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Records Management Guide #5 FAQ Regarding Public Record Requests and the Open Meeting Law

This guide is meant to answer frequently asked questions relating to the Public Record Law and the Open Meeting Law—both from citizens, and elected and appointed officials. Elected and appointed officials should also review the appropriate laws and publications noted in this guide, as well as records management training material at www.burlington.org/archives.

Who do I contact for public records requests?

Departments and committees transfer inactive records to the archives; if the records are in the archives, the archives can respond to your request (781-270-1604/1660, archives@burlmass.org, www.burlington.org/archives). As record inventories are completed and finalized, they will be posted on the web site.

If the office or committee of origin still has custody of the records, contact the department or committee. For a list of current elected and appointed officials, contact the Burlington Town Clerk's office at 781-270-1660 or see their web site at <http://208.58.133.9/clerk>.

When should I receive a response?

The record custodian should respond as soon as practical and within ten consecutive days of the request.

Do I have to put the request in writing?

No, but there are advantages to putting your request in writing. If the record custodian withholds the records or says that they are exempt, you cannot appeal a verbal request to the Public Records Division, a division of the secretary of the Commonwealth. Contact: Public Records Division, 1 Ashburton Place, Boston, MA 02108, 617-727-2832; for more information, see www.state.ma.us/sec/pre/preidx.htm. Some departments may ask you to put the request in writing if they are busy or if the request is complicated; this way you can make a specific request and the department will be able to provide all of the information you are looking for.

Does the request have to be on a specific form?

No. Burlington Town Counsel has developed a form, which the town clerk's office and archives put on letterhead (form16, available at <http://208.58.133.9/clerk/archives/pubs/archives/rm101fm.pdf>). This form makes it easier for us to process your request and ensures that we have all of the information (contact, payment, request) in one place.

What if I don't receive a response from the record custodian?

If you made a written request, send a copy of the request letter and copies of any correspondence provided by the custodian within ninety days to the Public Records Division, a division of the secretary of the Commonwealth. Contact: Public Records Division, 1 Ashburton Place, Boston, MA 02108, 617-727-2832.

Is everything a public record?

Every record made or received by a government entity is presumed to be a public record, unless it is subject to an exemption, as provided by MGL c4, §7 (26). Exemptions are listed at www.state.ma.us/sec/pre/prelaw/lawover.htm; examples of Exemption A statutes are listed at www.state.ma.us/sec/pre/prelaw/lawstat.htm. Examples include: records that relate to the internal personnel rules and practices of the organization; personnel and medical records; data relating to a specifically named individual that may constitute an unwarranted invasion of privacy; interagency correspondence

related to in-development policy decisions; sealed proposals and bids, until a decision has been made; and real estate appraisals, until an agreement is entered into. Portions of a record may be exempt and may need to be blocked e.g., social security numbers. For more information, contact the Public Records Division (see above).

If a record custodian withholds a record or claims that the record is exempt from the public record access, they must provide the reason and legal citation, and they must respond in writing. The town clerk's office and archives uses a form (form 10, available at <http://208.58.133.9/clerk/archives/pubs/archives/rm101fm.pdf>).

What if a record custodian says the records are exempt, but I disagree?

You have the right to make an appeal to the Public Records Division; see "What if I don't receive a response from the record custodian?"

How much can a record custodian charge for records?

Unless specifically addressed by statute, a custodian may charge 20 cents per page for photocopies, 25 cents per page for microfilm copies, and 50 cents per page for computer printouts. A record custodian may also charge for the time it takes to search the records, remove any exempt data, photocopy the record and refile it. The charge must be the prorated hourly wage of the lowest paid employee capable of performing the task. The record custodian should provide a written good faith estimate for the cost of complying with a request, if the total cost is expected to exceed \$10. The estimate should provide a breakdown of expenses. The custodian may require prepayment.

The archives' rules and regulations provide for one hour of free search time. After that, searches and blocking of exempt data is billed at \$20 per hour, billable in 15-minute increments. A written estimate will be provided and advance payment is required. Records may also be used in the archives free of charge. **It is best to call first—that way you will know the archivist is on-site and we can pull the records you are interested in. The archives is open Monday-Friday 8:30-4:30 and closes 12-1 for lunch. The archives is also open the second and fourth Thursday of each month until 6:30, with the exception of the summer months. The archives is also open by appointment.**

Does the record custodian have to make copies?

Per Massachusetts General Law chapter 66, the records must be available to the public upon request, unless the records are exempt from the Public Records Law. If copying would endanger the original record, the archives may require the researcher to take notes.

Do I have to say what I want to do with the records?

No, you do not have to tell a records custodian what you plan to do with the records.

How do I find out more about the Public Records Law, MGL c66?

Contact the Public Records Division (see above) or see a Guide to the Massachusetts Public Records Law at www.state.ma.us/sec/pre/prelaw/lawidx.htm. *Overview of the Massachusetts Public Records Law* (www.state.ma.us/sec/pre/prelaw/lawover.htm) and *Commonly Asked Questions About the Public Record Law* (www.state.ma.us/sec/pre/prelaw/lawfaq.htm) are quite helpful. Also, most public libraries have hard copies of the Massachusetts General Laws; see www.state.ma.us/legis/laws/mgl/mgllink.htm for an online copy.

What is the Open Meeting Law?

The Massachusetts Open Meeting Law applies to state, county, and local governments. MGL c30A, §§ 11A-11A ½ governs state agencies; MGL c34, §§ 9F-9G governs county agencies; and MGL c39, §§ 23A-24 governs municipal entities; also see MGL c66, §§ 5A, 10, 15, 17C regarding public records. Most public libraries have paper and/or electronic copies of the Massachusetts General Laws; online access is available at www.state.ma.us/legis/laws/mgl.

In general, these laws require that meetings of government entities are open to the public, that notice of such meetings be publicly posted, and that accurate records of the meeting be maintained and available to the public.¹ More specifically, the law stipulates that the meeting must be open to the public except in nine specific circumstances that are described in the statute. If an exception applies, the governmental body may meet in executive or closed session, provided it follows certain preparatory procedures. Records of all meetings (including executive sessions) must be maintained and made available to the public after the reason that caused it to be closed has ended or been resolved; and the notice of the meeting must also be publicly posted.²

2

What is the legal citation for the Open Meeting Law, as it applies to local government?

Massachusetts General Law c39, §§23A-23C. Most public libraries have hard copies of the Massachusetts General Laws; see www.state.ma.us/legis/laws/mgl/mgllink.htm for an online copy.

Do minutes of open meetings have to be approved before they can be made available to the public?

Minutes of open meetings are public upon creation. The minutes do not have to be approved to be public. Shorthand and other notes must be provided, if requested.

What if minutes have not been approved?

Draft minutes should be marked draft, but draft minutes cannot be withheld. Audiotape or notes (including shorthand) must be made available upon request, even if the minutes have not been approved. If you request a copy of the audiotape, the board should provide a copy and may charge you for the duplication; the cost may include the vendor's reproduction cost and/or staff time. Boards and committees should never release the original audio or videotape.

I requested a copy of the audiotape and the approved minutes, but the board says the tape does not exist. Is that legit?

Audiotapes of public hearings must be retained for a minimum of one year following the expiration of the appeal period.³ Audiotapes of regular meetings may be destroyed after approval of minutes by the public body; a written destruction request is not necessary.⁴

Are BCAT videotapes a public record?

Videotapes become a public record if they are in the possession of a town department, committee or board; otherwise they are not a public record. Written minutes are the official meeting record and must be retained permanently.

BCAT records meetings as a public service; to receive copies, contact BCAT directly: PO Box 740, Burlington, MA 01803, 781-273-5922.

Who enforces the Open Meeting Law? What happens if a board or committee is in violation of the Open Meeting Law?

The county district attorney is responsible for enforcing the Open Meeting Law in the county, cities, and towns within his or her district.⁵ The district attorney, attorney general, or three or more registered voters may seek judicial remedies in the form of injunctive, declaratory, or other appropriate relief.⁶ The *Open Meeting Law Guidelines* note that such relief may include "an order invalidating or rescinding past actions by the governmental body, an award of back pay, orders requiring public records to be maintained and released to the public, and a civil fine of not more than one thousand dollars for each meeting held in violation of the law."⁷

Who is subject to the Open Meeting Law?

The Open Meeting Law applies to *governmental bodies*, defined on the local level as:

Every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted...shall not include town meeting.⁸

The law governs collegial bodies or groups, such as boards of selectmen, but not individual officials such as a police chief or members of their staff.⁹

The Open Meeting Law also governs subcommittees appointed by any governmental board, commission or committee that is a governmental body. The *Open Meeting Law Guidelines* state:

It is the position of the Middlesex District Attorney that this includes not only subcommittees comprised of the parent governmental body's members, but also subcommittees or special purpose committees that may contain individuals who are not on the parent body, so long as the subcommittee or special purpose committee is carrying out delegated functions or responsibilities of the parent body...The fact that the jurisdiction of the subcommittee or special purpose committee extends only to making recommendations to the parent governmental body does not render the Law inapplicable..[Even if]...the subcommittee's jurisdiction does not authorize it to make binding decisions on behalf of the commission but is limited to recommendations; the subcommittee still qualifies as a governmental body.¹⁰

If the special purpose committee exists to review compliance with standards set by federal and state statutes, has no direct involvement in the development of public policy, and does not advise its parent body in decisions on public business, the committee does not need to comply with the Open Meeting Law. Staff meetings called by individual town administrators generally are not considered governmental bodies. Finally, if an administrative official appoints a group of citizens to provide advice on a matter within that individual administrator's own responsibilities, the group is generally not an administrative body; see the following examples from the *Open Meeting Law Guidelines*:¹¹

A school superintendent, with statutory responsibility to nominate and recommend to the school committee a candidate for high school principal, appointed a seven-member committee to assist him in that task. The committee screened 68 applicants, interviewed seven finalists, and chose one candidate to recommend to the superintendents, who accepted the recommendation and forwarded it to the school committee. All the committee's work was done in private. The Supreme Judicial Court held that, as the committee's only task was one delegated to it by the superintendent, and since that task was within the superintendent's own duties, the committee was not a governmental body and was not governed by the Open Meeting Law.¹²

A local housing authority appoints a special committee composed of private citizens, representatives of the local planning board, the local conservation commission and interested tenant groups to study and make recommendations to the authority on the design, placement, and tenant selection criteria for a low and moderate income housing project the authority is building. Since all the matters which have been delegated to the special committee are matters of public business and policy within the housing authority's jurisdiction and responsibility, the special committee itself is a governmental body and subject to the law.¹³

A subcommittee of the local conservation commission, composed of three of the seven commission members, is delegated the task of making factual investigations of a local conservation problem, reporting its findings to the full commission and making oral recommendations on what action the commission should take. Although the subcommittee jurisdiction does not authorize it to make binding decisions on behalf of the commission but is limited to recommendations, the subcommittee still qualifies as a governmental body. The fact that the jurisdiction of the subcommittee or special purpose committee extends only to making recommendations to the parent governmental body does not render the Law inapplicable...If a committee were subject to the Open Meeting Law, having a town official nominally appoint its members would be seen as a subterfuge, and the committee would not be excused from complying with the Law.¹⁴

What meetings does the Open Meeting Law apply to?

The Law applies to every meeting of a quorum of a governmental body, if any public business over which the governmental body has jurisdiction is discussed or considered; the Law defines a quorum as a simple majority of the body, unless otherwise defined by applicable constitution, law, etc. If a subcommittee is a governmental body, the subcommittee is subject to the Law if a quorum of the subcommittee—not the parent governmental body—is present.¹⁵

Except for notice requirements, the Law also applies to emergency meetings. The emergency must relate to the functions and responsibilities of the governmental body calling the meeting and it must be of such a nature that it cannot wait 48 hours, the prescribed notice period.¹⁶

The Open Meeting Law also applies to executive or closed sessions of the governmental body; see the sections "Do minutes of executive session need to be kept?" and "How long should executive session minutes remain closed?"¹⁷

How far in advance should meeting notices be posted?

A notice of every meeting of any governmental body must be filed with the town clerk and must be publicly posted at least 48 hours (including Saturdays, but not Sundays or legal holidays) before the meeting.¹⁸

How about school district meetings?

The secretary for regional school district committees must file a notice of every meeting with the town clerk within the district. In addition, the regional school district's secretary must post the notice in his or her office or on the principal official bulletin board of the district.¹⁹

Is it possible to file a printed schedule of future meetings?

A printed schedule of future meetings may be posted, as long as the day of the week, time, and place of each meeting is listed—and so long as the governmental body does in fact meet regularly at the scheduled time and place. If the governmental body *does not* meet at the pre-filed meeting days, times, and locations, it does not satisfy the requirement of the Law.²⁰

What should the minutes contain?

The minimum requirement includes the date, time, place of the meeting, identity of the members present or absent and a record of all actions taken. The Middlesex District Attorney has interpreted this to mean not only votes and other formal decisions, but also discussion or consideration of issues for which no vote was taken or final determination was made. It is not necessary to take verbatim notes, but a summary of each discussion should be included. The minutes must be in a written form.²¹

Do minutes need to be typed?

The Open Meeting Law provides for ready access to legible minutes. Typed minutes—though not required—are preferable.²²

How long does the governmental body have to adopt and make available official written minutes?

Per the *Open Meeting Law Guidelines*:

By implication, the Open Meeting Law requires that such minutes be made available to the public within a reasonable period of time after the conclusion of any given meeting. What is reasonable will depend upon such factors as the length of the meeting in question, the complexity of issues discussed at the meeting, the staffing and workload of the particular body responsible for preparing the final document, and the like...A time frame of two to four weeks may be considered reasonable under most circumstances.²³

I am a recording secretary for board XYZ. Should I keep the original meeting minutes?

Original, written, signed minutes and agendas should be filed with the Burlington Town Clerk's office after the minutes are approved. Reports, correspondence and other records mentioned in the minutes should also be retained and transferred to the archives at the end of each calendar year. The board or committee should keep photocopies for a minimum of one year.²⁴

Do minutes of executive session need to be kept? Do originals need to be filed with the town clerk's office?

Yes; see the section "How long should executive session minutes remain closed?" Original executive session minutes should be filed with the town clerk's office after they are approved. *The town clerk's office will keep the minutes separate from the regular minutes; they will not be provided to the public without the written permission of the board.* It is the town clerk and archives policy to refer requests for executive session minutes to the board or committee, unless the board or committee has already signed a written release.

For executive sessions, the vote of each member must be recorded on a roll call vote and entered in the executive session minutes. The presiding officer must also cite the purpose(s) for executive session and whether the governmental body will reconvene to open meeting after the executive session has concluded.²⁵ For more information on executive sessions, see the *Open Meeting Law Guidelines*, pp. 27-42.

How long should executive session minutes remain closed?

Executive session minutes are closed until the purpose that caused the session to be private has ended. For instance, land negotiations that result in the purchase of property are open after the purchase has been finalized and after related litigation has been resolved. For more information on executive sessions, see *Open Meeting Law Guidelines*, pp. 27-42.

Are discussions via email or phone a violation of the Open Meeting Law?

Yes, discussion via email or phone of a quorum of the governmental body is a violation of the Open Meeting Law. Members should use caution with email, as private conversations may reach a quorum of the members without the knowledge of all participants. Email or phone conversations should not be used to poll members or engage in discussions that involve a quorum.²⁶

Does the individual have the right to be present, if the matter involves that individual?

If the governmental body holds a meeting under MGL 39, §23B exemptions 1 or 2 e.g., to discuss an individual's reputation, character, physical condition or mental health, or to consider disciplinary sanctions, the individual has the right to be present; have counsel or another representative; speak in his or her behalf; receive written notice at least 48 hours in advance; and to request that the meeting be open rather than closed.²⁷ For more information, see the *Open Meeting Law Guidelines*, pp. 27-42.

What is the history of the Open Meeting Law?

Massachusetts adopted its first open meeting law in 1958. The law was substantially revamped in 1975, adding a set of definitions of terms and making more specific the provisions governing closed meeting sessions and the notices of meetings. There have been a number of amendments since 1975, but the general format and provisions have remained the same. There have also been a number of appellate court decisions since the district attorney's previous *Open Meeting Law Guidelines* were distributed in 1984, 1987, 1989, and 1993.²⁸

What can I do if there is a violation of the Open Meeting Law?

Questions regarding the content of minutes, requirements to keep minutes or any procedural aspects of the Open Meeting Law should be addressed to the local district attorney. In Middlesex County, contact: Appeals Bureau, Office of the Middlesex District Attorney, 40 Thorndike St., Cambridge, MA 02141, ATTN: Open Meeting Law Team, 617-679-6540, www.middlesexda.com.

How do I find out more about the Open Meeting Law?

The Middlesex County District Attorney's office revised the *Open Meeting Law Guidelines* in 2001. To obtain a current copy, contact: Appeals Bureau, Office of the Middlesex District Attorney, 40 Thorndike St., Cambridge, MA 02141, ATTN: Open Meeting Law Team, 617-679-6540.

The League of Women Voters publishes an excellent guide, *A Guide to Open Meetings*, written by Mary Adelstein and revised by Lynn Cohen in 1996. Boston, Mass. : League of Women Voters of Massachusetts, 1996. Online www.ma.lwv.org/guideto.htm. Also available from the LWV office, 133, Portland St., Portland, MA 02114, 617-523-2999.

¹ Martha Coakley. *Open Meeting Law Guidelines*. [Middlesex District Attorney's Office: Cambridge, Mass.], 2001, p. 1.

² *Ibid.*, p. 5.

³ Archives Division, Records Management Unit. *Administrative and Personnel Records in Common Schedule #23/1989 (rev. 5/1993)*, item 23.056.

⁴ Archives Division, Records Management Unit. *Administrative and Personnel Records in Common Schedule #23/1989 (rev. 5/1993)*, item 23.057.

⁵ *Ibid.*, pp. 1 and 5.

⁶ *Ibid.*, p. 5.

⁷ *Ibid.*, p. 6.

⁸ *Ibid.*, p. 6.

⁹ *Ibid.*, pp. 6-7.

¹⁰ *Ibid.*, pp. 7-8.

¹¹ *Ibid.*, p. 9.

¹² *Ibid.*, p. 10.

¹³ *Ibid.*, pp. 7-8.

¹⁴ *Ibid.*, pp. 8 and 10.

¹⁵ *Ibid.*, p. 10.

¹⁶ *Ibid.*, p. 12.

¹⁷ *Ibid.*, p. 13.

¹⁸ *Ibid.*, p. 14.

¹⁹ *Ibid.*, pp. 13-14.

²⁰ *Ibid.*, p. 15.

²¹ *Ibid.*, p. 17.

²² *Ibid.*, p. 18.

²³ *Ibid.*, p. 19.

²⁴ Burlington Archives. *Record Schedule #23: Records Held in Common by Various Departments*, item 23.017, revised 5/29/2001.

²⁵ Coakley, p. 40.

²⁶ *Ibid.*, pp. 24-26.

²⁷ *Ibid.*, p. 39.

²⁸ *Ibid.*, pp. 3 and 5.