

Guidance Spotlight: Deliberation Via Email or Social Media

GUIDANCE SPOTLIGHT:

DELIBERATION VIA EMAIL OR SOCIAL MEDIA

This month we offer guidance on what constitutes deliberation under the Open Meeting Law. We recognize that public body members want to efficiently and effectively conduct business and that communication via email or social media is often convenient. However, public body members must exercise caution when communicating outside of a public meeting, including when communicating by social media and other electronic communications.

Deliberation is defined very broadly under the Open Meeting Law as an 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. The Open Meeting Law does not carve out an exception to the definition of “deliberation” for discussions that do not result in a decision or vote. Any communication among a quorum of a public body on matters that are within the public body’s jurisdiction is considered deliberation, with only limited exceptions. Moreover, a one-way communication from one public body member to a quorum of the public body on matters within the body’s jurisdiction is deliberation, even if no other public body member responds. Finally, questions asked by public body members, supplemented by answers, can convey information and constitute a verbal exchange within the Law’s definition of deliberation.

Deliberation does not include the distribution of a meeting agenda, scheduling or other procedural information, or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed. The following activities are examples of the types of communications that public body members may engage in outside of a properly posted meeting without violating the Law:

- Choosing a date and time for the next public body meeting;
- Requesting that a topic be added to a meeting agenda so long as the discussion is limited to a request to add the topic to the agenda and not a statement about why it is important that the topic be addressed by the public body or to advocate support for a certain position with respect to that topic;
- Signing a document where the terms have been previously discussed and approved during a noticed meeting;
- Signing a form farewell letter to a retiring employee;
- Sharing a first draft of meeting minutes, but edits or comments on those minutes should not be circulated to a quorum outside a meeting;
- Distributing an Open Meeting Law complaint or meeting agenda.

Please remember that a public body may not use a non-member, such as a staff member, to communicate on matters that the Board would not otherwise be able to discuss outside an open meeting.

In addition, the Open Meeting Law does not restrict an individual's right to make comments to the general public via social media, but it does apply to communication between or among a quorum of a public body outside of a meeting. Therefore, the communicator's intent in posting to a social media platform is relevant; whether other members of the public body happen to see the communication is not

determinative. Moreover, where a quorum of the members of a public body are also members of a Facebook group, a communication by a public body member posted to that group is not in and of itself a violation of the Open Meeting Law. We have not found a violation of the Law where a public body member posted a comment on Facebook because the communication was directed at members of the public, no other member of the public body responded, and any viewing of the posts by fellow members of the public body was incidental. Nor have we found a violation of the Law when a public body member posted statements on social media for political purposes that did not concern matters presently or likely to come under consideration by the public body.

OML Determinations Regarding Deliberation

OML 2020-160: violation where the chair communicated with a quorum of public body members via serial communication, formulated a plan based on his previous communications with the quorum, and then communicated that plan to a quorum via serial communication; further, the chair polled each member regarding where the public body stood on a particular issue and communicated to the head of the state agency the stance approved by a quorum of the body.

OML 2020-144: violation where public body members sent comments and input to a staff member who then compiled and circulated by email a document to all public body members that contained all the comments.

OML 2020-139: no violation where one public body member posted comments regarding the body's prior actions on a development project to a town-themed Facebook page.

OML 2020-136: violation where one public body member emailed a quorum of her public body with suggested edits to meeting minutes and questions regarding the public body's budget and vendor fees.

OML 2020-94: no violation where the chair of a three-member subcommittee called the other two subcommittee members to determine availability for a meeting.

OML 2020-88: no violation where a staff member emailed an Open Meeting Law complaint to all public body members and included the opinions of legal counsel regarding that complaint.

OML 2020-83: violation where a quorum of public body members deliberated via email regarding the operation of the body.

Recent Open Meeting Law Determination Highlights

OML 2021-2: In this determination, we address whether a public body member who is participating in a meeting remotely violates the Open Meeting Law when the member turns off his camera or steps off camera at times, in light of the Open Meeting Law regulation 940 CMR 29.10(6)(b), which states: "[w]hen video technology is in use, the remote participant shall be clearly visible to all persons present in the meeting location." That regulation, promulgated in 2017, contemplated a situation in which at least a quorum of the public body members, as well as members of the public, attended a meeting at a physical meeting location, and one or more public body members participated remotely if physical attendance at the meeting was unreasonably difficult. Currently, when many public bodies are holding fully virtual

meetings, we are cognizant that some public body members may not have personal technology available to participate in a meeting by video, and that public body members who utilize video may need to step off camera briefly. A strict requirement that if video technology is in use all public body members must be visible on camera at all times could result in public bodies opting not to use video technology at all, which surely would not serve the Open Meeting Law's transparency goals. Therefore, we decline to find a violation of the Open Meeting Law when video technology is generally in use for a meeting but some members of the public body are not on camera at all times. Nonetheless, the Attorney General recommends, as a best practice, that members of public bodies turn on their video cameras, especially while speaking, whenever possible.

OML 2020-165: Violation of Open Meeting Law found where public body voted to adjourn its meeting; at least one member of the public left; and shortly thereafter the public body realized it had adjourned in error, reconvened and continued to deliberate.

OML 2020-159: Acting under the Governor's March 12 executive order suspending certain provisions of the Open Meeting Law, a public body may meet in person and invite certain individuals, such as direct participants with a matter on the agenda, to also attend the meeting in person, while providing adequate, alternative access to all other members of the public. In order to ensure that the decision of who may attend in person and who must access the meeting through remote means is not arbitrary, the public body should act in accordance with a set policy that will meet the Open Meeting Law's goals of transparency and requirements for accessibility.

Open Meeting Law determinations may be found at the Attorney General's website, <https://www.mass.gov/the-open-meeting-law>

