KAND P

KOPELMAN AND PAIGE, P.C.

The Leader in Municipal Law

101 Arch Street
Boston, MA 02110
T: 617.556.0007
F: 617.654.1735
www.k-plaw.com

January 19, 2012

MEMORANDUM TO MUNICIPAL CLIENTS

To: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: Open Meeting Law – Preparing Your Meeting Notice

This is the first of a series of four memoranda providing updated information about the Open Meeting Law. As you know, the new Open Meeting Law took effect on July 1, 2010. Of the many changes to the law, implementation of the new requirement applicable to the form of meeting notices has proven especially challenging. Under the prior version of the Open Meeting Law, there was no requirement that a public body prepare a meeting agenda. The new version of the law requires the chair of the public body to prepare a meeting notice listing those topics that the chair "reasonably anticipates" will be discussed at the meeting. Having the benefit of a series of decisions on this topic, it is now clear that the Attorney General's Division of Open Government interprets this requirement in a consistently strict manner. The notice requirement as interpreted by the Attorney General represents a striking change from the earlier law, and public bodies will need to reexamine their Open Meeting Law procedures to ensure they are consistent with the Attorney General's standards. The Division issues decisions from time to time, and posts them on its website at http://www.mass.gov/ago/government-resources/open-meeting-law/. Although this memorandum seeks to summarize several important decisions, new decisions on these topics are issued frequently.

The next memorandum in this series will address the Attorney General's treatment of votes taken in executive session involving contracts with non-union personnel, and the possible implications thereof. The third memorandum will provide an update of other important decisions, including the timing of posting and updating meeting notices, discussion of matters not appearing on a meeting notice, and more. The final memorandum will provide examples of meeting notice agenda items and votes to enter executive session that may be used as a resource when planning for or holding a meeting under the Open Meeting Law.

LAW AND REGULATIONS

The previous version of the Open Meeting Law only required that notice of meetings of a public body contain the time, date and place of the meeting. The new law requires that the notice also include "a listing of topics that the chair reasonably anticipates will be discussed at the meeting." G.L. c.30A, §20(b). [emphasis added]. The regulations promulgated by the Attorney General provide further that public bodies are required to list such topics with "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." 940 CMR 29.03.

© 2012 Kopelman and Paige, P.C. - All Rights Reserved

Division of Open Government Determinations

The Division takes the position in a series of decisions that the meeting notice must be itemized in specific detail, rather than listing the "head of a proposition" or setting forth a simple statement of the subject matter to be discussed. In drafting such topics, therefore, the specific items to be discussed must be individually listed, as well as whether it is anticipated that votes will be taken. To the extent that the chair is aware of any speakers or presentations, it is likely that the Division would find that such information should also be listed on the meeting notice. Further, if the chair anticipates that an executive session might be needed, that should also be included. Specific examples follow.

1. General Business Items

In AG-OML-2011-7, Natick School Committee (February 1, 2011), the Division determined that the Natick School Committee provided insufficient notice of its discussion of various Town Meeting warrant articles where the following item appeared on the notice: "Superintendent's Report, Town Meeting Update". The facts recited by the Division in its decision include that the Chairman of the School Committee led a discussion concerning "seven separate warrant articles, including votes on whether the School Committee would recommend positive action at Town Meeting." The Division concluded that the Chair could reasonably have anticipated discussion of the particular warrant articles and therefore that the notice item was not sufficient, stating further, "The meeting notice should have, at a minimum, included detail of the nature of discussion; ideally it would also indicate any anticipated votes." The Division recommended that the meeting notice should have taken the following form: "Discussion of Town Meeting Warrant Articles 1, 9, 10, 18, 32, 33, and 35. The School Committee may vote to recommend action on these articles at Town Meeting."

Practical Implications: A meeting notice must include the particular, specific items the chair anticipates will be discussed, rather than a "summary" statement concerning such items.

2. Discussion of Particular Permits or Renewals

In AG-OML-2011-11, Freetown Soil Conservation Board (February 15, 2011), the Division considered whether an agenda item entitled "Renewal of Fall Soil Permits" was sufficient notice to allow the Soil Conservation Board to act on particular permit renewals. The Division noted that where the Chair reasonably anticipated action on specific permits, the individual permits were required to be listed with "the details of those specific permits, including the name of the applicant and the location under consideration." The Division suggests the meeting notice should have taken the following form:

Renewal of Fall Soil Permits
#496 [Name of Applicant], 5 acres on the south side of the Assonet River
#497 [Name of Applicant], 53 Dr Braley Road
#499 [Name of Applicant], 5 acres on Braley Road
#498, [Name of Applicant], 4 acres on Chace Road
#500, [Name of Applicant], AA Will Quarry

Practical Implications: Form of Notice Items - This case is of particular importance to land use boards, those boards that grant annual licenses or permits, and those that make annual appointments. In all such cases, the meeting notice, to the extent possible, must list the particular license, permit or appointment to be acted upon, as well as detailed information about the applicant (i.e., name and address for land use applications, and, to the extent applicable, applicant names for appointments).

3. Negotiations with Non-Union Personnel

In AG-OML-2011-15, Melrose School Committee (May 1, 2011), the Division considered whether the following meeting notice was sufficient: "To conduct strategy sessions in preparation for negotiations and, if appropriate, to conduct contract negotiations with nonunion central office administrative personnel." Although the person with whom the School Committee would be negotiating was likely obvious to persons familiar with the facts, the Division concluded that the notice must also include the name of that person. The Division stated, "Providing the public with this additional information would not have been detrimental to the Committee's negotiating position, particularly as [the individual] was aware of the session and had been invited to attend for the contract negotiation portion."

Practical Implications: Exemptions (2) and (3) - This case makes clear that when a board intends to enter executive session for the purpose of negotiating with non-union personnel, the name and office of the non-union personnel must be included in the meeting notice. The same reasoning is likely applicable to negotiations with collective bargaining units.

In AG-OML-2011-32, Templeton Board of Selectmen (July 26, 2011), the Division considered whether the following meeting notice was sufficient to allow discussion in executive session of charges against a public officer. The notice stated, "Complaint of charges against a public officer, employee, staff member or individual. May go into Executive Session under exemption #1 under the Open Meeting Law." The Division found that the notice was sufficient, but stated further:

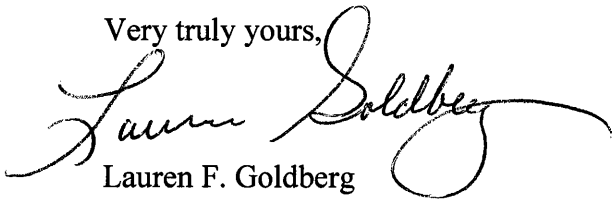
> Given the lack of detail contained within the meeting notice, a member of the public could have had questions about the exact nature of the discussion anticipated by the public body. However, the meeting notice complied with the letter of the Open Meeting Law because it stated the

reason for the anticipated executive session, while balancing the privacy rights of the individual who was the subject of the complaint.

Practical Implications: Exemption (1) - A board entering executive session pursuant to exemption (1) may omit from the meeting notice the name of the individual to be discussed, provided that the public body otherwise preserves the privacy rights of that individual by not disclosing private information concerning that person.

In summary, public bodies should take care to craft detailed meeting notices so as to avoid challenges to the actions they take based upon arguments of technical non-compliance with the notice provisions of the Open Meeting Law.

Very truly yours,



Lauren F. Goldberg

Brian W. Riley

436849