

PRESENTATIONS

AND

DISCUSSIONS

- *Open Meeting Law, Public Records, Public Hearings, & Ethics – Attorney Mark Cerel*



355 East Central Street
Franklin, Massachusetts 02038-1352

MEMORANDUM

TO: Franklin Town Council

FROM: Mark G. Cerel, Town Attorney

RE: OML, Public Records, Ethics Law, Public Hearing Procedures: Specific Application to Town Council and Individual Member Conduct

DATE: November 15, 2017

I have provided prior Councils with written memoranda on Open Meeting Law, Ethics Law, and Conducting Public Hearings. I have attached copies of the three memoranda for the current Council members, because the law in these areas has not substantially changed. This memorandum is intended to emphasize those statutory provisions and legal procedures which continue to have specific application to the Town Council and its individual members.

Open Meeting Law (OML)

- Statutory definitions of "deliberation" and "meeting" are both broad:
"Deliberation": an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body . . .

"Meeting" a deliberation by a public body with respect to any matter within the body's jurisdiction . . .
- Cannot use either serial communications or subcommittees to avoid compliance.
- A.G.'s Office (Division of Open Government) charged with enforcement; consequence of public body's non-compliance includes nullification of its action and/or a civil fine.
- Remote Participation: Revised A.G.'s regulations ease procedural requirements, but still need quorum to be physically present and all votes to be by roll-call.

Public Records Law

- Definition includes all documents, regardless of form, made or received by public official for public purpose, unless within one or another specific statutory exemption, G.L. Ch. 4, Section 7, Par. 26

- Document itself determines whether it is a public record, not the equipment by which it was generated, e.g.; personal electronic device

Ethics Law G.L. Chapter 268A)

- Town Council members are deemed to be municipal employees (as opposed to "special municipal employees") and are therefore subject to all statutory prohibitions and restrictions
- Statutory prohibitions and restrictions apply not only to individual Council members, but also to their "immediate family" members
- Prohibitions apply not only to final decisions, i.e.: individual Councilor's votes, but also to his/her participation, i.e.: deliberative process
- G.L. Chapter 268A is a criminal statute; penalty for violation include imprisonment and/or fine
- Specific statutory prohibitions:
 - Self-dealing, G.L. Ch. 268A, Section 19(a)
 - Interest in Contract, G.L. Ch. 268A, Section 20
 - Solicitation/Receipt; Appearance of Conflict, G.L. Chapter 268A, Section 23
- Ethics Commission available for guidance, in advance

Conducting Public Hearings

- Adjudicatory hearings are deemed to be an administrative function, as opposed to legislative; increased legal exposure to municipality, government body, and individual members as a result.
- Importance of being an impartial fact finder, as opposed to an advocate.
- Need to be familiar with appropriate legal standard/criteria and quantum of proof.
- Need to refrain from irrelevant or inappropriate comments.

MGC:ce
Attachments

**11-9-11 OML PRESENTATION FOR TOWN COUNCIL
MARK G. CEREL, TOWN ATTORNEY**

Statute is now in effect; took effect July 1, 2010

Going to address:

- Requirements for "public bodies", Town Boards, Commissions and Committees in particular, as opposed to Town Clerk;
- Enforcement mechanism (A.G.)
- Problems

General Prohibitions/Requirements/Exceptions:

- Quorum of public body meeting to deliberate
- What is/is not "meeting", "deliberation"
- Emails and other electronic communication
- Sequential communications

Meeting Requirements (Chair, in particular):

- Posting of Notice – timing and contents
(Definition of "Emergency" unchanged)
- Listing of topics Chair reasonably anticipates . . .
- Conduct of meeting
 - Requirement to announce recordation
- Executive session
 - Limited
- Minutes and records

A.G. Enforcement

- Process
- Remedies, including imposition of civil penalty

Problems

- Definition of "deliberation" and, because of it, with "meeting"
- Notices: listing of topics Chair **reasonably anticipates**
- Executive Session: "stating all subjects that may be revealed without compromising . . ." (level of detail?)
- Attorney-client privilege (SJC in **Suffolk Construction** case)

OUTLINE FOR WORKSHOP ON HOLDING PUBLIC (ADJUDICATORY) HEARINGS AND RENDERING DECISION IN MUNICIPAL PERMIT AND APPROVAL CASES

Workshop Subject Matter:

- Encompasses both land use and non-land use
- Includes Suspensions/Revocations as well as grants
- Applies to official(s) as well as Boards, if designated local permitting authority

Legal Context:

- Statutory authority to act (regulate)
- Constitutional procedural due process requirements:
 - Impartial fact-finder/decision maker
 - Notice and opportunity to be heard
 - Factual support for decision (varies with type of case)
- Compliance with other legal requirements
 - Open meeting and public records statutes
 - G.L. Chapter 268A (ethics law)
 - Mullin case applies to multi-session hearings; G.L. Ch. 39, Section 23D allows any Board member to miss one session

Principles Applicable to All Hearings:

- Be familiar with legal authority (statute, regulations, bylaw) under which you are acting
- Identify legal requirements/criteria upon which Board or officer must make factual findings
- Give proper legal notice: applicant/licensee, public at large, abutters/interested parties
- Hold public hearing: open, continue, close
- Deliberate: determine facts, based upon evidence introduced during hearing, apply legal criteria, reach decision including any conditions

Additional Principles Applicable to Land Use Hearings:

- Hold public hearing
 - Require applicant to introduce satisfactory proof on each element
 - If necessary, retain own consultant(s) to evaluate applicant's proof (G.L. Ch. 44, §53G)
 - Allow any opponents to make presentation, confined to legal criteria
 - Confine Board members' questioning, remarks to relevant issue(s)
- Deliberate publicly: review legal requirements, evaluate applicant's proof and any opposition in light of those requirements, being careful that Board members' confine analysis to relevant issue(s)
 - Find facts (make determination of facts supporting individual legal criteria)
 - Discuss conditions (must bear reasonable relationship to relief, Dolan v. City of Tigard, U.S. Sup. Ct.); no imposition of impact/exaction fees or other public benefits
 - Vote on decision, with any conditions
 - Draft/authorize staff to draft written decision for subsequent Board review

Additional Principles Applicable to Non-Land Use Hearings (Grants, Suspensions/Revocations):

- Legal standard: abuse of discretion or substantial evidence; importance of "creating record" for judicial review in event of appeal
- Application hearings: require applicant to make presentation
- Suspension/revocation hearings: arrange for another municipal officer to prosecute (make presentation): Police Chief, Board/Commission Agent, Town Attorney, etc.

OVERVIEW OF STATE ETHICS LAW, G.L. CHAPTER 268A, AS REVISED IN 2009
by Mark G. Cerel, Franklin Town Attorney and
Medfield Town Counsel

The Massachusetts State Ethics Law G.L. Chapter 268A is a statute of extremely broad application. The statute defines "municipal employee" as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis", excluding only elected town meeting and charter commission members. In 2009, the Legislature revised the statute, expanding prohibited conduct and substantially increasing the penalties for engaging in same. It is therefore important that all municipal employees be familiar with the statute so as not to run unwittingly afoul of legal requirements and prohibitions. The following discussion is intended to assist in this effort by highlighting the most significant aspects of the statute, both as it existed prior to 2009 and with the 2009 revisions.

Section 1 of the statute contains definitions; these were already in place and were not affected by the 2009 legislation. As with any comprehensive statutory scheme, a person needs to start his or her analysis with a close reading of all operative definitions. Of particular significance, are definitions of:

- (a) "Compensation", which includes not only money but economic benefit.
- (c) "Immediate Family" which, in addition to spouse and children, includes both employee's and spouse's parents and siblings.
- (f) "Municipal Agency" which includes both enumerated representatives and "other instrumentality".

- (g) "Municipal employee", the definition of which is set out above.
- (j) "Participate" which includes not only actual decision making but input.
- (k) "Particular matter" which applies to virtually all governmental activities, excepting only municipal home rule petitioning.
- (n) "Special municipal employee" a status that provides limited exemption from the statute based upon being a volunteer or working part-time (works for municipality no more than 800 hours per year).
 - Cannot be mayor, city council member, or selectmen in town with population in excess of 10,000.
 - Position must be expressly classified (voted) by Council or BOS.
 - Designation applies to position, not individual.
 - Failure of Council or BOS to make express classification renders all employees of municipality "municipal employees" subject to all provisions of statute.

Sections 2 and 3 of the statute contain broad prohibitions on bribery, generally. Section 2 prohibits corrupt gifts or solicitations to public officials and Section 3 prohibits public officials from accepting or soliciting. These sections address fairly clear-cut criminal conduct and provide commensurate criminal penalties.

Section 17 of the statute prohibits certain conduct by municipal employees and parallels earlier sections addressed to state and county employees. In particular, the statute prohibits receiving or requesting compensation from a third party in relation to a "particular matter" in which his or her municipality has "direct and substantial interest" or the third party's paying or offering compensation. The statute partially exempts "special municipal employees" from its provision. There are several other stated exemptions

including: representation of immediate family, special municipal employee's assisting another person in performing contractual work for the benefit of the municipality (superior's written certification required), municipal employee's applying for building permit and performing work thereunder as long as not employed by permit-granting agency or its regulator. The 2009 revisions substantially increased both imprisonment and fine; a violation is currently punishable by 2 ½-5 years imprisonment and/or a \$10,000 fine.

Section 18 prohibits certain conduct by former municipal employees including acting as agent or attorney for a third party in any matter in which the person participated while a municipal employee. The 2009 revisions substantially increased both imprisonment and fine; a violation is currently punishable by 2 ½-5 years imprisonment and/or a \$10,000 fine.

Section 19(a) prohibits a municipal employee from participating in a municipal matter in which the employee, his or her immediate family, business entities in which the employee has an interest, or prospective employer has a financial interest. Section 19(b) provides several exemptions:

- municipal employee's written disclosure of interest in advance and determination by person's superior that interest insubstantial.
- Elected municipal employee (Treasurer-Collector) making bank deposits who files written disclosure of financial interest in advance.
- "Particular matter" involves determination of general policy and interest of municipal employee and immediate family is shared with substantial segment of

municipality's population. (Example: school committee member with school-age children).

The 2009 revisions substantially increased both imprisonment and fine; a violation is currently punishable by 2 ½-5 years imprisonment and/or a \$10,000 fine.

Section 20 prohibits a municipal employee from having a financial interest in a contract with the municipality other than his or her own employment contract; this means that a municipal employee cannot hold multiple positions with the municipality, unless he or she falls within a stated exception to the general prohibition. There are a number of exemptions; the first is a process to be followed where the employee proposes to provide personal services to the municipality on a limited basis outside of his or her regular working hours and not involving his or her regular job duties. (Example: school teacher employed by municipal recreation department during summer.) This requires written certification from contracting agency and exemption vote by council or selectmen. Other exemptions include: a qualifying special municipal employee who files a full disclosure of financial interest, and a municipal employee who provides personal services as part-time, call or volunteer emergency personnel (police, fire, ambulance, etc.). The 2009 revisions substantially increased both imprisonment and fine; a violation is currently punishable by 2 ½-5 years imprisonment and/or a \$10,000 fine.

Section 21 was rewritten by 2009 legislation to expand the State Ethic Commission's enforcement authority; this includes the authority to impose a civil fine of up to \$25,000.

Section 23 sets out supplemental standards of conduct applicable to all governmental employees; the 2009 legislation substantially expanded these. The standard now include prohibitions on the following:

1. Accepting compensable employment which is "inherently incompatible" with one's public responsibilities.
2. Soliciting or receiving anything of substantial value (value of \$50) or using official position to secure favorable treatment.
3. Acting in a manner which would cause a reasonable person to conclude that official can be improperly influenced. (Liability can be avoided by official's filing of written disclosure.)
4. Making false or fraudulent claim for payment or compensation.

On the positive side, the legislation authorizes the State Ethics Commission to adopt regulations establishing a definition of "substantial value", exclusions for ceremonial privileges and exemptions, exclusions for family/friendship privileges and exemptions, and additional exclusions where "no genuine risk of conflict or appearance" thereof.