

OPEN MEETING LAW:

Limits on Communications and Information Sharing Outside of Public Meetings

TRAINING FOR BELMONT MA

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	Old Open Meeting Law	New Open Meeting Law
Meeting	A "corporal convening" of a governmental body	"a deliberation by a public body with respect to any matter within the body's jurisdiction"
Deliberation	A " verbal exchange between a quorum of members ... attempting to arrive at a decision on any public business within its jurisdiction."	"an <i>oral or written communication through any medium</i> , including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that ' <i>deliberation</i> ' <i>shall not include the distribution of a meeting agenda, scheduling information or distribution of other reports or documents that may be discussed at a meeting, <u>provided that no opinion of a member is expressed.</u></i> "

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"Serial Communication"

- McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648–649 (2008) (Boston City Council "rotating quorum" case)
- District Attorney for the Northern District v. School Committee of Wayland, 451 Mass. 561, 570-571 (2009) ("Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form").

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Distribution of Documents to be discussed at a meeting:

- Boelter v. Board of Selectmen of Wayland
- Distribution of evaluation forms prepared by individual members of the Board of Selectmen, together with a composite evaluation form prepared by the Chair, in advance of meeting where final evaluation was to be discussed violated OML because the documents contained the opinions of individual board members.
- Court rejected the argument that the phrase “provided that no opinion of a board members is expressed” applied only to “oral or written communication” and not to documents to be discussed at a meeting.
- SJC created a rule allowing distribution of such documents as long as they are contemporaneously posted and available in the office for public inspection.

Attorney General Ruling on Duncan OML Complaint Against Belmont Planning Board

- Distribution of two documents for discussion at a meeting violated OML based on Boelter decision: (1) a memorandum authored by the Chair describing a meeting with the Fire Chief, and (2) a draft decision prepared by staff but containing edits by the Chair.
- AG rejected claim that “working groups” formed to attend meetings were subcommittees subject to OML requirements where there was no evidence that the full board had formed the groups or charged them with a particular function.

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Conclusions and Recommendations

1. Distribution of Meeting Materials by Staff Prior to Meeting

- Only materials authored or edited by board members are affected by these rulings. Memos and recommendations by staff or from outside sources may be distributed without any requirement of simultaneous posting.
 - Side note: Boelter does not fully address what may be considered a document containing “opinion.” AG’s decision in Duncan OML complaint suggests that AG will take an extremely conservative view. Pending further decisions offering more clarity on this issue, best practice is to avoid distribution (without simultaneous publication) of all but the most anodyne texts.
- Where a board member has authored or edited a document to be discussed at a public meeting, the best practice ***in most cases*** will be to post the document with the agenda for the meeting. This satisfies the Boelter rule.

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1. Distribution of Meeting Materials by Staff Prior to Meeting (continued)

- There may be situations where the posting of a document to be discussed at a public meeting poses risks to the maintenance of reasonable “deliberative space;” i.e., the ability of board members to discuss an issue with one another – or even decide it – without intervention by interested parties through direct pressure. (Some decisions can be made without public input, and in some cases public input may even be undesirable.) In those cases:
 - Consider going into the meeting “cold” (i.e., without circulating anything that gives a preview of any members views);
 - Ask staff for the opening recommendation.
 - Staff may also compile board members’ views as long as they are not shared prior to the meeting. (For example, in Boelter, if the individual evaluations had been submitted to a staff person to prepare a composite, and the composite had been handed out at the meeting, so that no board member was advised of any other board member’s views prior to the meeting, there would have been no OML violation.)
 - Form a subcommittee. This is not a complete measure to preserve the board’s “deliberative space,” because the subcommittee will be subject to the OML, but it may be a way to limit interference in the board’s deliberative process.

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2. Preparation of Documents and Reports

- The Boelter decision and AG ruling on the Duncan OML complaint create a great deal of uncertainty around how a board or committee can work on documents together.
 - Circulation of drafts via email or through document sharing platforms like Dropbox or Google Docs should be presumed to be an OML violation.
 - For better or for worse, the law creates strong pressures to assign document preparation to individual board members, or to staff or outside consultants.
 - Feedback or edits involving multiple board members still have to be carried out in public, or through the compilation method (using staff), after publication.

3. Other communication issues

- Emails
 - There is a widespread practice of individual members requesting an agenda item in an email that includes reasons for its inclusion (almost always including an opinion), and which is sent to the chair and the other members. This is obviously a violation even if no one responds
- Communications Not Involving a Quorum
 - The AG's ruling on the Duncan OML complaint makes clear that members of boards and committees of five or more members can still talk to each other, as long there is no series of communications that includes a quorum. Email should be avoided for this purpose, as it is so easily forwarded.

Questions?