

Public Records, Open Meeting and Conflict of Interest Laws

Town of Nantucket

November, 2016

Presented by Lauren F. Goldberg, Esq.

Government Information and Access Practice Group

KP | LAW



THE LEADER IN PUBLIC SECTOR LAW
ATTORNEYS AT LAW

© 2016 KP LAW, P.C. | ALL RIGHTS RESERVED.

Disclaimer

This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship between the presenter and the recipient. You are advised not to take, or to refrain from taking, any action based on this information without consulting legal counsel about the specific issue(s).

Basic Facts – Sunshine Laws

- Open meeting , public records and conflict of interest laws exist in virtually every state
- Purpose of such laws is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based
- Under the Open Meeting Law (“OML”), public bodies can only conduct business through public meetings, held in accordance with the OML, unless an exemption allowing an executive session exists.
- Under the Public Records Law (“PRL”), virtually any record created or received by a government employee or official is a “public record”, by definition
- The Conflict of Interest Law (“COI Law) is intended to ensure that the Town’s interest, rather than personal interest, dictates action by public employees and officials

Public Records Law

Introduction

- G.L. c.66, §10 (Public Records Requests);
- G.L. c.4, §7, clause 26 (Exemptions);
- 950 CMR 32.00, et seq. (Public Records Access Regulations); and
- Other statutes specifically addressing the public records status of the records to which they relate.

An Act to Improve Public Records

Chapter 121 of the Acts of 2016

- Signed into law on June 3, 2016
- Makes far-ranging changes to the law
- Followed months of debate by the House and Senate and lobbying efforts by various groups
- Significant adjustments will need to be made to public records practices

Effective Date

- The portions of the law applicable to public records practices become effective on January 1, 2017
- The law further requires that the Supervisor of Records promulgate regulations to implement no later than January 1, 2017

Overview of Significant Issues

- Creation of Records Access Officers and duties thereof
- Timelines and obligations for responses to requests
- Assessment of fees and appeals related thereto
- Appeals (requester, Attorney General, court)
- Attorneys Fees and Punitive Damages

Records Access Officers (“RAO”)

- Each municipality must designate one or more RAO
 - Municipal clerk or designee automatically a RAO
 - Chief executive officer may designate additional RAO
- Contact information for RAO must be posted in municipal offices and on website
- Duties include assisting requesters, records custodians, preparing guidelines to enable requesters to make “informed” requests, including a listing of categories of records
- Guidelines must be posted on website no later than July 1, 2017

Requests

- Made to RAO
 - In person
 - By first class mail
 - By e-mail
- Does not specify whether request can be made orally, although Supervisor of Public Records may clarify same

Responses to Requests

- Must respond within 10 **BUSINESS** days; failure to do so means that **NO FEE MAY BE ASSESSED**
- If full response, including provision of records cannot be made within 10 business days, RAO must respond to the requester
 - Confirming receipt
 - Identifying correct custodian/RAO if not correct
 - Outlining what will be withheld, if known
 - Explaining reason for inability to provide the same within the timeframe
 - When a response is expected

Responses to Requests

- Have a total of **25 business days** from date of original request to provide full response
- RAO may within 20 business days of receipt of request petition the Supervisor of Records for additional time, **not to exceed an additional 30 business days** “for good cause shown”, based upon:
 - Amount of time required to search for and redact
 - Office hours
 - Capacity of office
 - Number of requests, including if part of a series of contemporaneous requests that are frivolous, intended to intimidate or harass

Responses to Requests

- Supervisor must provide response to petition within five business days of receipt
- Supervisor may provide longer response period if determination is made that request is intended to harass or otherwise is not in the public interest OR may “relieve” municipality of obligation to respond
- Response must be provided electronically if possible and available in that format unless not desired by requester

Fees

- A reasonable fee may be assessed for production of records other than those “freely available”
- Fees shall not exceed actual cost for reproducing the record:
 - Actual cost of storage device
 - \$.05/page for black and white copies and printouts, one or two sided

**THE \$.05 PER PAGE COPYING FEE IS ALREADY
IN EFFECT**

Fees

- For work under two hours, no fee may be assessed
- For work over two hours, municipalities with 20,000 people or fewer may assess a fee for the first two hours of employee time
- For municipalities with more than 20,000, no fee may be assessed for the first two hours of employee time

Fees

- “Employee time” is defined as “necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed”
- The hourly rate is capped at \$25.00
- An RAO may petition the Supervisor for a higher hourly rate, and the Supervisor must provide a determination within five business days of receipt of the petition
 - Petition can be approved if the Supervisor determines that the response cannot be prudently completed without review and redaction, and can consider the public interest in inexpensive access to records and the ability of the requester to pay
 - The fee must still be reasonable, and cannot be intended to limit, deter or prevent access

Fees

- RAO may deny requests from requesters that have failed to pay fees in connection with previous requests
- Must provide requester with notice of the same, and an accounting of outstanding
- The hourly rate is capped at \$25.00
- An RAO may petition the Supervisor for a higher rate, and the Supervisor must provide a determination within five business days of receipt of the petition
 - Petition can be approved if the Supervisor determines that the response cannot be prudently completed without review and redaction, and can consider the public interest in inexpensive access to records and the ability of the requester to pay
 - The fee must still be reasonable, and cannot be intended to limit, deter or prevent access



Fees

- Police records now subject to same fee schedule as other municipal records
- As with the current version of the law, the RAO may not ask the requester the purpose of their request
- However, they can request information to determine whether the request is being made to further better understanding of government or for news, as compared to a “commercial purpose”, defined to mean:
 - Sale or resale of a portion of the record
 - Use of the record to advance strategic business interest

Appeals

- Requester –
 - Requester may appeal response of RAO to Supervisor
 - Supervisor must issue decision within 10 business days of receipt of appeal
 - If requester is dissatisfied, may appeal to Superior Court
 - Appeal directly to court, bypassing Supervisor
- Attorney General -
 - Supervisor may refer to Attorney General to compel compliance with order
 - Attorney General must identify a single point of contact for the Supervisor
 - Attorney General may on her own initiative bring action to compel disclosure or intervene in case brought by requester

Appeals

- Superior Court has all remedies at law or in equity
 - De novo review
 - May perform an in camera review of records without waiving attorney client privilege or work product privilege
 - Presumption that records are public
 - Municipality must demonstrate by a preponderance of the evidence that record or portion thereof may be withheld

Attorneys Fees

- Presumption in favor of award of attorneys fees and costs IF requester “obtains relief through a judicial order, consent decree, or the provision of the requested documents after the filing of a complaint
- UNLESS municipality establishes:
 - Supervisor found in favor of municipality
 - Municipality relied upon an appellate level decision with substantially similar facts
 - Municipality relied upon published opinion of the Attorney General
 - Request was designed to harass, intimidate, was not in the public interest and made for commercial purpose



Punitive Damages and Waiver

- Punitive Damages - Superior Court may award punitive damages between \$1,000 and \$5,000 if requester has obtained judgment in Superior Court and demonstrates municipality failed to act in good faith
- Waiver - If award of attorneys fees and costs is made, Superior Court shall order the municipality to waive any fees in connection with provision of copies; even if no award of attorneys fees is made, may still require waiver of fees

Resources

Public Records Division - (617) 727-2832

<http://www.sec.state.ma.us/pre/preidx.htm>

A Guide to the Public Records Law -

<http://www.sec.state.ma.us/pre/prepdf/guide.pdf>

Supervisor of Public Records Bulletin -

<http://www.sec.state.ma.us/arc/arcrmu/rmubul/bulidx.htm>

Chapter 121 of the Acts of 2016 -

<https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter121>

Open Meeting Law

Open Meeting Law (“OML”)

- G.L. c.30A, §§18-25
- Revised as part of the 2009 Ethics Reform Bill (replaced OML G.L. c.39, §§23A-23C)
- Effective since July 1, 2010

Overview of the Revised OML

- Centralizes enforcement in Attorney General's Office
- Alters important statutory definitions:
 - Deliberation
 - Meeting
 - Governmental body
- Imposes new requirements for: distribution of OML materials to members of public bodies; notices, minutes, executive sessions, exemptions, member participation and related administrative matters

Definition: Meeting

“[A] deliberation by a public body with respect to any matter within the body’s jurisdiction...,” with certain express exceptions.

•“Meeting” does not include:

- an on-site inspection, so long as the members do not deliberate
- attendance by a quorum of the body at a public or private gathering or social event, so-long as the members do not deliberate
- attendance and participation by a quorum of the body at a meeting of another public body that has complied with the notice requirements of the OML, communicating only by open participation on matters there under discussion and not privately among themselves

Meeting (cont.)

- * OML violation where a quorum of the School Committee stepped outside a meeting of the Board of Selectmen to discuss an alternative to a ballot question relating to funding a school project
 - Ministerial acts, such as signing documents, may take place outside of a meeting when the terms have previously been discussed and voted on at an open meeting

Meeting (cont.)

- **Practical Considerations:**
 - **Post follow-up meeting of board or committee** if members anticipate that they might want to discuss matters amongst themselves or respond to matters raised
 - **Do not** drive to meeting together, sit together, or talk to each other during the meeting
 - If a member wishes to speak, should **be clear** that the member is not representing the public body, but instead speaking as an individual
 - **Post “joint” meeting** to be held at same time and place

Definition: Deliberation

“[A]n **oral or written** communication **through any medium**, including electronic mail, **between or among a quorum** of a public body on any public business within its jurisdiction...,” with certain express exceptions.

Provided that no opinions of governmental body are expressed, deliberation specifically excludes distribution by a member of the public body of:

- A meeting agenda
- Scheduling or procedural information
- Reports or documents that may be discussed at an upcoming meeting, so long as the material does not express the ideas, feelings, beliefs, opinions of a member of the body

Deliberation (cont.)

- **Email Communications:**

- Now explicitly addressed in OML
- A quorum of the members of a public body may not use e-mail to share their ideas, feelings, opinions, beliefs, whether serially or in a single e-mail, on board business
- Members of a public body may not use a non-member, such as a staff member, to facilitate communication on matters the body would otherwise have to discuss at a public meeting

- **Social Media:**

- Alternative electronic communications have become more prevalent, including blogging, instant messaging, texting, social networking such as Facebook, and Twitter.
- Communications among a quorum on these types of services would likely implicate the OML.

Deliberation (cont.)

- **Potential for violation:**
 - An e-mail, voice mail, IM, posting, or blog originally addressed to one member of a public body subsequently forwarded to, or reviewed by a quorum of members;
 - An e-mail, voice mail, IM, posting or blog sent to a quorum of members of a public body;
 - A web-based discussion group, chat room or social networking site where a quorum is participating, whether contemporaneously or in serial fashion.

Deliberation (cont.)

- **Practical considerations for board members include:**
 - Don't ask for or express opinions, ideas, beliefs in an e-mail to other members
 - **Beware of “reply to all”**
 - Limit use of e-mail to scheduling purposes, and try to avoid using e-mail to undertake Town business
 - Assume that e-mail may be forwarded to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog

Public Body

“[A] multiple-member board, commission, committee **or subcommittee** within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; ...and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.”

Public Body (cont.)

- Any multiple-member board, commission, committee, or sub-committee, however created or otherwise constituted, established to serve a public purpose
 - Public Body is “within government”;
 - Empowered to act collectively; and
 - Serves a public purpose.
- The focus of the rule is on the manner in which the committee is created, either formally or informally, rather than on who created it.
- Conservative approach is to err on side of compliance with law.

Public Body (cont.)

- **Subcommittee** - any multiple-member body created to advise or make recommendations to a public body
- **The term “public body” does not include:**
 - General Court or Judicial branch;
 - Bodies that do not serve a public purpose; nor
 - Bodies created by a single person who has authority to undertake action individually, i.e., the so-called “Connelly Rule”.

Scheduling Meetings: Location

- **Accessibility**

- Location of meeting must be included in notice
- Location of meeting must be accessible; required both by the OML and the ADA

- **Practical considerations include:**

- Ability to meet in privately owned location
- Moving meeting to different location (e.g., unanticipated attendance)
- Closing door during open session

Scheduling Meetings: Notice

- Posted at least 48 hours in advance of meeting, **excluding** Saturdays, Sundays and legal holiday unless an “emergency”
- Notice **must state both the date and time** that the **notice is posted**. OML 2015-43 (Carver)
- If revised, must state both the date and time of the original posting and the date and time of the revised posting. OML 2015-43 (Carver)
- Although the OML is silent with regard to the time that meetings must be held, the AG “encourages” public bodies to schedule their meetings at a time that permits maximum attendance of public body members as well as the public. OML 2013-2 (Melrose)

Scheduling Meetings: Notice

- Must be filed with Town Clerk and posted in manner conspicuously visible to the public **at all hours** in or on municipal building housing clerk's office; AG's regulations now allow posting on website; AG must be notified of the municipality's election with respect to its alternate posting location.
- A meeting **may not** be continued from one night to the **next unless** the meeting is properly posted. OML Letter 1-15-2015 (Maynard)
- The notice required under the Open Meeting Law **does not** substitute for notice required by any other statute.

Scheduling Meetings: Notice

- **Practical Implications:**
 - For a Monday meeting, notice must be posted on Thursday
 - If Monday is a holiday, a Tuesday meeting must also be posted on Thursday
 - Clerk should time stamp notice to ensure accurate record exists of filing
 - Posting made in an “alternate location”, notice must be timely posted in both locations

Notice (cont.)

Content Requirements

- Notice shall include “**a listing of topics** that the chair **reasonably anticipates** will be **discussed** at the meeting”
- This requirement has been interpreted by the AG to mandate that the notice include a listing of the **particular items** to be discussed, rather than general topics of discussion; must be detailed

Scheduling Meetings: Notice

- The AG has found that notice includes sufficient specificity when a reasonable member of the public can read the topic and understand the anticipated nature of the discussion
 - If executive session is planned, must indicate that meeting will first have open session

Notice (cont.)

- **Practical Implications**

- If a matter does not appear on the meeting notice, and the Chair did not reasonably anticipate the matter would be discussed at meeting, the law does not prohibit consideration of the matter
- However, AG recommends that unless matter requires immediate action, matter not appearing on meeting notice should be put off to later meeting and included in posting

Scheduling Meetings: Notice

- **Practical Implications (cont.)**
 - If a matter is brought to attention of Chair after notice has been posted, to the extent feasible, meeting notice should be updated to include such matter
 - Useful to consider implementing procedure/policy with respect to ensure updated notice clearly indicates time and content of update
 - May not be possible to update if staff cannot reach Chair, and/or if Chair discovers matter shortly before meeting

Conducting Meetings: Public Session

- **Practical considerations with public participation:**
 - Allow? **NOT required** See OML 2015-12 (Sudbury)
 - Beginning or end of meeting?
 - Controls:
 - Protect individual rights
 - Don't try to resolve issues at time; consider adding issue as agenda item at future meeting
 - Avoid debate
 - Limit time per person and total time

Public Session (cont.)

E.g., OML Letter 5-4-11 (Sturbridge) - Where matter not listed on meeting notice was raised by member of public and not reasonably anticipated, no violation found; however AG “strongly encourag[ed] . . . [Board] not to consider topics that may be controversial or of particular interest to the public until the topic has been properly listed in a meeting notice in advance of a meeting.”

E.g., OML 2015-4 (Marshfield) – discussion and informal vote on matters raised during public comment do not violate OML

NEW Executive Session Requirements

- “New” OML changed the following with respect to executive sessions:
 - Process for going into executive session
 - Required timeline for review and release of minutes

Executive Session (cont.)

- **Process:**
 - Must first convene in open session beforehand.
 - Must state the purpose(s) of executive session
“stating all subjects that may be revealed without compromising the purpose for which the executive session was called.”
 - Must have roll-call majority vote to go into executive session.
 - Must announce if open session will reconvene afterward.
 - Must maintain exhibits and documents used.
 - Must only discuss matters cited.
 - All executive session votes must be by roll-call

Exemptions to OML: Executive Sessions

1. To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. ...

- **Adds** right of individual to create independent record of session at own cost
- Meeting notice and vote need **NOT** refer to name of individual to be discussed

Exemptions (cont.)

2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;”

- OML requires that collective bargaining contracts negotiated in executive session be approved or ratified in open session. OML 2011-56.
- Public bodies may agree on terms with individual non-union personnel in executive session, but the final vote to execute such agreements must be in open session. OML 2013-194 and others.

Exemptions (cont.)

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 public body *and the chair so declares ...*

- This includes the name of a case in litigation or union, if doing so would not compromise the litigation or negotiating position. OML 2012-118

6. To consider the purchase, exchange, lease or value of real property *if the chair declares* that an open meeting may have a detrimental effect on the negotiating position of the public body

- If entering executive session under exemptions 3 or 6, the public body cannot invite the “other side” to participate in the executive session. OML 2012-114.

Exemptions (cont.)

- Practical considerations:
 - If executive session is anticipated, it must be listed in appropriate detail on [meeting notice](#), with such specificity as is possible without compromising purpose of the session.
 - Related [vote to enter executive session](#) must also include all information possible without compromising purpose of session (i.e., name of non-union personnel or union must be identified in notice and vote if bargaining or negotiations will be conducted; case name to be discussed under litigation strategy must be listed, unless doing so would compromise Town's position); [and declaration must be made, as needed](#)

Conducting Meetings: Meeting Minutes

- **Meeting Minutes**

The minutes must include a summary of the discussions of each topic. While a transcript of the discussion is not required, **minutes must be sufficiently detailed** to allow a person who was not in attendance to determine the essence of the discussion **and** what **documents** were **used**.

Minutes (cont.)

- Minutes must state date, time, place of meeting, and members present or absent
- Minutes must include:
 - A **detailed** summary of discussion of each topic sufficient to allow a person not present at the meeting to understand the substance of what occurred at that meeting;
 - Decisions made, actions taken, and votes recorded (no secret ballots permitted); and
 - A list of documents and other exhibits **used** by the body at the meeting, which will be “part of record” but not of minutes; AG has established the following standards to determine if a document is “used”:
 - Document is physically present at meeting; and
 - Document is verbally identified; and
 - Content of document is discussed by members (OML 2012-42).

Public Session (cont.)

- Open meeting minutes **shall not be withheld** under any of the exemptions to the Public Records Law, **except:**
 - “personnel information”
 - materials used in a performance evaluation of an individual bearing on his professional competence that were not created by members of the body for purposes of the evaluation; and
 - materials used in deliberations about employment or appointment of individuals, including applications and supporting materials but excluding resumes

Conducting Meetings: Meeting Minutes

- "The minutes of an open session, if they exist and whether approved or in draft form, **shall be made available upon request** by any person within 10 days." G.L. c. 30A, § 22(b); OML 2015-50
- Although the law does not specify a time frame for approval of minutes, they should be approved at the next meeting if possible. OML 2014-1
- Approval of meeting minutes one month after the meeting is "timely," but two months is not. OML 2015-43.

Minutes (cont.)

- **Executive Session Minutes:**

- Must be disclosed when purpose of exemption has been met, **unless otherwise protected under the Public Records Law**
- Must be reviewed periodically by chair or public body;
- Must be provided within 10 days in response to request, unless review not yet undertaken, in which case **the minutes must be reviewed no later than the board's next meeting or 30 days, whichever occurs first**

Minutes (cont.)

The minutes “have to reflect the discussion that occurred, the action taken by the body, and the positions taken by the individual members.”

E.g., OML 2011-34 (UMASS Board of Trustees) – Presidential Search Committee failed to maintain sufficient minutes of its meetings where the members met in executive session for 2 ½ hours, settled on a process and timeline for the candidate search next University president yet, the minutes contain only eight sentences. The AG found the minutes were insufficient because:

- 1) the sentences provided no detail about either the timeline or the process the committee planned to use to select the next University president;
- 2) the minutes essentially contain only a statement about the need for confidentiality and the fact that a certain number of interviews were conducted;
- 3) the minutes provide no summary of the interviews, no summary of the Search Committee's discussion to narrow the list of candidates to the finalists; and
- 4) the minutes contained no record of any votes.

Conducting Meetings: Recordings

- Under new OML, Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute)
- Recording by individuals:
 - Must inform the Chair
 - Chair must make required announcement
 - Chair may reasonably regulate recordings (placement, operation of equipment)

Conducting Meetings: Remote Participation

- Under “old” OML, most District Attorneys interpreted OML as prohibiting remote participation by a board member
- Under “new” OML, **remote participation permitted if authorized by AG by regulation**, which it has been, as long as “chair” and quorum are physically present
- Requires permission of chair to address meeting (no change)
- Certification of receipt of OML, regulations and AG educational materials; held by appointing authority, city/town clerk; must be provided within 2 weeks of taking office.

Remote Participation (cont.)

- May be allowed subject to procedures and restrictions.

These include:

- Authorized, and may be revoked, by Board of Selectmen or Mayor for all.
- Quorum must be physically present at the meeting location (Remote participants considered present and may vote).
- Person chairing meeting must be physically present.
- Members participating remotely and all present at meeting location must be audible to each other.
- All votes recorded roll call votes.
- Remote members may vote and shall not be deemed “absent”.
- Chair must announce use of remote technology, member using it, and general reason for its use including: Personal illness; Personal disability; Emergency; Military service; Geographic distance

Role of the Attorney General

- Oversees and enforces OML
- Promulgates rules and regulations; interprets OML; issues written letter rulings or advisory opinions
- Authority to:
 - Void action taken in violation of OML
 - Reinstate employee if violation is found regarding employment action

Enforcement Process

- Filing Complaint = **Three steps:**
 - Complainant must file written complaint with the public body, within 30 days of the alleged violation;
 - Public body must forward complaint to AG within 14 business days of receipt and inform AG of any remedial action taken; and
 - Complainant may file a complaint with AG after 30 days from the date complaint was filed with public body.

Enforcement (cont.)

- **Public Body must consider complaint at properly posted meeting**
 - Matter must appear on meeting notice
 - Body must acknowledge receipt of complaint
 - Should deliberate concerning allegations and possible resolution
 - Vote to resolve complaint
 - If appropriate, authorize response to be prepared and sent to Attorney General and Complainant
- **Cure:**
 - “Public deliberation (at a properly posted open meeting) effectively cure the private discussion which occurred over email because it enabled the public to see the discussion that went into the creation of the policy. To cure a violation of the Open Meeting Law, a public body must make an independent deliberative action, and not merely a ceremonial acceptance or perfunctory ratification of a secret decision.” See OML 2011-14 (Wakefield School Committee).

Enforcement (cont.)

- Upon finding a violation, the AG has a range of enforcement options from compelling compliance with OML and/or attendance at a training session and/or creation or disclosure of minutes, nullifying action taken, imposition (after a hearing) of \$1000 fine for **intentional** violation. Public body may seek judicial review in Superior Court within 21 days of receipt (stay's AG's order, but may not implement)
- AG may file action in Superior Court to require compliance
- 3 registered voters may bring action in superior court

Enforcement (cont.)

Defenses

- Compliance – The burden of proof is on the public body to show by a preponderance of the evidence that the action complained of was in accordance with and authorized by OML.
- Advice of counsel defense to imposition of civil penalty: public body acted in good faith in compliance on advice of legal counsel.

Resources

Attorney General's Office: <http://www.mass.gov/ago>

Attorney General's Open Meeting Law Website:

<http://www.mass.gov/ago/government-resources/open-meeting-law/>

Secretary of the Commonwealth Public Records Law:

<http://www.sec.state.ma.us/pre/preidx.htm>

Conflict of Interest

Introduction

- General Laws c.268A, the Conflict of Interest Law (COI), was enacted in 1963.
- The statute regulates the conduct of public officials and employees of the Commonwealth, counties and municipalities.
- The State Ethics Commission was created in 1978 with four separate divisions: legal, statements of financial interest, public education and enforcement.

Relevant Statutes

- G.L. c.268A, §23 – Code of Conduct
- G.L. c.268A, §21A – Appointments to Certain Positions
- G.L. c.268A, §17 – Compensation
- G.L. c.268A, §17 – Agency
- G.L. c.268A, §18 – Former Municipal Employees
- G.L. c.268A, §19 – Financial Interest
- G.L. c.268A, §20 – Multiple Contracts with the Town

Are you a municipal employee for conflict of interest law purposes?

- You do not have to be a full-time, paid municipal employee to be considered a municipal employee for conflict of interest purposes.
- Under the COI, [anyone](#) performing services for a city or town or holding a municipal position, whether paid or unpaid, including full- and part-time municipal employees, elected officials, volunteers, and consultants, is a municipal employee under the conflict of interest law.
- For example, a municipal employee under the conflict of interest law also includes:
 - an employee of a private company with a contract with the city or town and the employee is a "key employee" under the contract, meaning the town has specifically contracted for his services

Overview of Acts Prohibited by the COI

- **Current Municipal Employees:**

- **Compensation.** A municipal employee is prohibited from directly or indirectly receiving or requesting compensation from anyone other than the Town in a matter in which the Town has a direct and substantial interest. c.268A, §17(a).
 - Bribes. Asking for and taking bribes is prohibited.
 - Gifts and gratuities. Asking for or accepting a gift because of your official position, or because of something you can do or have done in your official position, is prohibited.
- **Misuse of position.** A municipal employee is prohibited from using his official position to get something he is not entitled to, or to get someone else something they are not entitled to, is prohibited. Causing someone else to do these things is also prohibited. G.L. c.268A, §23.

Acts Prohibited (cont.)

- **Current Municipal Employees:**

- Agency. A municipal employee is prohibited from acting as an agent or attorney for anyone other than the Town with regard to a particular matter. G.L. c.268A, §17(c). Special municipal employees are exempt from these prohibitions unless the matter is on in which:
 - The employee has ever participated in the matter;
 - Is, or within one year has been a subject of his official responsibility; or
 - Is pending in the municipal agency in which the employee is serving.
- Inside track. Being paid by the municipality, directly or indirectly, under a second contract or position in addition to the employee's job is prohibited, unless an exemption applies

Acts Prohibited (cont.)

- **Current Municipal Employees:**

Financial Interest. A municipal employee is prohibited from participating in a particular matter in which the employee, the employee's immediate family, business or employer has a financial interest. G.L. c.268A, §19.

- Self-dealing and nepotism
- Financial Interest Exemption. An appointed employee may advise his or her appointing authority of the nature and circumstances of the matter and make **full disclosure of the financial interest**. The employee may thereafter participate **only if** the appointing authority, in its sole discretion, determines in writing in advance of participation that the interest “is not so substantial to be deemed likely to affect the integrity of the services which the Town may expect from the employee.”

Acts Prohibited (cont.)

- **Current Municipal Employees:**

- Appointment of member of a multiple-member board.** No member of a multiple-member board may be eligible for appointment by that board to a position, whether or not compensated, under the supervision of that board until 30 days have elapsed since the person's resignation from the board. G.L. c.268A, §21A.

- The only exception to this is that the appointment may be authorized by an Annual Town Meeting.

- Multiple Contracts with the Town.** A municipal employee is prohibited from having a direct or indirect financial interest in a contract made by the Town. G.L. c.268A, §20.

- There are several exemptions to this prohibition.

Acts Prohibited (cont.)

- **Current Municipal Employees:**
 - **False claims.** Presenting a false claim to your employer for a payment or benefit is prohibited, and causing someone else to do so is also prohibited.
 - **Appearance of conflict.** Acting or failing to act under any circumstances that would cause a reasonable person to conclude that such act results from bias, improper influence, kinship, etc. G.L. c.268A, §23 (b)(3).
 - However, if the employee first files a written disclosure of the relevant facts with his or her appointing authority, or, if elected, files a disclosure with the Town Clerk or makes a disclosure in some other manner that is public in nature, such a conclusion is deemed “unreasonable”.

Acts Prohibited (cont.)

- **Current Municipal Employees:**
 - **Confidential information.** Improperly disclosing or personally using confidential information that is exempted from the definition of Public Records (G.L. c.4, §7, cl.26), which was acquired in the employee's public position, or using such materials for the employee's personal interest. G.L. c.268A, §23.
 - **Second Job. Divided loyalties.** Receiving pay from anyone other than the city or town to work on a matter involving the city or town is prohibited. Acting as agent or attorney for anyone other than the city or town in a matter involving the city or town is also prohibited whether or not you are paid. G.L. c.268A, §23.

Acts Prohibited (cont.)

Tricky Areas

- Multiple Office Holding
- Acting as an Agent
- Political Activity

Acts Prohibited (cont.)

- **Former Municipal Employees:**
 - **Lifetime ban.** After municipal employee leaves his municipal job he may never work for anyone other than the municipality on a matter that he worked on as a municipal employee. G.L. c.268A, §18.
 - **One year cooling-off period.** For one year after a municipal employee leaves the municipal job, he may not participate in any matter in in connection with a particular matter in which (1) the Town has a direct and substantial interest and (2) was within the former employee's official responsibility for two years prior to leaving Town office. G.L. c.268A, §18
 - **Partners.** Partners will be subject to a one year cooling off period for any matter that subjects the former employee to a lifetime ban. G.L. c.268A, §18

Recent Changes

- **In 2009, the Conflict of Interest Law was amended.**
- Penalties for receiving, or offering, any gift or gratuity of substantial value for or because of an official act have been increased to a maximum of \$50,000 or up to five years in prison.
- Penalties for violating G.L. c.268A, §§17, 18, 19, and 20 increased to a fine of up to \$10,000 or five years in prison.
- Penalties for violating G.L. c.268A, §§17, 18, 19, §21 were revised to allow the State Ethics Commission to order restitution from an offender of up to \$25,000 after an administrative adjudicatory hearing.
- The Commission may also rescind or cancel action taken by a municipality if it determines, after a hearing, that violation of the Conflict of Interest Law “substantially influenced the action taken” by the municipality.
- Under the prior version of the law, court action was required to achieve these results.

Recent Changes (cont.)

- General Laws c.268A, §23 was also amended to require minimum levels of training.
 - Each year, all municipal employees, whether elected or appointed, must be provided with a summary of the Conflict of Interest Law, and must sign a written acknowledgement of receipt.
 - All municipal employees must complete a training program within 30 days of assuming their position, and every two years thereafter. Notice of completion of the training must be provided to, and maintained by, the City or Town Clerk.
 - Every municipality must designate a senior-level employee to act as a liaison with the Ethics Commission, and provide the Commission with the name of that person.

Recent Changes (cont.)

- The amendments to G.L. c.268A also included direction to, and authorization for, the Commission to issue regulations.
 - Regulations have been promulgated and are found at 930 CMR 1.00 – 7.00
 - In 930 CMR 5.00, et seq., the exemptions are applicable to gifts
 - In 930 CMR 6.00, et seq., the exemptions are unrelated to gifts
 - **930 CMR 6.20 – Clerks and Elections**

Recent Changes (cont.)

- 950 CMR 5.03 states that a municipal employee who complies with the regulations is “**deemed to be in compliance**” with the applicable provision of the Conflict of Interest Law.
- 950 CMR 5.05 codifies Ethics Commission precedent, defining “**substantial value**” as **\$50.00 or more**, calculated by determining fair market value, or face value, whichever is greater

Recent Changes (cont.)

- **Gifts**

- If a gift is made to multiple people, the value of the gift per person is arrived at by dividing the gift by the total number.
- In certain instances, gifts will be deemed to be cumulative.
- An employee may produce evidence to rebut the presumptions.

Recent Changes (cont.)

- No exemption is needed if gift is unrelated to public service, but, if giver were to come before employee within six months, a disclosure must be made.
- Sometimes, a disclosure will be required even if gift is under \$50.00.
- A disclosure must be in writing, filed with the appointing authority, or town clerk if elected.

Recent Changes (cont.)

- Exemptions allowing gifts exceeding \$50.00 in value:
 - Travel expenses, where the purpose of the travel is related to a legitimate public purpose (not excluding the expenses of the employee's family members)
 - In-state travel for educational purposes (training)
 - Legitimate speaking engagements related to the employee's position
 - Public employee discounts, if offered to all public employees
 - Ceremonial or retirement gifts

Summary

- The Conflict of Interest Law imposes many restrictions on the activities of public officials.
- Care should be taken to explore the application of the law to any particular matter **prior** to participation.
- While the new training requirements impose additional burdens on municipal employees, the new regulations attempt to provide a balance to the relatively strict statutory scheme aimed at reasonable results.

Resources

- The State Ethics Commission website has links to statutes, regulations, and educational materials, and may be accessed at the following link:

www.mass.gov/ethics

Any final questions?

Lauren F. Goldberg, Esq.

KP Law, P.C.

101 Arch St., 12th Floor

Boston, MA 02110

(617) 556-0007

www.k-plaw.com

KP | LAW



THE LEADER IN PUBLIC SECTOR LAW
ATTORNEYS AT LAW

© 2016 KP LAW, P.C. | ALL RIGHTS RESERVED.