaining sessions but also grievance hearings that are called for under a negotiated collective bargaining agreement.²⁴ Dismissal or disciplinary hearings, however, must comply with the requirements of exemption (2), even if they are held as part of a negotiated grievance procedure.²⁵

Contract negotiations with non-union personnel; strategy sessions to prepare for such negotiations:

Stated Purpose Example

The purpose of this executive session is to discuss contract negotiations with [named non-union personnel].

A governmental body of a municipality or district may enter executive session to conduct strategy sessions in preparation for, and to conduct, contract negotiations with nonunion personnel. Routine performance evaluations may not be conducted during an executive session held for the purpose of negotiating a contract.

In the usual case, where such evaluations relate solely to "professional competence," they are not proper subjects of an executive session and must be conducted in an open meeting. Similarly, contract negotiations with vendors or other entities, as opposed to municipal employees, are not included within this exemption.²⁶

²⁴ See Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 73 (1978).

²⁵ Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 308 (1990).

²⁶ Cf. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 630 (1985) (where no executive session exemption

Also note that this clause in exemption (3) does not require that the governmental body establish that an open session may have a "detrimental effect" before entering executive session to conduct strategy in preparation for negotiations with nonunion personnel. If an executive session is challenged under exemption (3), the governmental body has the burden of establishing that an open session may have a "detrimental effect" only if the strategy discussions pertain to collective bargaining with union personnel, or litigation.

Release of Exemption (3) Executive Session Minutes: Where the original executive session was held under exemption (3), the purposes for secrecy were to protect the governmental body's litigating or negotiating strategy from disclosure to the opposing party and to insulate the contract negotiation process from publicity. Once the litigation is concluded or the contract signed, the minutes must be released.

As to minutes of executive session held to discuss strategy with respect to collective bargaining or contract negotiations, if the governmental body can demonstrate that release would jeopardize future negotiations, those portions of the minutes which reveal future strategy may be withheld. Once the strategy is no longer in use, however, the minutes must be released in their entirety.

If the matter is still pending, the minutes generally need not be released. The governmental body, however, must be able to show that release of the minutes would be detrimental to the "[collective] bargaining or litigating position of the governmental body" G. L. c. 39, § 23B, paragraph 4, clause (3). In those cases where release would not harm the body's position, the minutes must be released.

applies to discussion of rubbish removal, Court would not create an implied exemption for meetings with legal counsel).

Exemption (4): To discuss the deployment of security personnel or devices.

Stated Purpose Example

The purpose of this executive session is to discuss the deployment of security [personnel or devices – one or both as applicable].

The purpose of this exemption is self-explanatory.

Release of Exemption (4) Executive Session Minutes: Where the original executive session was held under exemption (4), secrecy was required for security reasons. As long as the security devices or personnel are still deployed (or as long as there is any potential that they may be so re-deployed), the minutes may remain secret.

Exemption (5): To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.

Stated Purpose Example

The purpose of this executive session is to [investigate a charge of criminal misconduct, discuss the filing of a criminal complaint – one or both as applicable].

On the surface this exemption seems easily defined, but in fact the distinction between this exemption and the second exemption described above (to consider the discipline or dismissal of or charges brought against an individual) is not clear. In a close case it is preferable for a governmental body to convene the executive session under the second exemption in order to better protect the rights of the individual involved. In general, criminal investigations should be referred to the District Attorney's office or other law enforcement agency.

Release of Exemption (5) Executive Session Minutes: Where the original executive session was held under exemption (5), the reason for secrecy was to protect and further a criminal investigation and prosecution. If the investigation or prosecution

is still pending, the minutes should not be released. If the matter is concluded, other laws may nevertheless provide for secrecy, e.g., G. L. c. 6, §§ 167-178; G. L. c. 41, § 97D; G. L. c. 265, § 24C. It should be stressed that exemption (5) is rarely used, and that the District Attorney's Office or other law enforcement agency should be consulted in connection with any action involving a criminal matter.

Exemption (6): To consider the purchase, exchange, lease or value of real property if an open discussion may have a detrimental effect on the negotiating position of the governmental body with a person, firm, or corporation.

Stated Purpose Example

The purpose of this executive session is to consider the [purchase, exchange, lease, value – one or more as applicable] of real property.

Under this purpose, as with the collective bargaining and litigation purposes, the governmental body must show that an open meeting may have an adverse impact on the body's negotiating position. See Discussion of executive session exemption (3) above. Thus, once the purchase, exchange, lease or other transaction is completed this exemption may no longer be used. Obviously, this exemption cannot be used if the party with whom the governmental body is negotiating is present at the executive session. Allen v. Bd. of Selectmen of Belmont, 58 Mass. App. Ct. 715, 719-720 (2003). This exemption typically is limited to discussion on quantitative, rather than qualitative terms.

Release of Exemption (6) Executive Session Minutes: Where the original executive session was held under exemption (6), the reason for secrecy was to protect the governmental body's negotiating position. Once the purchase, exchange, lease, or other transaction is concluded, the minutes must be released.

While negotiations are still pending, however, the minutes may also be required to be released if they can be made public without harming the governmental body's negotiating position. Again, the burden will be on the governmental body to show that its negotiating position will be harmed by release of the minutes.

Exemption (7): To comply with the provisions of any general or special law or Federal grant-in-aid requirements.

Stated Purpose Example

The purpose of this executive session is to comply with the provisions of [cite the state or federal law allowing or requiring an executive session].

There may be provisions in certain statutes or restrictions applicable to the receipt of grant funds that require a governmental body to consider a particular issue in a closed session.

A list of such statutes is beyond the scope of these Guidelines, but the following are two examples:

Tenured teachers: General Laws c. 71, § 42 permits a school committee to hold public or private hearings to consider the dismissal of a tenured teacher. Where this specific provision applies, it overrides the right otherwise accorded an individual under the Open Meeting Law, G. L. c. 39, § 23B(2), to elect an open dismissal hearing. Kurlander v. School Committee of Williamstown, 16 Mass. App. Ct. 350, 361, further appellate review denied, 390 Mass. 1103 (1983). See also O'Sullivan v. School Committee of Worcester, 411 Mass. 123, 125-126 (1991).

Hiring process prior to semi-finalist stage: General Laws c. 214, § 1B, which prohibits unreasonable, substantial, or serious invasion of an individual's privacy, has been held to permit a governmental body to conduct the initial stages of a hiring

process, prior to the semi-finalist stage, in private. See Attorney General v. School Committee of Northampton, 375 Mass. 127, 128-130 (1978). To be entitled to utilize exemption (7) based on the privacy statute, the governmental body must show, as to each candidate, that open consideration (or release of his or her identity) would unreasonably, substantially, or seriously interfere with that candidate's right to privacy. Since the public's right to know who is being considered for a high-ranking public position increases as the list of applicants is narrowed, an applicant who reaches the semi-finalist level of consideration "would expect open and public discussion of his professional competence." Id. at 130. Thus, where the governmental body itself conducts a hiring process and does not rely on a separate screening committee (see exemption (8) below), that process must be conducted in public once the semi-finalist stage is reached, if not before.²⁷

Release of Exemption (7) Executive Session Minutes: Where the original executive session was held under exemption (7), the provisions of the law that required the executive session must be examined to determine when secrecy is no longer needed to fulfill the purposes of the law or grant requirement.

²⁷ The Supervisor of Public Records has also ruled that the names of semi-finalist candidates for public employment must be disclosed under the Public Records Law, G. L. c. 4, § 7(26)(c). See SPR90/242, SPR91/033, 060. The Supervisor has described "semi-finalists" as those candidates who have undergone a preliminary screening and have been selected for interviews. SPR90/242. A semi-finalist may choose to withdraw from consideration after being notified of his or her selections as a semi-finalist; in such a case, the candidates identity may be kept private. SPR91/033, 060. Finalists are subject to mandatory disclosure.

Exemption (8): To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if 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 or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a primary or preliminary screening.

Stated Purpose Example

The purpose of this executive session is to conduct a preliminary screening to [consider and/or interview – one or both as applicable] applicants for employment for the position of _____.

This exemption, which applies only to municipal and district governments, permits a preliminary screening committee or subcommittee, appointed by a governmental body, to conduct an initial screening process of candidates for employment in executive session, if the committee can show that an open process will have a detrimental effect on the ability to attract qualified applicants. Once the screening committee votes to recommend a candidate or candidates to its parent body, exemption (8) no longer applies, and all further consideration of such candidates must be conducted in open session. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 472 (1989). The burden is on the screening committee to show that an open meeting will harm its ability to attract qualified applicants.

Note: It is the position of the District Attorney that, as suggested by its wording, exemption (8) does not apply to screening by a standing governmental body itself. This exemption applies only to a separate screening committee or subcommittee appointed by the parent governmental body. Without the existence of a separate, parent body, the moment when candidates are recommended to the parent body could not be reliably

known.²⁸ Additionally, the existence of a separate parent body tends to act as a safeguard, since the members of the parent body will want to participate at a meaningful stage in the selection process, and their consideration of candidates recommended by the screening committee must be public.²⁹

A governmental body may, of course, choose to conduct the entire hiring process on its own. In such a case, an executive session may be permitted during the preliminary stages, prior to selection of semi-finalists, under exemption (7) and the privacy law, G. L. c. 214, § 1B (see previous section).

In either case, only the actual consideration of candidates may be conducted in executive session. Other matters such as the hiring process, criteria for selecting candidates, or recruiting strategies must be discussed publicly.

Release of Exemption (8) Executive Session Minutes: Where the original executive session was held by a preliminary screening committee or subcommittee under exemption (8) to consider applicants for employment, the time when secrecy is no longer needed will vary from case to case. The purpose of secrecy in screening candidates is to encourage persons to apply for positions in local government and thus to ensure that, at least at the preliminary stages of the hiring process, a municipality will not be unduly hampered in obtaining qualified applicants. See Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 470-474 (1989). The

²⁸ See Conte v. Board of Selectmen of the Town of Westborough and the Town Counsel Search Committee of the Town of Westborough, No. 06-1986 (Worcester Super. Ct. October 30, 2006) (court found violation of Open Meeting Law where, in executive session, preliminary screening committee interviewed eight candidates for position of Town Counsel, re-interviewed four candidates, and recommended only one to Board).

²⁹ A separate subcommittee or special committee may include representatives of its parent body, so long as the circumstances do not indicate that the committee is, in effect, a subterfuge. Cf. Connelly v. School Committee of Hanover, 409 Mass. 232, 235-238 & n.8 (1991).

executive session minutes, thus, may remain private as long as their release would either harm the current hiring process or discourage persons from applying for governmental positions in the future. Certainly, once an applicant consents to release of his or her records, or has passed the preliminary screening process and has been considered in open session, the portion of the executive session minutes regarding his or her consideration must, to the extent possible, be segregated and released.

On the other hand, records regarding applicants who did not pass the preliminary screening will probably be justifiably withheld for a substantial period of time. Although the burden is on the committee to show that privacy is needed so as not to defeat the original reasons for secrecy, the Supreme Judicial Court has recognized that rejected applicants may face harm to their current employment, future employment, or standing in the community. Attorney General v. School Committee of Northampton, 375 Mass. 127, 132 & n.5 (1978). Proof of such a potential for harm, or of the applicants' continuing desire for privacy for these reasons, should therefore be sufficient to justify keeping the records private. It may be wise to consult applicants at the time of their initial application regarding the later release of their records. As with other exemptions involving individual privacy rights, if an applicant consents to release of his or her records and if no other privacy law applies, the records regarding that applicant must be segregated, to the extent possible, and released.

Exemption (9): To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section.

Stated Purpose Example

The purpose of this executive session is to enter mediation with [named entity] regarding [issues involved] for the purpose [state purpose of mediation]. [Name of mediator] will be serving as mediator between the parties.

This exemption to the open meeting requirement was added in 1994 and is largely self-explanatory. It is important to emphasize that only sessions with the mediator may be held in private; all other related business, before and after the actual mediation sessions, must be held in open session. No action may be taken during a mediation session; rather, after mediation, the governmental body must convene another open meeting, at which it must deliberate and approve any action. Moreover, in order to enter executive session under this exemption, the mediator must be one who qualifies under the definition of "mediator" found in G. L. c. 233, § 23C:

a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

This exemption may not be used to resolve internal disputes of the governmental body.

Release of Exemption (9) Executive Session Minutes: Where the original executive session was held under exemption (9), the purpose for the secrecy was to insulate the mediation process from contemporaneous scrutiny and to encourage resolution of the dispute at hand. Once the mediation is concluded, this exemption requires the governmental body to convene an open meeting, publicly deliberate regarding the issues that were the subject of the mediation, and publicly approve any action taken as a result of the mediation.

While no appellate decision has yet addressed this exemption, enacted in 1995, it is apparent that the Legislature did not contemplate that the matters discussed during the mediation would remain secret. Under the exemption, these issues must be announced prior to the mediation and deliberated afterwards in open session. Consequently, the purposes for the executive session end upon the conclusion of the mediation process, and the minutes must be released at that time unless protected by another statutory provision.

5. Rights of Individuals

When a governmental body holds an executive session under exemptions (1) or (2), i.e., to discuss an individual's reputation, character, physical condition or mental health, or to consider disciplinary sanctions against an individual, the Open Meeting Law affords the individual concerned the following rights:

- (a) to be present at the executive session during discussions or considerations involving the individual;
- (b) to have counsel, or another representative of his or her own choosing, attend the session with the individual, to advise the

individual, but not to participate actively in the executive session;

(c) to speak in his or her own behalf;

(d) to receive written notice at least forty-eight hours in advance of the proposed executive session; and

(e) to request that the meeting be open rather than closed.

Note: There may be situations where a governmental body is authorized, under a separate statute, to insist that the meeting be closed. See Section E below – Coordination with Other Laws.

E. Coordination with Other Laws

In its application to municipalities and districts (but not to counties) the Open Meeting Law's provisions are in force only to the extent that they are not inconsistent with express provisions of any other general or special law. G. L. c. 39, § 24. It is beyond the scope of these Guidelines to try to foresee all such situations, but an example may help to illustrate the meaning of this section.

Example: General Laws c. 71, § 42, provides that a school committee considering the dismissal of a tenured teacher may choose to deliberate in a closed session. This express provision takes precedence over the Open Meeting Law, so that even if the teacher requests an open meeting to consider the dismissal issue -- a right provided by the Open Meeting Law -- the school committee is not bound to honor that otherwise binding request.³⁰

³⁰ See Kurlander v. School Committee of Williamstown, 16 Mass. App. Ct. 350, 359-361, further appellate review denied, 390 Mass. 1103 (1983).

F. Enforcement

1. In General

The Open Meeting Law states that the District Attorney for the county in which any violation of the Law occurs is to enforce the Law's provisions. The procedures adopted by the Middlesex District Attorney to handle complaints of Open Meeting Law violations and the Law's enforcement are outlined below in Section III of these Guidelines.

2. Legal Proceedings

Three or more registered voters, as well as the Attorney General or the District Attorney, may bring suit to enforce the Open Meeting Law by filing a complaint in the Superior Court or the Supreme Judicial Court alleging a violation of the Law by any governmental body. The body charged with violating the Law carries the burden of proving, by a preponderance of the evidence, that the action complained of did not amount to a violation of the Law.

3. Remedies

a. Prospective Relief: On proof in such a suit that a governmental body or any of its members have violated any provision of the Open Meeting Law, the court may enter an order requiring compliance with the Law at future meetings. (Note: Independent of a formal lawsuit, the Office of the District Attorney also seeks to enforce the Law by directing governmental bodies in appropriate circumstances to comply fully with the provisions of the Law in the future, or to take steps to achieve compliance with the Law. See Section III. A.3. below – Resolution).

b. Other Relief: In addition, the court may enter an order invalidating any action taken at any meeting in which the Law has been violated, provided the complaint is filed within twenty-one days of the date the action was made public. The court also may award back pay, may order that minutes be kept, and may order that minutes be made public (unless it determines that secrecy of the records should be maintained). G. L. c. 34, § 9 G; G. L. c. 39, § 23B; G. L. c. 66, § 17C. See Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 309-312 (1990). The Law allows the court to impose a civil fine upon a governmental body "in an amount not greater than one thousand dollars for each meeting held in violation" of the Law.³¹ Finally, the Law specifies that these remedies are not exclusive, and all other available remedies are still operative.

III. THE DISTRICT ATTORNEY'S PROCEDURES

What follows is an outline of the enforcement procedures the District Attorney has adopted to handle and respond to complaints of Open Meeting Law violations and requests for advice under the Law. The Appeals Bureau has responsibility within the District Attorney's Office for Open Meeting Law matters.

A. Complaints of Open Meeting Law Violations

1. Submission of Complaints

All telephone complaints are screened by an Assistant District Attorney in the Appeals Bureau. If the caller's complaint appears to relate to the Open Meeting Law and

³¹ The Public Records Law contains provisions similar to those in the Open Meeting Law as to the maintenance and release of minutes and provides for both civil and criminal remedies. See G. L. c. 66, §§ 5A, 10, 15, 17C. See also McCrea v. Boston City Council, No. 05-1798 (Suffolk Super. Ct. March 27, 2006) (court order imposed \$11,000 fine against Boston City Council for eleven separate violations of the Open Meeting Law).

appears to warrant investigation by this office, the caller is asked to submit a written complaint that provides as much detailed information as possible about the governmental body concerned and the date, time, place and nature of the alleged violation. All complaints of Open Meeting Law violations must be reduced to writing, must include the complainant's name, address, and telephone number and must be signed by the complainant in order for the office to review and investigate the matter; this office will not address complaints filed anonymously.

2. Response to Complaints

When the office receives a written complaint alleging a violation of the Open Meeting Law, the matter is assigned to an Assistant District Attorney on the Open Meeting Law Team in the Appeals Bureau. The assigned Assistant District Attorney will write or telephone the governmental body complained of, advising it of the nature of the complaint and requesting a response to the complaint's allegations and any other information the Assistant District Attorney determines is necessary for an effective review of the matter. A copy of the complaint is usually forwarded to the governmental body. The governmental body is generally afforded two to three weeks to respond to written requests for information, depending on the circumstances.

3. Resolution

This office will seek to resolve or otherwise proceed with the matter as expeditiously as possible in one of the following ways:

a. Informal Resolution: If the information provided to this office indicates that the matter will be more efficiently or expeditiously handled by a telephone call or informal letter clarifying the governmental body's obligations under the Open Meeting Law, the complaint will be handled in this manner.

b. Opinion letter: If there is sufficient information available to determine whether a violation of the Open Meeting Law did or did not occur, and this office determines that it would be inappropriate to handle the complaint informally, for example, because it presents a complex question or pertains to a series of violations, this office may render a formal Open Meeting Law Opinion. If the office determines that a violation of the Law occurred, the Opinion may direct the governmental body to refrain from future violations and/or to take other steps to bring itself into compliance with the Law's requirements. If the governmental body fails to follow such directives, this office may initiate a suit in court to enforce the Law.

If the facts and circumstances relating to the complaint demonstrate that there has been no violation of the Open Meeting Law, the Opinion will so state.

c. Further investigation: In cases involving complex questions or where the office has received incomplete information in response to a complaint, the office may undertake further investigation of the alleged violation(s).

d. Initiation of suit: The Open Meeting Law gives the District Attorney the power to initiate a suit to enforce the Law's provisions. In situations where the determination is made that a violation of the Open Meeting Law has occurred and may not be resolved appropriately by an Open Meeting Law Opinion, or that the governmental body has failed or refused to follow the direction of such an Opinion, the District Attorney may decide to exercise this authority and to bring suit against the governmental body and/or officials involved.

e. Other: The methods of resolving alleged Open Meeting Law violations outlined above are not the exclusive methods available, although they will be the ones

generally used by this Office. In certain situations, the procedures may vary, depending on the particular case.

B. Advice on Compliance with the Open Meeting Law

As part of his responsibility to enforce the Open Meeting Law, the District Attorney seeks to provide advice to governmental bodies at the municipal and district levels concerning the requirements of the Law. Assistant District Attorneys on the Open Meeting Law Team in the Appeals Bureau are available by telephone to answer the questions of governmental officials or counsel for governmental bodies and to discuss concerns they may have about the Law's application and requirements. The goal of the Office is to ensure as full compliance as possible with the Open Meeting Law, and if we can assist in offering advice before a meeting or before a governmental body takes action that relates to the Open Meeting Law, we will try to do so. We cannot, however, declare in a telephone conversation whether a particular prior action by a governmental body violated the Open Meeting Law. A complaint of a violation of the Law must be addressed pursuant to a written complaint only, so that the proper investigative procedures, described above in the Section on Resolution, are followed.

CHAPTER 39. MUNICIPAL GOVERNMENT

Chapter 39: Section 23A. Definitions

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; provided, however, that this definition shall not include a town meeting.

“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.

Chapter 39: Section 23B. Open meetings of governmental bodies

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.

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 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.

(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, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel.
- (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.
- (8)** To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if 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 or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a prior preliminary screening.
- (9)** To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section.

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. No votes taken in open session shall be by secret ballot.

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 or by means of videotape equipment fixed in one or more designated locations determined by the governmental body 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 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 complaints 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 1/2 of chapter thirty A, 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. Such order may also include reinstatement without loss of compensation, seniority, tenure or other benefits for any employee discharged at a meeting or hearing held in violation of the provisions of this section.

Such order may also include a civil fine against the governmental body in an amount no greater than one thousand dollars for each meeting held in violation of this section.

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.

Chapter 39: Section 23C. Regulation of participation by public in open meetings

Section 23C. No person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall, at the request of such presiding officer, be silent. If, after warning from the presiding officer, a person persists in disorderly behavior, said officer may order him to withdraw from the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned.

Chapter 39: Section 24. Application of chapter

Section 24. The provisions of this chapter shall be in force only so far as they are not inconsistent with the express provisions of any general or special law; and, so far as apt, shall apply to districts as defined in section one A of chapter forty.