

Jacqueline Shanley

From: Charles Cristello
Sent: Tuesday, June 16, 2009 4:33 PM
To: Jacqueline Shanley; Attorney Dan Murray
Subject: FW: Ethics law

Jackie, For correspondence next week. Charlie -----Original Message-----
From: Decas, Murray & Decas [mailto:decasmurraydecas@yahoo.com]
Sent: Monday, June 15, 2009 10:23 AM
To: Charles Cristello
Subject: Re: Ethics law

Dear Charlie:

I enclose a copy of material received from the City Solicitors and Town Counsel Association. The communication indicates that the General Court is considering legislation to amend the ethics law. There is included in the legislation significant changes to the Opening Meeting Law. Some of the changes would be burdensome to local boards and committees.

You may want to share this material with the Board of Selectmen.

Very truly yours,

Daniel F. Murray
Town Counsel

--- On Fri, 6/12/09, James B. Lampke <jimbosail@msn.com> wrote:

> From: James B. Lampke <jimbosail@msn.com>
> Subject: Fw: CSTC URGENT LEGISLATIVE ALERT RE: SIGNIFICANT OPEN MEETING LAW CHANGES PROPOSAL
> To:
> Date: Friday, June 12, 2009, 12:03 PM
>
> RE: Request for Amendments to Open
> Meeting Law Amendments Contained in Proposed Ethics Reform
> Legislation
>
>
>
> IMPORTANT LEGISLATIVE ALERT-
> IMMEDIATE ACTION
> REQUESTED
>
> City Solicitors and Town Counsel
> Association
> James B.
> Lampke, Esq., Executive Director/Secretary-Treasurer
> 115 North Street, Suite
> 3 Hingham, MA 02043
> 781-749-9922 fax-781-749-9923
> jlampke@massmunilaw.org
> www.massmunilaw.org
>
> No doubt you have heard about the
> pending ethics law
> changes being worked on by a conference committee at Beacon
> Hill. What you
> and many others may not have heard about however is that
> tucked away in this

> important ethics reform legislation are very significant
> proposed changes to the
> Open Meeting Law (OML).
>
> We certainly support appropriate
> ethics reform. We
> also certainly support meaningful reform to the
> OML.
>
> These proposed changes contain many
> good changes to the
> OML, such as consolidation of enforcement in the Attorney
> General's office as
> opposed to the present system of each county having its own
> interpretations,
> training for local employees and officials, the authority
> for the AG to enact
> regulations and other authorizations such as for improved
> notices, and many
> helpful clarifications. Importantly, the new proposed
> changes within the
> ethics bill do not include fines for individuals who may
> violate the law (which
> was sought in prior years; although other bills
> pending purportedly provide
> for such fines).
>
> However, the proposed
> legislation does not contain
> the important the codification of the attorney-client
> privilege that was
> recognized by the SJC in Suffolk Construction, a
> much needed exemption
> for negotiation of non-labor/personnel contracts and
> licenses such as cable
> licenses and other needed improvements.
>
> Also, and critical to the effective
> and orderly
> administration of local government, is the fact that the
> proposed legislation
> creates new burdens on local boards to, for
> example:
>
> - have to list on
> the agenda all items
> the chair reasonably anticipates will be discussed;
>
>
> - specify when
> going into executive
> session not only the reason for the executive session (as
> is presently required)
> but also "all subjects that may be revealed" in
> the executive session;
>
>
> - provide in the
> minutes of both open
> and executive session a summary of all matters discussed at
> the meeting;
>
>
> - include as part
> of the record of the
> meeting a listing of all documents "used"
> (whatever that means) at the meeting,

> and include all such documents "used" as part of
> the official record of the
> meeting along with the minutes and all such documents
> (with limited
> exceptions) also become public records not entitled to the
> protections of the
> Public Record Law (anyone have any empty warehouses for
> storage?);
>
> - authority for
> the Attorney General to
> reinstate an employee (with back pay, etc.) who may have
> been terminated in a
> meeting the AG determines was in violation of the OML;
>
>
> - there are other
> problems with the
> proposed changes as well.
>
> What is particularly disheartening
> is the fact that there
> has been, to our knowledge, absolutely no opportunity for
> public input of these
> changes. There has been no public hearing on these
> proposed changes.
> Apparently, it appears that the House passed an ethics
> reform bill that did not
> contain these OML changes. The Senate passed an
> ethics reform bill that
> did contain these OML changes. As a result, the bills
> go to a conference
> committee to work out the differences. We are advised
> that the current
> bill being considered with these changes is S. 2050.
> These conference
> committees have limited ability to add to the bills and
> generally can only
> delete or clarify the language. The conference
> committees do not hold
> public hearings or have any formal procedure or opportunity
> facilitating public
> input, even from those constituencies that would be most
> impacted. The
> timing and scheduling of when a conference committee
> releases its report and
> bill is also not subject to any advance
> notice.
>
> These problems with the bill should
> cause great alarm and
> concern for all local government boards and
> officials.
>
> Your Association only recently
> learned of the proposed OML
> changes tucked away in the ethics reform legislation.
> What is greatly
> feared is that in the urge to enact needed ethics reform,
> these important
> changes to the OML will be enacted with little review or
> analysis.
>
> When your Association found out
> about this, we sent emails
> and made contact with certain officials to express our
> concerns. At one

> point we urged that the OML changes be "stripped"
> from the bill and addressed
> separately so that there could be needed public input and
> proper analysis.
> Later, the position was softened to withdraw the request
> that the OML changes be
> stripped from the bill if our concerns were
> addressed. It remains unclear
> exactly what will be done with these changes and our
> concerns.
>
> WHAT CAN AND SHOULD YOU
> DO?
>
> Your help is critical in getting
> the message to local
> officials about these pending changes.. Your help is
> also critical in
> getting the word to Representatives and Senators about the
> problems with the OML
> language. We urge you to contact your local state
> house officials and
> others involved with the process, including the
> Governor. We also urge you
> to forward this email to your local officials and urge them
> to do
> likewise. The only chance we have to halt these
> changes from moving
> forward is for there to be a concerted effort to implore
> Beacon Hill not to
> enact these changes, at least not without adequate study
> and opportunity for
> comment.
>
> Pasted below into an email letter
> you can use or modify is
> an example of the emails that your Association through its
> President Christopher
> Petrini sent to Representative James Vallee, a member of
> the conference
> committee and a state house leader. For convenience,
> we have combined the
> two emails that went to Representative Vallee (and others)
> into one and also
> added a comment about the section that enables the AG to
> reinstate an employee
> and made some other changes to make it more appropriate for
> your use and that of
> your local officials. As you can see, we identified
> the text by line
> numbers. We have only focused on what we felt were
> the most significant
> issues- there were other concerns as well and you may have
> additional
> concerns.
>
> YOUR PROMPT ACTION IS
> ESSENTIAL. PLEASE ACT NOW AND
> FOLLOW UP ON YOUR EFFORTS. PLEASE LET US KNOW OF ANY
> REPLIES YOU
> RECEIVE. IF YOU KNOW WELL ENOUGH BEACON HILL
> OFFICIALS, PLEASE CONTACT
> THEM DIRECTLY AND PERSONALLY TO EXPRESS YOUR
> CONCERNS.
>
> If you have any questions or other
> concerns, please

> contact us. If you need a copy of the law before the
> conference committee
> (S. 2050), let me know and we will email it to you.
> It is about 112 pages
> long, so we are not attaching it to this
> email.
>
> Thanks for your interest and
> support. And again, it
> is critical to act immediately on this. Many local
> officials (and we
> suspect some state officials) do not even know of these
> pending changes, so
> spread the word.

> Regards,

> Jim

> City Solicitors and Town Counsel
> Association
> James B.
> Lampke, Esq., Executive Director/Secretary-Treasurer
> 115 North Street, Suite
> 3 Hingham, MA 02043
> 781-749-9922 fax-781-749-9923
> jlampke@massmunilaw.org
> www.massmunilaw.org

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> -----

> Dear

> _____:

> I am writing about the
> proposed changes to the Open
> Meeting Law (OML) that are contained in the Ethics
> Legislation (S. 2050)
> presently before a conference committee. Being
> involved in local
> government, I and others are very concerned that these
> changes to the OML have
> not been publically discussed and there has been no
> opportunity for input from
> those who will be most affected by the changes. While
> we all agree that
> there should be changes to the OML, and many of the
> proposed changes are good,
> there are a number that will place unreasonable burdens on
> local
> government.

> Contained below are some comments
> on these proposed
> changes and some very significant omissions in the proposed
> law.

> Unfortunately, these concerns are
> being raised rather late
> in the process, as we were not aware of the changes until
> recently and more
> importantly were not aware of the tight time line on the
> bill which contained
> the proposed changes. There was no opportunity to
> appear before any public

> hearing that we are aware of to discuss these
> significant
> changes.
>
> We recognize that the present focus
> is on the very
> important ethics law; however we are concerned that in the
> process these very
> significant, and in some cases adverse to the effective and
> orderly
> administration of local government, changes to the Open
> Meeting Law might be
> enacted in the drive to pass needed ethics
> reform.
>
> It would be extremely unfair to
> local government, the
> public in general and the many people- particularly the
> thousands of unpaid
> volunteers in local government-to have such sweeping
> changes and increased
> burdens enacted without thorough consideration. Local
> government
> organizations are dedicated to the improvement of
> local government through
> the advancement of municipal law and stand ready, willing
> and able to promptly
> meet to discuss these changes and work to bring about
> needed and
> effective changes to the Open Meeting
> Law.
>
> I would greatly appreciate your
> review of this matter and
> passing it along, hopefully with your support, to your
>
> colleagues involved in the process, particularly those
> on the conference
> committee.
>
> If I can provide additional
> information or if you wish to
> discuss this matter further in the meantime, please do not
> hesitate to contact
> me.
>
> Here are some of the key
> concerns:
>
> 1. Attorney-Client
> Privileged
> Meetings: In addition to other needed
> changes, the proposed
> legislation suffers from a major defect insofar as it does
> not include a
> statutory exemption to the Open Meeting Law for boards to
> meet with their
> attorneys. I and others strongly urge that the
> proposed revisions to G.L.
> c. 39, § 23B, Open Meeting Law, include a new subsection
> 11 to statutorily
> codify the Supreme Judicial Court's recent holding in
> Suffolk Construction
> Co., Inc. v. Division of Capital Asset
> Management, 449 Mass. 444
> (2007), which recognized unequivocally that the
> attorney-client privilege

> applies to communications between public entities and their
> counsel. The
> SJC made clear in Suffolk, that, for private and
> public alike, "the
> attorney-client privilege is a fundamental component of the
> administration of
> justice," Suffolk, supra, 449 Mass at 445,
> which constitutes an
> "essential function" in "a society that covets the
> rule of law." Id. at
> 449, and "serves the same salutary purposes in the public
> as in the private
> realm." Id. at 450. As the SJC recognized in
> substantiating its
> ruling, "it is now well established that
> communications between government
> agencies and agency counsel are protected by the privilege
> as long as they are
> made confidentially and for the purpose of obtaining legal
> advice for the
> agency." Id. at 450-451. The
> Legislature should revise the
> Open Meeting Law to reflect this tenet, as has been done in
> several other
> states.
> Specifically, the Open Meeting
> Law should be amended to add a new subsection 11, as
> follows:
> Executive
> sessions may be held
> only for the following purposes:
> ...
> (11) To
> allow a governmental body
> to meet with and consult its counsel for purposes of
> engaging in, reviewing or
> discussing communications protected by and within the scope
> of the
> attorney-client privilege, as such privilege is recognized
> and defined under the
> common law.
> 2. Lines
> 480-483:
>
> a.
> Re: members of a body attending another body's
> meeting; This change
> is very much needed to address the issue of members of a
> body attending another
> body's meeting and whether those members can participate
> or not. This
> arises when for example members of a City Council may
> attend a meeting of the
> budget committee or subcommittee. Issues have arisen
> as to whether such
> members can speak and participate at the other body's
> meeting if there happens
> to be a quorum of the other committee present. The
> present draft language
> allows this. We feel this language should be
> clarified to include members
> of a main body being able to attend as individuals a
> committee or subcommittee
> of that main body. This can be easily addressed by
> adding at the end of
> line 480 after "body" the phrase "or at a committee
> or subcommittee of the main body".

>

>

> b. Line

> 483: We believe that the language "do not
> deliberate" should be
> deleted. It suggests, given the definition of
> "deliberate" in the law that
> such members would not be able to make an "oral or
> written communication" as an
> individual at the other body's meeting.

>

> 3. Line

> 493: Preliminary screening committee
> definition- We recommend
> that the definition be clarified to indicate that the
> Appointing Authority
> itself can be the Preliminary Screening Committee.
> There appears to be
> some disagreement as to whether an Appointing Authority
> could designate itself
> as the Preliminary Screen Committee. This confusion
> can be easily resolved
> by adding a sentence along the lines of the
> following:
> "The public body may designate itself and
> serve as the preliminary
> screening committee or
> subcommittee."

>

> 4. Line

> 534: Open Meeting Law Advisory
> Commission- We believe
> that the membership of this commission should include a
> member of the City
> Solicitors and Town Counsel Association. Our
> organization can and would
> bring to the mission of this commission our unique insight
> and knowledge of
> local government. We would be able to present helpful
> contributions to the
> process in analyzing how any OML issues impact local
> government. While the
> other proposed representatives on this commission certainly
> bring helpful
> information and important perspectives, having municipal
> legal counsel work with
> them will add an important element to the process.
> Since adding a member
> of the CSTC would increase the membership to six, we would
> suggest that there be
> a seventh member, perhaps appointed by the Governor, to
> keep the composition an
> odd numbered body.

>

> 5. Line

> 568

> Agendas for meetings: Most boards already use an agenda,
> particularly if there are
> scheduled hearings. The bill however requires listing
> in the agenda by the
> chair "topics that the chair reasonably anticipates
> will be discussed at the
> meeting". We believe that this is unworkable and
> not practicable. As
> a practical issue, there are numerous matters that come to
> the attention of
> board members right up to the time of, and even during, a

> meeting that may need
> to be addressed. While the proposed language does
> reference "reasonably
> anticipates", it would be likely that disputes would
> arise over whether
> something was "reasonably anticipat[ed]" by the
> chair. Other members of a
> body would still be able to bring up matters. Members
> of the public often
> bring up matters. It would also lead to
> frequent disputes as to
> whether action taken at a meeting on a matter that was not
> listed was a legal
> action or not. There are many instances for example
> where documents are
> signed by a board at a meeting that would not normally be
> listed on the formal
> agenda. These might include for example bond
> issuances or signing of other
> documents. Having such actions open to question
> because they might not
> have been listed on the agenda would unduly interfere with
> the effective and
> orderly administration of local government. We are
> also not aware of this
> being a problem in terms of the way boards conduct
> business. We believe
> that the language "and a listing of
> topics that the chair
> reasonably anticipates will be discussed at the
> meeting" be
> deleted.
> 6.
> Line 622 Executive
> Session: Proposed language in bill
> would require "all subjects
> that may be revealed" be announced before going into
> Executive Session. We
> believe that this is very problematic and would, depending
> on how it would be
> interpreted, require stating the topics with identification
> of the matters when
> going into Executive Session. We believe that this
> would interfere
> unreasonably with the need to go into Executive
> Session. We recognize that
> the proposed language does make reference to "without
> compromising the purpose
> for which the executive session was called".
> It would however create
> situations where there would be disputes over how much
> identification must be
> given on the statutory reasons for going into Executive
> Session. It
> is not in the best interests of the community for a board
> to have to state the
> name of a particular litigation matter publically, thus
> giving notice to the
> other parties that the community is planning
> something. It would be
> counter to the purpose of privacy to have to state the name
> of the person whose
> medical condition is being discussed or information on the
> medical issue. We
> believe that the language "stating all subjects
> that may be revealed,
> without compromising the purpose for which the executive

> session was
> called" should be deleted.
> 7. Line
> 662 re investigation
> of criminal matters:
> We believe the language should be clarified to
> also include civil
> matters as well. Presently, such matters are
> often covered under the
> litigation exemption. However, adding "civil" to
> this section would
> clarify the law. This is especially since our legal
> system now includes
> numerous civil penalty situations. There is no reason
> why this statutory
> reason should be limited to just criminal matters.
> This clarification can
> be easily accomplished by adding the words
> "civil
> or"
> before the words "criminal" in lines 662 and
> 663.
> 8.
X> Line ~~11~~
> 683: We have already commented
> above on the importance of adding language to address the
> attorney-client
> privilege. That addition would appear to belong
> as Exemption No.
> 11. the next exemption We also
> believe that it is important
> in this day and age of major contracts and licenses that
> the law be clarified to
> permit public bodies to negotiate non-labor/personnel
> contracts and licenses in
> Executive Session. Such an exemption would logically
> be added at this
> place. Under the present law, a community cannot
> negotiate contracts that
> may involve a multi-million expense to the community, such
> as waste management,
> development projects, utility licenses (including cable)
> and numerous other
> major contracts. While staff often deals with the
> negotiations, there are
> many instances where it would be in the public interest, as
> well as a necessity
> to resolve certain issues, for negotiations in Executive
> Session.
> Often times there are competing companies dealing with the
> community and it is
> not in the public interest that competitors of a party the
> community is
> negotiating with know the terms and conditions, objectives,
> etc. prior to the
> contract being negotiated. For example, many
> communities are dealing with
> their existing cable operator seeking a renewal of their
> license and a new
> provider seeking an original license. Preventing such
> negotiations to be
> held in an Executive Session results in each of the two
> providers knowing the
> negotiating posture of the other and more critically what
> the community may be
> seeking. This problem could be addressed
> by adding a new Exemption 12

> to permit Executive Sessions
> "to permit the
> negotiation of non-labor or personnel contracts and
> franchise licenses if an
> open meeting may have a detrimental effect on the
> bargaining position of the
> government body."
> 9. Line
> 686- 697
> re minutes of both
> open and
> executive sessions: The proposed language calls for
> having to provide a
> summary of the discussions on each subject, a list of
> documents and other
> exhibits used at the meeting". The documents
> "used" also become part of
> the official record. We believe that this requirement
> is overly burdensome
> and not practical. Numerous subjects are discussed at open
> sessions. The public
> has ample opportunity to observe these discussions, as they
> should.
> Requiring a "summary" to be in the minutes on each
> topic discussed creates a new
> and unnecessary burden on local
> officials. With respect to
> Executive Sessions, the law presently requires, as it should, that
> minutes be kept.
> The new law would also require a summary of each topic
> discussed.
> Executive Session discussions can only be for certain
> statutory purposes.
> Having to list a summary of each topic discussed will
> create many of the same
> problems noted above. In addition, having a summary
> of the discussions in
> Executive Session may likely defeat the purpose of the
> Executive Session and may
> contain information that could be used against the
> community. Having to create a list of
> all documents and exhibits "used" at the meeting and
> have those documents and
> exhibits so "used" as part of the official record also
> creates similar
> problems. For example, many times at meetings someone
> appearing before a
> board may use documents and may even display them to the
> board. The new
> law would seem to require that those documents must now be
> submitted to the
> board and be made part of the record. This would
> place an additional
> burden and expense on citizens who may come before
> boards. We believe that this
> concept of having to prepare a summary would create
> unintended consequences that
> would not be in the public interest. Of significant concern is
> the fact that the
> proposed language in line 699 would appear to emasculate
> any public records
> exemption of such documents "used" at an open or
> Executive Session, regardless
> of the nature of the document. A fair reading of the
> proposed language
> essentially provides that if a document that would
> otherwise be exempt from

> mandatory disclosure as a public record under an existing
> statutory exemption in
> the Public Records Law was "used" at a meeting, it
> would no longer be subject to
> an exemption under the Public Records Law. For
> example, a board has before
> it a request for a sick leave extension from an employee
> and a medical record
> supporting the request. If the board relies on those
> documents at a
> meeting, the documents now become part of the record, must
> be made available to
> the public and no longer would be exempt under the Public
> Records Law, even
> though the medical record would otherwise be exempt under
> the Public Records
> Law. Therefore, we believe that the references to
> these requirements in
> this section of the proposed law should be deleted, such as
>
> in lines 686-687 "a summary of the
> discussions on each subject, a
> list of documents and other exhibits used at the
> meeting"; lines 694-696
> "(d) Documents and other exhibits, such as photographs,
> recordings or maps, used
> by the body at an open or executive session shall, along
> with the minutes, be
> part of the official record of the
> session."; lines 697-699
> "the notes, recordings or other materials used in the
> preparation of such
> minutes and all documents and exhibits used at the
> session."
> 10.
> Lines 766-767:
> Empowering
> the Attorney General to reinstate an employee if there was
> an OML
> violation. The ability for an employee to challenge
> personnel action
> exists already in several forums. The law presently
> provides a mechanism
> in a judicial proceeding before a Judge for an employment
> action to be
> overturned if there was a violation of the OML. I
> would be overly
> burdensome and disruptive for this type of broad remedy to
> also be available to
> the Attorney General in overseeing compliance with the
> OML. Sufficient
> avenues exist for this remedy in court without having to
> expand it to another
> forum.
> If you
> need further details, or
> require further information, please do not hesitate to call
> me. I also
> understand that the Massachusetts Municipal Association
> (617-426-7272), the City
> Solicitors and Town Counsel Association (781-749-9922) and
> many other groups
> share many of these concerns and could also discuss the
> impact of these changes
> with you.
> Thank you
> in advance for your consideration of these

> requests.
> Very
> truly yours,
>
> _____
>
>