

# TOWN OF SHERBORN

## PUBLIC RECORDS LAW, OPEN MEETING LAW, AND CONFLICT OF INTEREST LAW PRIMER AND UPDATE



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Virtual Zoom Presentation



**CHRISTOPHER J. PETRINI, TOWN COUNSEL (CPETRINI@PETRINILAW.COM)**  
**HEATHER C. WHITE, ESQ. (HWHITE@PETRINILAW.COM)**



**P&A** PETRINI & ASSOCIATES, P.C.  
Counselors at Public Law

# Agenda

- Public Records Law
- Open Meeting Law
- Conflict of Interest Law, G.L. c. 268A
- Question and Answers

# PUBLIC RECORDS LAW



# Sources of Public Records Law

- M.G.L. c. 66, §10 (Public Records Requests)
  - Public Records Access Regulations - 950 CMR 32.00 et. seq.
- M.G.L. c. 4, §7, cl. 26<sup>th</sup> (Public Records Definition and Exemptions)
  - M.G.L. c. 4, §7 (a) “exemption” statutes (addressing public records status of particular records) for example:
    - M.G.L. c. 59, §60 (abatement records)
    - M.G.L. c. 6, §172 (CORI records)
    - 603 CMR 23.07 (student records)
- Public Records Division is led by Supervisor of Public Records (“SPR”)

## What is a Public Record? M.G.L. c. 4, s. 7 cl. 26<sup>th</sup>

- “All books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose....” M.G.L. c. 4, s. 7 cl. 26<sup>th</sup> , unless one or more of the exemptions listed in the statute apply.

# Public Records Can Include:

- Emails
- Electronic Documents
- Social Media Posts
- Text messages
- Voicemails

# Public Records and Attorney-Client Privilege

- Although not technically listed as an exemption to Public Records Law, attorney-client privilege is a valid basis for withholding of documents in response to a public records request. *See Suffolk Construction Co. v. DCAM*, 449 Mass. 444 (2007).
- In Sherborn, **the Select Board is the holder of the attorney-client privilege and only a majority vote of the Select Board may waive the privilege.** If relevant board wants to release a privileged opinion, they can so vote and request will be brought to the Select Board.

# Your Communications in Your Capacity as a Municipal Board Member or Officer are Public Records

- Before creating something that may be a public record, consider how you are going to retain it.
  - Social media posts
  - Blogs
  - Text messages
  - Voicemails



# Law Requires Preservation of Public Records

- Municipal records are retained for different periods of time, depending on the nature of the record, according to applicable retention schedule adopted by the SPR.
- Most records require SPR prior permission before they can be destroyed. Criminal/civil penalties for unlawful destruction of public records.



# Recommendations for Communication:

- Consider creating email and social media accounts to be used only for your Board or Committee activities.
- Assume that anything you write will be produced in a public records response; litigation or court filing; news media.
- Human tendency is to use informal language in emails.
  - Use formal language and keep public communications formal, i.e., leave “text” speak, emojis, .gifs, slang, for personal communication.
- Refrain from disparaging the public and conducting disputes with colleagues or others by email, text or social media posts.

# Records Access Officers (“RAO”)

- **Public Records Access Officers** who interact with the Super Records Access Officer, interact with requesters, and help coordinate response to specific requests
  - Super Records Access Officer (Town Clerk or designee, other employees designated by a municipality’s chief executive); and
  - Individual Department “point persons”.
- **Super Records Access Officer** – Jackie Morris ([jmorris@sherbornma.org](mailto:jmorris@sherbornma.org)), who interfaces with Town Counsel regarding questions concerning compliance with Public Records Laws

# Contact information for all RAOs must be posted in Town offices and website. RAO Duties include:

- Providing access to certain records of great interest to a large number of people (i.e., meeting minutes, ordinances, policies, street lists, budget documents, board decisions, etc.) on website and in RAO's office
- Assisting requestors to identify records sought;
- Coordinating Town's response to public records requests; and
- Assisting records custodians to preserve public records.

PRR can be made in person, in writing, by telephone, but only written requests may be appealed to the SPR.

- If request is unclear, seek clarification from requestor, but do not ask the requestor the reason for the request unless needed to determine: (1) if the request is for a commercial purpose; or (2) whether fee can be waived or reduced fee
- Use knowledge of records to ensure that a request for records is delivered to the appropriate party.
- Forward the request to the RAO and inform the requestor that you have done so.

# PRR Response: 10<sup>th</sup> business day

- Last day to either: (1) produce records, or (2) deny in writing, or (3) provide detailed written response stating exemptions and/or need for additional time.
- The RAO must respond within 10 business days or no fee may be assessed, provided that the: (1) request reasonably describes the record sought; and (2) the record is within possession, custody or control of the Town; and (3) payment is made for reasonable fee as authorized by the Public Records Law.

# Strict deadlines for PRR Response:

- Maximum of 25 business days from receipt of original request to provide full response, unless requestor agrees to extend time
- Within 20 business days of receipt of original request, RAO may petition SPR for additional time, not to exceed an additional 30 business days “for good cause shown”
- “Good cause” is determined by weighing public interest in expeditious disclosure against factors such as:
  - Time required to search for/redact records;
  - Limitations in office hours and administrative capacity to respond;
  - Documented efforts undertaken to respond to request;
  - Number of requests / frivolous nature of requests/ whether request(s) is/are intended to intimidate or harass.
- SPR must decide petitions within 5 business days of receipt.

# PRR Response deadlines: 10, 20, 25, 55 business days



RAO has **10 business days** to produce, deny, respond to request.



RAO has **20 business days** to petition SPR for more time to respond.



RAO has **25 business days** to produce response without an SPR extension.



RAO has **55 business days** to produce response with an SPR extension.



# Responding to Requests

- Provide response electronically if possible and available in that format in “searchable, machine readable format”, unless not desired by the requester
- A new record does not need to be created to respond to a public records request (but consider if it makes it easier to respond)
- Furnishing a segregable portion of record is not deemed to be creation of a new record
- Provision of an extract of requested data from a database does not constitute creation of a new record
- If the record is available on the Town website or another website, can comply with the request by providing requester with reasonable assistance locating the requested record on the website

# Requestor may appeal to SPR or directly to Superior Court



- The SPR may refer to Attorney General to compel compliance with SPR orders
- Presumption that records are public.
- Town must demonstrate **by a preponderance of the evidence** that record or portion thereof may be withheld.
- Court or SPR may review records in camera (meaning in private, without public present) without waiving attorney-client or work product privileges.

If Requestor prevails in his or her appeal, Superior Court can order award of attorney's fees or punitive damages up to \$5,000.

- Presumption in favor of requestor for attorney's fees unless custodian of records establishes one of statutory exemptions.
- Requestor must show custodian failed to act in good faith to obtain punitive damages.



# Helpful Resources:

- Public Records Laws
- A Guide to Massachusetts Public Records Law  
<https://www.sec.state.ma.us/pre/prepdf/guide.pdf>
- The Municipal Records Retention Manual:  
[http://www.sec.state.ma.us/arc/arcpdf/MA\\_Municipal\\_Retention\\_Manual.pdf](http://www.sec.state.ma.us/arc/arcpdf/MA_Municipal_Retention_Manual.pdf)
- Public Records Division Resources:  
<https://www.sec.state.ma.us/pre/pretraining/trainingidx.htm>
- Your RAOs
- Town Counsel

# OPEN MEETING LAW

## G.L. c. 30A, §§18 - 25



# Open Meeting Law

OML in a nutshell:

All meetings of a public body must be open to the public.

- Purposes of the OML include:
  - Ensure greater transparency in government operations
  - Provide more notice to public about when meetings will be held and what will be discussed
  - Create uniform procedures for maintenance of meeting records
- Attorney General's Office oversees education and enforcement.

Regulations, guidelines, FAQs, and determinations are available at:

<https://www.mass.gov/the-open-meeting-law>

# What is a Meeting?

- A meeting is generally defined as “*a deliberation* by a public body with respect to any matter within the body’s jurisdiction.”
- Exceptions:
  - On site inspection - no deliberation
  - Attendance by quorum at an event - no deliberation
  - Attendance by quorum at a meeting of another public body, provided members communicate only by open participation in the meeting on those matters under the discussion by the host body – no deliberation
  - Meeting of quasi-judicial board for sole purpose of making a decision – interpreted not to apply to municipal boards

# What is a Deliberation?

- A meeting is generally defined as “*a deliberation* by a public body with respect to any matter within the body’s jurisdiction.”
- A “deliberation” is: 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.
  - Exceptions – not “deliberation”
    - Distribution of a meeting agenda, scheduling information
    - Distribution of documents or reports that may be discussed at meeting
  - No opinion of member may be expressed – staff member who distributes may not inform members of any member’s opinion

# What is a Deliberation?

- A communication among less than a quorum of the members of a public body will not be a deliberation, unless there are multiple communications among the members of the public body that together constitute communication among a quorum of members.
- Courts have held that the Open Meeting Law does apply when members of a public body communicate in a serial manner in order to evade the application of the law.

# What is a Deliberation?

- Quorum - a simple majority of the members of a public body, unless otherwise provided in a general or special law, executive order, or other authorizing provision.
- When there is a vacancy on a public body, a quorum is still measured by the number of members of the public body as constituted unless otherwise provided by law. See *Gamache v. Town of Acushnet*, 14 Mass. App. Ct. 215, 219 (1982) (noting that a Town bylaw established a board of appeals of five members, and a temporary vacancy did not alter that bylaw).

# Subcommittee Meetings

- Members of parent body attending subcommittee meetings
  - Cannot deliberate
  - Must sit with the general public
  - May participate in the meeting like other members of the public, through public participation portion of the meeting
  - May not discuss matters that are not under consideration by the subcommittee
- If any issues complying with these conditions are anticipated, parent body should post a separate meeting notice

# Potential Pitfalls of Social Media

- Social media posts can constitute deliberation – be careful!
- Facebook posts by a member of a public body that can be viewed by a quorum of a public body
  - Groups where quorum are members
  - Quorum are friends of the poster
  - Posts viewable by the public
- Comply with Sherborn Social Media/Social Networking Policy
- Social media communications directly with quorum of public body violate the OML (see Div. of Open Gov't FAQs)

# What is a Public Body?

- Multiple-member board, commission, committee or subcommittee of a town
- However created, elected, appointed or otherwise constituted
- Established to serve a public purpose
- Subcommittee defined to include any multiple-member body created to advise or make recommendations to a public body



# What is a Public Body?

- Committees or boards informally appointed by individual officials to carry out duties that are assigned to such officials are not subject to OML. See *Connelly v. School Committee of Hanover*, 409 Mass. 232 (1991) (high school principal selection committee appointed by school superintendent to assist him in choosing candidates was not a governmental body subject to the OML).

# Meeting Notice and Posting Requirements

- 48 hours not including Saturdays, Sundays and legal holidays
- Include date, time and place of meeting
- List all matters chair “reasonably anticipates will be discussed at meeting”
  - enough specificity so public will understand what will be discussed
  - update notice if unanticipated topics arise after posting
  - best practice: table unanticipated topics of significant interest to the public



# Emergencies

- Sudden, generally unexpected occurrence or set of circumstances demanding immediate action
- Post as soon as possible prior to the meeting
- **Narrowly construed exception**



# Conduct of Meeting

- Public may make audio or video recording of open session upon notification of chair and subject to reasonable requirements
- Chair must announce at beginning if anyone is making a video or audio recording
- Chair has authority to determine whether public participation is allowed; AG encourages allowing participation to the extent practicable. Public may not address public body without permission of chair and may not otherwise disrupt meeting
- If someone continues to disrupt after clear warning from chair, chair may order person to leave. If person does not leave, chair may authorize constable or other officer to remove.

# Managing Public Participation

- *Barron v. Kolenda*, 491 Mass. 408 (2023) highlights the need for balance between the work conducted by public bodies in open meetings and the public right to observe that work and engage in civil discourse.
- Any public comment policy must not infringe on rights guaranteed by the First Amendment, Declaration of Rights, and Civil Rights Act.
- Southborough’s “civility restraints on the content of speech at a public comment session at a public meeting are forbidden.”
- Time, place, and manner restrictions are allowed. May require that comments be conducted in “orderly and peaceable manner,” prevent speakers from disrupting others, and remove them if they do.

# Executive Session

- Ten purposes for which a public body can meet in executive session: G.L. c. 30A, § 21
- Chair must state purpose of the Executive Session and “all subjects which may be revealed without compromising the purpose for which the Executive Session was called”
- For litigation/collective bargaining, real estate, and interviewing applicants, chair must state that including in open session would have a detrimental effect
- Unauthorized disclosure of executive session information is a violation of the Conflict of Interest Law, G.L. c. 268A, §23(c)(2)

# Minutes and Records Used

- All minutes (open and executive session) must include:
  - Date, time and place
  - Members present or absent
  - Summary of the discussion on each subject
  - List of documents and exhibits used at the meeting
  - Decisions made
  - Actions taken

# Minutes and Records Used

- Minutes must be created and approved in a timely manner – generally considered to be within the next 3 meetings or within 30 days, whichever is later, unless good cause shown for further delay
- Verbatim transcript is not required. Minutes should include the content required by law without overburdening staff resources.
- Minutes to be made available within 10 calendar days of request, even if in draft form, unless exempt from disclosure

# Minutes and Records Used

- Documents used in open session become part of official record, except:
  - Materials used in individual performance evaluation provided such materials were not prepared by members for purposes of evaluation
  - Employment application materials (resume not exempt)
- Challenges:
  - Preventing people from leaving with documents
  - Storage of documents
  - Rare or unique documents

# Executive Session Minutes

- Chair or designee must review
  - At “reasonable intervals”
  - To see if continued non-disclosure is still warranted
  - Determination announced at next meeting and determination to be included in meeting minutes
  - Must respond to request within 10 days
  - If body has not already reviewed minutes and there is a request, body is to review minutes and release non-exempt minutes no later than body’s next meeting or within 30 days, which ever first
  - Cannot assess fee for time spent in review

# Documents Used in Executive Session

- Not public until purpose of Executive Session has expired, and documents remain not subject to disclosure:
  - If covered by the attorney-client privilege
  - If publication will defeat lawful purpose of Executive Session and Executive Session was lawfully held
  - If one or more Public Records exemptions apply
- Review periodically along with minutes

# OML Enforcement

- Complaint filed in writing with Town Clerk and chair of public body within 30 days of alleged violation or within 30 days of date when the complainant could reasonably have known of the violation.
- Within 14 business days, public body must review complaint, take remedial action if appropriate and send copy of complaint and action taken to AG and complainant.
- AG: it is permissible to meet under Purpose 1 in executive session to review an OML complaint.

# OML Enforcement

- Complainant may apply to AG for further action if not satisfied with public body's response
- Attorney General may resolve complaints with or without a hearing, through:
  - informal action (telephone call, letter, email explaining the violation)
  - formal order for training, nullification of action taken, imposition of a fine (for intentional violations only), reinstatement of employees, requirement that certain minutes, records or materials be made public

# Intentional Violations

- 940 CMR 29.02: Intentional Violation means an act or omission by a public body or a member thereof, in knowing violation of the open meeting law.
- Evidence of an intentional violation of the OML includes, but is not limited to, that the public body or public body member:
  - acted with specific intent to violate the law;
  - acted with deliberate ignorance of the law's requirements; or
  - was previously informed by receipt of a decision from a court of competent jurisdiction or advised by the Attorney General, either in resolution of a previous complaint or through an advisory opinion, that the conduct violates the OML.

# Intentional Violations

- Where a public body or public body member has made a good faith attempt at compliance with the law, but was reasonably mistaken about its requirements or, after full disclosure, acted in good faith compliance, such conduct will not be considered an intentional violation of OML
- If the public body acted in good faith compliance with the advice of the public body's legal counsel, no fine will be imposed

# Intentional Violations

**WHEN IN DOUBT... CONSULT TOWN COUNSEL  
TO PROTECT YOURSELF AND YOUR BOARD/  
COMMITTEE / COMMISSION**

# Remote Participation

- Currently permitted under Chapter 2 of the Acts of 2023 until March 31, 2025
- Can meet remotely without a quorum and without need for person chairing the meeting to be present at physical location of meeting
- Adequate alternative means of access for public
- Must provide one, internet or satellite audio or video conferencing.
  - If no ability: may post transcript of hearing on municipal website
    - Not available if public participation is required by applicable statute, regulation or bylaw.

# Remote Participation

## Procedure for Remote Participation

- All votes taken during meeting must be by roll call vote
- Executive sessions – remote participant must protect confidentiality
- Chair should distribute documents/exhibits to be used at meeting to remote participants in advance if possible

# Public Meeting Access

Public bodies are subject to all applicable state and federal laws that govern accessibility for persons with disabilities. These laws include:

- the Americans with Disabilities Act
- the federal Rehabilitation Act of 1973
- and state constitutional provisions.

Public bodies that adopt website posting as method of notice must ensure that the website is accessible to people with disabilities, including individuals who use screen readers.

All open meetings of public bodies must be accessible to persons with disabilities. Locations must be accessible by wheelchair.

Sign language interpreters for deaf or hearing-impaired persons must be provided, subject to reasonable advance notice.

# Resources

- AG continues to issue determinations regarding complaints of violations and publishes them on its website. Review determinations periodically to become familiar with the types of activities that are subject to enforcement.
- AG conducts regional trainings and webinars. See AG website at <https://www.mass.gov/service-details/open-meeting-law-trainings>
- Town Counsel and Town Clerk are here to help with any specific questions
- Open Meeting Law website (Guide, FAQs, laws)  
<https://www.mass.gov/the-open-meeting-law>

# CONFLICT OF INTEREST LAW

G.L. c. 268A



# ETHICS LAWS

**\*ALL MUNICIPAL EMPLOYEES MUST COMPLY \***

- **Conflict of Interest Law, G.L. c. 268A**
- **State Ethics Commission Regulations, 930 CMR 1.00 et seq**

# WHO IS A MUNICIPAL EMPLOYEE?

Any person:

- Holding an office, position, employment, or membership in a municipal agency
- By election, appointment, contract, or engagement
- Compensated or uncompensated
- Full, regular, part-time, intermittent, consultant basis

Does not include:

- Elected Town Meeting members
- Charter Commission members

# Information and Training

- G.L. c. 268A, §27 - Summaries of the law provided to all employees, who must acknowledge receipt
  - With 30 days of commencing employment
  - Annually thereafter
- G.L. c. 268A, §28 – Completion of the State Ethics Commission’s online training required
  - With 30 days of commencing employment
  - Every 2 years thereafter
  - Provide notice of completion to Town Clerk
- Can organize group trainings through Ethics Commission

# AREAS OF FOCUS

- Bribes/Gifts and Substantial Value
- Appearances of a Conflict of Interest (and how to dispel them)
- Political Activity
- Job Recommendations
- Divided Loyalties / Representing Parties in Matters Involving Sherborn
- After You Leave your Town Position
- Financial Interests in Matters Before Your Board
- Financial Interests in a Contract with the Town

# Section 2: Bribes/Influence



Whoever, being a ...municipal employee...or a person selected to be such an employee..., directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

- being influenced in his performance of any official act
- being influenced to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the commonwealth or on a state, county or municipal agency, or
- being induced to do or omit to do any acts in violation of his official duty; or
- for influencing testimony

Shall be punished by a fine of not more than \$100,000, or by imprisonment in the state prison for not more than 10 years, or in a jail or house of correction for not more than 2 ½ years, or both; and in the event of final conviction shall be incapable of holding any office of honor, trust or profit under the commonwealth or under any state, county or municipal agency.

## Section 3: Gifts/Offers to Act

Whoever knowingly, being a present or former ...municipal employee ...or person selected to be such an employee ..., otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value: (i) for himself for or because of any official act or act within his official responsibility performed or to be performed by him; or (ii) to influence, or attempt to influence, him in an official act taken....

shall be punished by a fine of not more than \$50,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 1/2 years, or both

# “Substantial Value”

- \$50 or more.
- May aggregate all gifts offered or given by a person to a public employee within any 365 day period.
  - Example : A series of five free passes given to a single public employee, each worth \$10, will be of substantial value
- If multiple recipients, value to each public employee is the total value of the gift divided by the number of recipients.
- To determine the value of attendance at an event, the Commission will consider the admission fee, or ticket price, or per person cost to the sponsor, or will divide the actual cost of the event by the number of attendees.



# “Substantial Value” Examples

## Tickets, Dinners and Special Events

- Example: The face value of a ticket to a sporting event is \$30 but the giver paid \$100. The value of the ticket is \$100, and it is a gift of substantial value.
- Example: The face value of a ticket to a concert is \$40, but due to the scarcity of such tickets, the fair market value is \$500 at the time of the gift. The value of the ticket is \$500, and it is a gift of substantial value. A person who is given the opportunity to purchase, and does purchase, the ticket at face value has received a gift of \$460, which is of substantial value.
- Example: The fair market value of meals and entertainment at a charitable event is \$40, but the face value or cost of a ticket to the event is \$150. The value of the ticket is \$150, and it is a gift of substantial value.

# “Substantial Value” Examples

## Tickets, Dinners and Special Events

- Example: Dinner for 10 = \$750. Each public employee who attends is presumed to have received \$75 dinner, which is of substantial value. This presumption may be rebutted as to a particular individual by evidence that the cost of the items ordered or consumed by that individual and any guests, plus tip, was less than \$50.
- Example: There is no admission charge to an event but the estimated per person cost of food and drink is \$90. The presumed value of the admission is \$90, and of substantial value. This presumption may be rebutted as to a particular individual by evidence that the cost of the items ordered or consumed by that individual and any guests, plus tip, was less than \$50.
- Example: The host of an event pays a set fee of \$75 per person for a catered event. The \$75 per person cost includes all refreshments, taxes, service charges, and the rental of the banquet hall. The value of attendance to each attendee is \$75, and it is a gift of substantial value.

# No Violation/No Exemption Needed (from SEC website)

Example: A public employee may accept any rebate, discount, or promotional item available to a group that includes, but is not limited to, public employees, or to a geographically defined class that includes the public employee (10% off for Boston residents).

Example: A public employee may accept any reward or prize given to competitors or entrants in a random drawing open to the public, or any reward or prize given to all attendees at an event (1000<sup>th</sup> attendee at Topsfield fair gets a car).

# No Violation/No Exemption Needed (from SEC website)

Example: A public employee may accept gifts, meals, and events given and received for reasons entirely unrelated to the recipient's official actions or position, on holidays; occasions of religious significance, including bar mitzvahs and confirmations; occasions of personal significance, including weddings, engagements, birthdays, the birth or adoption of a child, illness, or a relative's illness or death; and occasions of professional significance, including hirings and promotions.

Example: A public employee may accept *honoraria* (voluntary, unsolicited payments) unrelated to the employee's official action, position, or duties, as long as the speech or service for which the *honorarium* was given was performed on the employee's own time and without the use of public resources.

# No Violation/No Exemption Needed (from SEC website)

Example: Gifts from family and from long-time friends, with whom the public employee customarily exchanges gifts

Example: Retirement gifts from co-workers or from private parties, provided there is no link between the giver and a specific official act (honoring X for 35 years of service v. honoring X for her work on Town project Y)

Example: Gifts to a public agency for the agency's use, such as personal computers for use in a school's computer laboratory (assuming agency has authority to accept gifts)

Example: Holiday gifts such as fruit baskets if accepted on behalf of a public employee's agency and shared with all agency employees and/or the public

# §23 Appearance of Conflict

Cannot knowingly, or with reason to know:

- (1) accept other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office;
- (2) (i) solicit or receive anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's official position; or (ii) use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;

# §23 Appearance of Conflict

Cannot knowingly, or with reason to know:

- (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion; or
- (4) present a false or fraudulent claim to his employer for any payment or benefit of substantial value.

# §23 and Gifts under \$50



- Disclosure under §23 may be required for a gift that is not of “substantial value” if a reasonable person having knowledge of the relevant circumstances, would conclude that the public employee could unduly favor the giver or be influenced by the giver when performing official duties.
- Such a gift may only be accepted if the employee files a disclosure with their appointing authority or the Town Clerk (if they are an elected official) prior to taking any official action involving the donor.

# Gifts under \$50

- Example: A building inspector accepts a \$40 bottle of wine from a developer whose projects he frequently inspects. The inspector must make a disclosure.
- Example: A business association's representatives meet regularly with city councilors to discuss association issues. Several weeks after the city council votes in favor of a significant association measure, the association sends a concert ticket worth \$30 to each to the councilors who voted in favor. Each councilor must make a disclosure before any subsequent meeting with or action involving the association.
- Example: A public school teacher accepts a \$40 gift certificate from the parent of a current student. The teacher must make a disclosure.

# Helpful Resources on Gift Issues

- State Ethics Commission Advisory 19-1, Gifts and Gratuities (<https://www.mass.gov/advisory/19-1-gifts-and-gratuities>)
- State Ethics Commission Regulations 930 CMR 1.00 – 7.00 (<https://www.mass.gov/service-details/state-ethics-commission-regulations-930-cmr-100-700>)



# Political Activity

- In Ethics Advisory 11-1, the State Ethics Commission advises that Section 23(b)(2) restricts the extent to which public employees may engage in political activity.
- Election-related political activity:
  - Actively directed at influencing people to vote for or against candidates or ballot questions
- Non-election-related political activity:
  - Directed at influencing governmental decision-makers but does not involve an election, i.e., supporting/ opposing proposed measures before Town Meeting or the Select Board, local user fees, public construction, etc.

# Election-Related Activity

- May engage in private political activity, subject to restrictions on political fundraising (enforced by OCPF)
- May not use public resources to send campaign-related e-mails, faxes, letters, invitations to rallies/fundraisers
- May not use staff to research election issues, write speeches, answer campaign questions, etc.
- May not use public offices for press conference
- Elected officials may use title in seeking re-election and may state viewpoints on ballot questions

# Non-Election-Related Activity

- May engage in such activity on your own time
- Appointed non-policymaking employees may not engage in non-election-related political activity during work hours. Policymakers and elected employees have more leeway.



# Job Recommendations

- Advisory 13-1: Section 23(b)(2) imposes certain restrictions on public employees recommending constituents for employment.
- No restriction if you know and have personally worked with the individual at your current agency.
- May not exert pressure.
- Elected official may not use title or letterhead to recommend a constituent unless you have a standard procedure in place and apply it equally to all requests (disclosure may still be required).

# Job Recommendations

- May make recommendation in private capacity to non-municipal employer.
- May not recommend immediate family or be involved in review process if immediate family member is an applicant. Disclosure required if a friend is an applicant.
- May not give preferential treatment to a job applicant based upon a recommendation unless all qualifications are met.

# §17: Other Compensation/Agent

- Cannot directly or indirectly request or receive compensation from anyone other than the Town in relation to a matter in which the Town is a party or has a direct and substantial interest.
- Cannot act as agent or attorney for anyone other than the Town in 1) prosecuting a claim against the Town, or 2) in connection with any particular matter in which the Town is a party or has a direct and substantial interest.
- Punishable by a fine of not more than \$10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both

# §18 Former Municipal Employees

- “Forever ban” - Cannot knowingly act as agent or attorney for or receive compensation, directly or indirectly from anyone other than the Town in connection with any particular matter in which the Town is a party or has a direct and substantial interest and in which you participated as a municipal employee while so employed.
- “One year cooling off period” - For 1 year after employment ends, cannot appear personally before any agency of the Town as agent or attorney for anyone other than the Town in connection with any particular matter in which the Town is a party or has a direct and substantial interest and which was under your official responsibility within a period of two years prior to the termination of employment.
- See Ethics Commission Advisory 15-1 for more information

## §19 Financial Interest in Particular Matter

- Cannot participate in a particular matter in which you or certain others have a financial interest.
- Others include immediate family; partner; business organization in which you serve as officer, director, trustee, partner, or employee; or person or organization with whom you are negotiating employment.
- Certain exemptions may apply.
- Punishable by fine of not more than \$10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

# §20 Financial Interest in Contract

- Cannot have a financial interest, directly or indirectly, in a contract in which the Town is an interested party of which financial interest you have reason to know.
- Punishable by fine of not more than \$10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.
- Certain exemptions may apply. Exemptions are narrow, and every element of an exemption must be satisfied. Remember, public policy strongly favors avoidance of conflicts of interest.

# Penalties

- Additional penalties for violations of Sections 2, 3, 8, 17 – 20, and 23.
- In addition to criminal prosecution, State Ethics Commission may issue order to:
  - pay the commission on behalf of the municipality damages in the amount of the economic advantage or \$500, whichever is greater (up to \$25,000); and
  - make restitution to an injured third party.
- If damages are greater than \$25,000, Commission may file civil action.

# Ask in Advance

- G.L. c. 268A, s. 22 gives all municipal employees the right to request an opinion from State Ethics Commission or Town Counsel about a potential conflict of interest
- Both SEC and our office will only give opinions regarding prospective (future) conduct, not past conduct (which may be a future enforcement matter)
- Request should be in writing and include detailed existing facts
- Formal opinions by Town Counsel are filed with Town Clerk and SEC for approval

# Further Information

- Online Training: <https://www.mass.gov/how-to/complete-the-online-training-program-for-municipal-employees>  
\*New training platform opened January 12, 2023 – includes employee compliance tracking tool
- Disclosure Forms: <https://www.mass.gov/service-details/municipal-employee-disclosure-forms>
- Advisories: <https://www.mass.gov/service-details/state-ethics-commission-advisories>
- State Ethics Commission (617) 371-9500

*Thank you for attending!*

