MURPHY HESSE TOOMEY & LEHANE LLP

Attorneys at Law

Municipal Client Advisory
November 2009

NEW CHANGES TO THE OPEN MEETING LAW

For a discussion of these and other issues, please visit the update on our website at www.mhtl.com/law. To receive legal updates via e-mail, contact information@mhtl.com.

In Chapter 28 of the Acts of 2009, entitled "An Act to Improve the Laws Relating to Campaign Finance, Ethics and Lobbying", the Legislature substantially redrafted the provisions of the Open Meeting Law. **The new provisions of the Open Meeting Law take effect on July 1, 2010**.

A summary of the pertinent changes to the Open Meeting Law is as follows:

- The definitions in the Open Meeting Law have been revised:
    - The term "deliberation" has been amended to reflect oral and written communication through any medium, including email. However, "deliberation" excludes: (a) the distribution of a meeting agenda, scheduling information, and other procedural information (including through email); and (b) the distribution of materials to be discussed at an upcoming meeting, as long as no member of the public body expresses an opinion.
    - A definition for an "intentional violation" has been added, which consists of a knowing act or omission in violation of the Open Meeting Law. A public body violating the Open Meeting Law may be subject to a $1,000 fine for each intentional violation.
    - A "meeting" refers to a deliberation by a public body on any issue falling with the public body's authority. However, a meeting excludes:
        - on-site inspections of projects or programs, provided that the members do not deliberate;
        - the presence of a quorum of a public body at a public or private gathering where the members do not deliberate, such as a conference, training program, or media, social or other event;
        - the presence of a quorum of a public body at a duly noticed meeting of another public body, but only if the visiting members do not deliberate and instead only communicate via

open participation in the matters that the host public body has under discussion;
- a meeting by a quasi-judicial public body (e.g. a zoning board of appeals or planning board) only held in order to make a required adjudicatory decision; and
- a town meeting session attended by a quorum of a public body.

- "Minutes" are defined as the written report of a public body for its meeting.

  - Minutes must be made for open and executive sessions, and must contain the following: (a) time, date and place of the meeting; (b) the members present or absent; (c) a summary of the discussions for each topic; (d) a list of documents and other materials used at the meeting; (e) the decisions made; and (f) the actions taken, including a record of all votes.

  - The official record of a meeting includes the minutes, documents and other materials (e.g. photographs, recordings, maps) used by a public body at an open or executive session.

  - Open session minutes, if they exist, and regardless of whether they are approved or are in draft form, must be provided within ten (10) days of a request.

    - The open session minutes, the notes, recordings and other items used to prepare the minutes, and all documents and materials used at the meeting, are public records.
      - However, the following materials continue to constitute "personnel information" exempt from disclosure under the Public Records Law: (a) items used in a performance evaluation of an individual which relate to professional competence, so long as these items were not created by the public body members for purposes of the evaluation; and (b) items used to deliberate about employing or appointing

Phone (617) 479-5000 Fax (617) 479-6469
www.mhtl.com

individuals, which includes applications and supporting materials (but excluding resumes).

- For an executive session, the minutes, notes, recordings and other items used to prepare the minutes, and all documents and materials used at the executive session, remain exempt from disclosure under the Public Records Law so long as publication may defeat the lawful purpose of the executive session. These items may continue to be withheld if any other exemption to the Public Records Law or the attorney-client privilege applies.

    - The public body, its chair or a designee must periodically review the minutes of executive sessions to determine if nondisclosure remains appropriate. This determination of whether or not disclosure is appropriate must be announced at the next meeting of the public body, and it must be included in the minutes.

    - If there is a request for copying or inspecting the minutes of an executive session, the public body must respond within ten (10) days of receipt of the request and it must release any non-exempt portions of the minutes. If the public body has not yet performed the mandatory review to determine whether withholding remains appropriate, it must perform the review and release the non-exempt minutes, or any portion thereof, no later than the next meeting of the public meeting or thirty (30) days, whichever occurs first. A public body cannot assess a charge for this review of the minutes.

- If an executive session is held for the purposes of conducting strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel, or to discuss strategy with respect to collective bargaining or litigation, then the minutes, preparatory materials, documents and exhibits used at the session may be withheld for so long a time as the litigating, negotiating or bargaining position is no long at risk by

Phone (617) 479-5000 **Fax (617) 479-6469**
www.mhtl.com

disclosure, unless another Public Records Law exemption or the attorney-client privilege applies.

- Although "notice" of a meeting may be displayed in hard copy or electronic format, notice of a meeting of a local public body must be filed with the city or town clerk and posted in a location visible to the general public at all hours in or on the municipal building where the city or town clerk's office is situated.
  - A meeting notice must include the topics that the chair reasonably anticipates will be discussed at a meeting, in addition to the date, time and location of the meeting.
  - The Attorney General may define or approve alternative methods of providing notice.
  - The Attorney General may authorize members to remotely participate in a meeting of a public body, as long as all members are clearly audible and there is a quorum of members present at the meeting location. Members participating remotely may vote and are not considered absent.
  - Notice still must be posted at least forty-eight (48) hours prior to a meeting, excluding Saturdays, Sundays and legal holidays, unless there is an emergency (in an emergency, notice must be posted as soon as reasonably possible).
- The term "preliminary screening" is defined as the first stage of applicant screening performed by a committee or a subcommittee of a public body for the exclusive purpose of providing the public body with a list of applicants who may be furthered considered or interviewed.

- Attendees may make recordings of a public meeting via video or audio equipment, but the public body chair may reasonably regulate the number, placement and use of equipment so as to not obstruct the conduct of the meeting. The public body chair must notify attendees if a meeting is being recorded at the beginning of a meeting.

Phone (617) 479-5000 Fax (617) 479-6469
www.mhtl.com

Municipal Client Advisory
November 2009

- The Open Meeting Law generally retains the same purposes for a public body to enter executive session. Before a public body enters the executive session, the public body chair must state the purpose(s) for executive session and all subjects that may be revealed without compromising the purpose(s) for entering into executive session.

    - If an executive session is held to discuss the reputation, character, physical condition or mental health (but not the professional competence) of an individual or to discuss the discipline or dismissal of, or complaints or charges against an individual:

        - In addition to the requirements under the prior version of the Open Meeting Law, the public body must allow for an independent record to be created of the executive session via audio recording or transcription, at the individual's expense; and

        - An individual's rights under the Open Meeting Law supplement, rather than replace, any rights existing from other sources, such as under a collective bargaining agreement or by law.

    - In order to enter executive session to discuss strategy for collective bargaining or litigation, the public body chair must first declare that there will be a detrimental effect on the bargaining or litigating position of the public body.

    - Executive session may also be held to consider strategies for deploying security personnel or devices.

    - In order to enter executive session to consider the purchase, exchange, lease or value of real estate, the public body chair must first declare that an open meeting may have a detrimental effect on the negotiating position of the public body.

Phone (617) 479-5000 **Fax (617) 479-6469**
www.mhtl.com

- Executive session may be held for the purpose of a public body acting under the authority of any general or special law or federal grant-in-aid requirements.

- Executive session may be held to consider or interview applicants for appointment or employment by a preliminary screening committee (the prior version of the Open Meeting Law only addressed employment applicants).

- The newly created Open Government Division of the Office of the Attorney General replaces the District Attorneys as the enforcing authority for the Open Meeting Law.

  - There are two (2) means for enforcement: (a) administrative; and (b) judicial. A defense to the imposition of any penalty is that the public body, after full disclosure, acted in good faith compliance with the advice of its legal counsel.

    - <u>Administrative Enforcement</u>

      - A complainant must first submit a written complaint to the public body, which describes the alleged violation and an opportunity to cure. In turn, the public body has fourteen (14) business days upon receipt of a complaint to notify the Attorney General and the remedial action. This remedial action is not admissible as evidence that there was a violation. The public body may request in writing, and the Attorney General may authorize, additional time for the public body to take remedial action upon a showing of good cause.

      - A complainant must file a written complaint with the public body at least thirty (30) days before notifying the Attorney General. Thereafter, the complainant may directly file a complaint of an alleged violation with the Attorney General.

Phone (617) 479-5000 **Fax (617) 479-6469**
www.mhtl.com

- The Attorney General may conduct an administrative hearing, but it is required to hold such a hearing before assessing a civil monetary penalty. The Attorney General must determine whether there is a violation and whether this violation is intentional or unintentional.

- If the Attorney General determines that there is a violation, it may issue an enforcement order involving the following: (1) mandatory immediate and future compliance with the Open Meeting Law; (2) mandatory attendance at a training session; (3) nullification of all or part of an action taken by the public body at a meeting; (4) a $1,000 fine upon the public body for each intentional violation; (5) reinstatement of an employee without loss of compensation, seniority, tenure or other benefits; (6) mandatory disclosure of the minutes, records or other materials; or (7) other appropriate action.

- Within twenty-one (21) days of receipt of the enforcement order, a public body or its members may appeal to the Superior Court for judicial review. Judicial review stays the order, but if the order nullifies an action of the public body, the action taken cannot be instituted while judicial review is pending.

- The Attorney General may file an action to compel compliance if the public body fails to comply with an enforcement order or it fails to pay a civil monetary penalty within twenty-one (21) days of the date of issuance of the order or thirty (30) days of the Superior Court's decision (assuming judicial review is timely).

▪ Judicial Enforcement

- The Attorney General or a minimum of three (3) registered voters may commence a civil action in the Superior Court.

Phone (617) 479-5000 Fax (617) 479-6469
www.mhtl.com

- The Superior Court may impose any of the remedies that the Attorney General can include in an enforcement order, along with all remedies available in law or in equity.

▪ The Attorney General may also conduct an investigation to determine whether a violation of the Open Meeting Law has occurred, which includes the authority to take testimony, examine any documents or materials, and require attendance during an examination.

- The Attorney General may adopt Open Meeting Law regulations, interpret the Open Meeting Law, and issue written letter rulings and advisory opinions.

  - The Attorney General must prepare and distribute educational materials and provide training to public bodies on the Open Meeting Law.

    ▪ Within two (2) weeks of being qualified for office, all public body members must certify receipt of a copy of the Open Meeting Law and the corresponding regulations. Unless the Attorney General otherwise directs or approves, the appointing authority or city or town clerk must obtain and retain the certifications.

- There is an Open Meeting Law Advisory Commission. This Advisory Commission reviews Open Meeting Law issues and periodically makes recommendations to the Attorney General on Open Meeting Law recommendations, trainings and educational initiatives. The Attorney General must annually file a written report with the Advisory Commission.

Phone (617) 479-5000 **Fax (617) 479-6469**
www.mhtl.com

Municipal Client Advisory
November 2009

If you have any further questions about the Open Meeting Law, please contact Robert S. Mangiaratti or the attorney assigned to your account at (617) 479-5000. If you have general questions about Murphy, Hesse, Toomey & Lehane, LLP, please contact information@mhtl.com.

* * * * * * * * * * *

Murphy, Hesse, Toomey & Lehane, LLP, is a full-service law firm with offices in Quincy, Boston, and Springfield, Massachusetts. As counsel to cities, towns and other Governmental entities throughout the Commonwealth of Massachusetts, the firm assists and advises public officials and committees with respect to matters of day-to-day management, as well as initiating or defending litigation on their behalf.

Phone (617) 479-5000 Fax (617) 479-6469
www.mhtl.com