

# Open Meeting Law

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Since questions concerning the scope and applicability of the Open Meeting Law, M.G.L. c.39, §§ 23A-C, are often raised by board of health members and those working closely with the boards of health, such as tobacco control directors, I offer the following summary for your review.

The statute in part reads:

“All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as provided by this section. No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section. No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.”

The statute and case law clearly define and apply the operative words of the statute. The Open Meeting Law provides for a list of exemptions where executive sessions may be held for those limited purposes. The apparent concern and challenge for board of health members lies with the definition and application of the operative words of the statute. The following words are defined in M.G.L. c. 30 §23A:

- “Deliberation”, a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction.
- “Emergency”, a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.
- “Executive session”, any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.
- “Governmental body”, every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting.
- “Made public”, when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body.
- “Meeting”, any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.
- “Quorum”, a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body.

Massachusetts case law has applied the statute and has delineated the meanings of several of the most controversial operative words. In *Nigro v. Conservation Commission of Canton*, 17 Mass. App. Ct. 433 (1984) the court was faced with the question of whether a three-member subcommittee of the seven-member conservation commission was required to hold open meetings, to give notice of its meetings, and to maintain accurate records. The court first started with the definition of “Governmental body” and found that it includes “every board, commission, committee, or subcommittee of any ...city... or town, however elected, appointed, or otherwise constituted”. *Nigro* at 434. The court in *Nigro* then went and applied the above

statutory definitions to the terms, “Deliberation” and “Meeting”. In doing so the Appeals Court rejected the earlier Court’s finding where it was held that the subcommittee did not make decisions as described in the definitions. The Court reasoned: “We think it axiomatic that any report of facts which the subcommittee may make to the full commission after conducting whatever investigation may be appropriate in the circumstances is necessarily grounded on one or more decisions as to what the facts are. And, of course, the subcommittee cannot formulate a recommendation without deciding what it should be.” Nigro at 436.

In *Connelly v. School Committee of Hanover*, 409 Mass. 232 (1991), the court was asked to decide whether the open meeting law applies to the Hanover High School principal selection committee which was appointed by the superintendent of schools to assist him in nominating candidates for the position of school principal. The court citing to the statutory definition of “governmental body” and to *District Attorney for the N. Dist. v. Trustees of the Leonard Morse Hospital*, 389 Mass. 729 (1983) (board of trustees of a public hospital established by a will is not a governmental body and thus is not subject to the open meeting law) as well as the holding in *Nigro*, found that for several reasons the selection committee was not included in the statutory definition. These reasons included the fact that the selection committee was not created pursuant to any statute or by-law, but was informally appointed by the superintendent. *Connelly* at 235. Also since the superintendent himself was not a “governmental body” and could have completed the task in a closed session, those appointed to assist him could as well. The court distinguished *Connelly* from the situation in *Gerstein v. Superintendent Search Committee*, 405 Mass. 465 (1989) where the school committee was a “governmental body” and that the screening committee to which it delegated some of that responsibility was also a “governmental body” subject to the open meeting law. Further reasoning included that the court had defined “traditional governmental powers”, see *Leonard Morse Hospital* at 733, as “the power to tax, the power to take property by eminent domain, and the power to regulate coercively individual and group conduct”. Subcommittees would be included as a “governmental body” when they are appointed by a governmental body, constituted pursuant to a statute, ordinance or by-law, or in some other way to perform an assignment itself subject to the law. *Connelly* at 238.

The court’s application of the exemptions in M.G.L. c. 39 S 23B occurred when the school committee followed the procedure outlined in the statute for going into closed session to discuss a collective bargaining issue. The Attorney General commenced an action in the Superior Court alleging that the school committee, by holding the executive session, had failed to comply with the open meeting requirements of M.G.L. c. 39, S 23B. *Attorney General v. School Committee of Taunton*, 7 Mass. App. Ct. 226 (1979). The court held that the statute in its exemptions requires “only a reasonable showing that the matters to be discussed under the rubric of collective bargaining strategy might have adverse impact on the committee’s bargaining processes if publicly disclosed at an open meeting. *Id.* at 231. Conversely, in *Board of Selectmen of Marion v. Labor Relations Commission*, 7 Mass. App. Ct. 360 the selectmen were charged with refusing to bargain collectively in good faith by the Labor Relations Commission when the selectmen insisted on conducting collective bargaining sessions in meetings open to the public. The court held that where the statute specifically provided for the collective bargaining exception and since the “commission could properly determine that by refusing to negotiate with the representatives of its employees in executive session, the selectmen failed to bargain collectively in good faith”. *Id.* at 362.

In M.G.L. c. 39 S 23B the legislature has provided the means to enforce the open meeting law. The procedure for the filing and hearing on the complaint is outlined as well as the available remedies such as a court order that the governmental body must have future meetings open to the public and where appropriate the court order may invalidate any action taken at any meeting where any provision of the statute has been violated.

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