

Explanations for the Attorney General's Revisions to
the Open Meeting Law Regulations, 940 CMR 29.00-29.11

September 25, 2017

The Attorney General has promulgated revisions to the Open Meeting Law regulations in an effort to help members of public bodies and the public better understand the requirements of the Open Meeting Law and to update the regulations to conform with guidance issued by the Attorney General. These revisions become effective on **October 6, 2017**. Below is a summary of the material revisions to each section of the regulations and an explanation of why the revisions were made.

29.01: Purpose, Scope and Other General Provisions

There are no revisions to this section.

29.02: Definitions

A revision to this section removes the definition of the Open Meeting Law Advisory Commission because the Commission is not otherwise referenced in these regulations, making this definition unnecessary. This section also adds definitions for regional and county public bodies to clarify their jurisdiction. State and local public body jurisdictions are generally understood and thus are not defined here.

In the definition of intentional violation, a revision removes a phrase that offers a defense to the imposition of an intentional violation where a public body reasonably relied on the advice of counsel. Language describing a defense to the imposition of a fine where a public body reasonably relied on the advice of counsel now appears in section 29.07, the section describing penalties.

29.03: Notice Posting Requirements

A significant revision in this section removes the various alternative notice posting options for local public bodies and offer a single alternative to the bulletin board: a website. Few, if any, municipalities have adopted alternatives other than the municipal website. Another significant revision clarifies that the chief executive officer of a municipality must make the decision to adopt an alternative notice posting method for the municipality. The Attorney General has received numerous requests from municipalities seeking guidance as to who has the authority to adopt alternative notice posting methods. This language clarifies that authority.

The Attorney General often receives questions about the effect on meeting notices when a website becomes unavailable for public bodies that have adopted a website for posting notices. An addition here offers a balanced approach to give a public body or a municipality a short window of time to restore website access before requiring public bodies to cancel their meetings and post new notices.

Additional language requires the date and time that notices are amended to be recorded on or with the notice, which conforms with guidance provided in the Attorney General's Open Meeting Law determinations.

29.04: Certification

Most of the revisions here reorganize the section to make it easier to follow. A significant revision requires that new public body members receive a copy of each determination by the Attorney General that the public body violated the Open Meeting Law, over the prior five years. This requirement will ensure that new public body members are aware of their public body's history of compliance with the law and any orders that the Attorney General may have issued, thus reducing the risk of repeat violations and intentional violations. Additional language offers guidance in response to questions the Attorney General regularly receives regarding certification.

29.05: Complaints

A significant revision creates an option for public bodies to request mediation with a complainant who has filed five or more complaints within the prior 12 months. This option is for public bodies that respond to frequent complaints from the same complainants and may assist in resolving ongoing conflicts. If the public body requests mediation and the complainant fails to participate, then the Attorney General may decline to review the complaint.

Another revision clarifies that public bodies must meet to review Open Meeting Law complaints. This requirement has been made clear in the Attorney General's determinations. Also, in this section is a clarification that complainants must file complaints with the Attorney General within 90 days of an alleged violation or reasonable discovery of the alleged violation. Currently, the regulations do not account for reasonable discovery. Finally, the changes remove language and subsections that are not relevant, or are rarely, if ever, invoked.

29.06: Investigation

A revision in this section clarifies that, while the Attorney General will generally not disclose information provided by the subject of a complaint in the course of an investigation, the Attorney General may reveal such information in a written determination where necessary to resolve the complaint. The Attorney General will continue to maintain the confidentiality of executive session minutes and documents where the public body has not yet publicly released the executive session minutes.

29.07: Resolution

The most significant revision in this section removes the requirement that the Attorney General resolve complaints after a hearing before issuing orders of nullification and reinstatement of an employee. This means that the Attorney General may order nullification of an action taken by a public body in violation of the Open Meeting Law, or order the reinstatement of an employee, without the necessity of a hearing before an administrative law judge. This allows the Attorney

General to issue such orders sooner, avoiding harm to those who rely on a public body's action that would otherwise be nullified many months later. A public body still has the right to appeal the Attorney General's order within 21 days.

Another revision clarifies that, while the Attorney General may fine a public body for an intentional violation of the Open Meeting Law, a fine will not be imposed where the public body acted in good faith compliance with advice of counsel. This is a requirement in the Open Meeting Law itself.

A significant revision to this section requires public bodies that receive an order from the Attorney General to certify in writing to the Attorney General its compliance with the order within 30 days. Typical orders requiring written certification include approval and release of meeting minutes and attendance at a training. No such certification is required for orders of immediate and future compliance. This requirement will help the Attorney General ensure that public bodies comply with her orders. This section also clarifies that the Attorney General does not resolve complaints by telephone.

29.08: Advisory Opinions

The Attorney General has never invoked this section, and by policy, does not issue Open Meeting Law advisory opinions. Rather, the Attorney General provides written guidance on common concerns available on the Frequently Asked Questions pages at the Attorney General's website. The update to this section reflects that practice.

29.09: Other Enforcement Actions

There are no revisions to this section.

29.10: Remote Participation

The most significant revision to this section replaces the five permissible reasons for remote participation with the sole requirement that, to participate in a meeting remotely, physical attendance at the meeting be unreasonably difficult. This single standard should help public body members and the public understand when it is appropriate to participate remotely. The five permissible reasons currently provided in the regulations add another level of administration to remote participation procedures. Another revision reflects a recently adopted amendment to the Open Meeting Law that applies to local commissions on disability.

29.11: Meeting Minutes

This revision adds a new section describing public bodies' obligations to approve both open and executive session meeting minutes. It also provides guidance by addressing the meaning of "timely manner" for the approval of minutes. The Open Meeting Law requires public bodies to approve meeting minutes in a timely manner. Public bodies that approve meeting minutes within the next three meetings, or 30 days, whichever occurs latest, will have approved minutes in a timely manner. While this timeframe is not a rigid requirement, as a public body may show

good cause for further delay, it should help encourage public bodies to develop a schedule for prompt creation and approval of meeting minutes.