



OPEN MEETING AND PUBLIC RECORDS LAWS¹

TOWN OF HANSON December 3, 2008

OPEN MEETING LAW, G.L. c.39, §§23A and 23B

I. Introduction: Purpose

The basic purpose of the Open Meeting Law is summarized in Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978) as follows: “The open meeting law is designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.” The Open Meeting Law therefore requires that the Town’s boards deliberate and decide in a public forum for which interested members of the public have been provided adequate notice.

II. Definitions

Many of the key concepts necessary for understanding the Open Meeting Law are found in the definitions set forth in G.L. c.39, §23A, as follows:

Deliberation
Emergency
Executive Session
Governmental Body
Meeting
Quorum

III. What is a *Meeting*?

A “*meeting*” is:

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. [emphasis added]

The Open Meeting Law does not apply to **chance** or **social meetings** at which official business is discussed, so long as no final agreement is reached. However, it is a violation

¹ This outline is for informational, summary purposes only and should not be construed to constitute legal advice regarding any particular set of facts. To review the text of the Open Meeting Law, please see G.L. c.39, §§23A and 23B. To review the text of the Public Records Law, please see G.L. c.66, §10 and G.L. c.4, §7(26). Please also be aware that these laws continue to be interpreted through case law and administrative decisions.

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of the Open Meeting Law to use a chance or social meeting to circumvent the law's requirements. Thus, even if a chance or social meeting does not in and of itself violate the Open Meeting Law, there is an inherent risk that a chance or social meeting wherein official business is discussed will result in a complaint to the District Attorney.

The definition of "meeting" specifically excludes "**on-site inspection** of any project or program." Accordingly, notice of a site visit need not be, and can not be, made under the Open Meeting Law. In other words, the Town cannot invite persons onto another's private property. However, deliberation and voting may not occur at the site visit. Instead, such action must take place at a properly posted open meeting. For this reason, it is often helpful to schedule a meeting of the governmental body for a time immediately following a scheduled site visit. Under such circumstances, the members of the governmental body will be able to discuss their observations at the site while their memories of the site are still fresh. Notice requirements of other statutes will continue to be applicable.

In turn, a "**governmental body**" is defined as:

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.

If a governmental body appoints a **subcommittee**, a quorum of the subcommittee is also subject to the Open Meeting Law. This result occurs even though fewer than a quorum of the full governmental body is present. If a single individual, such as a superintendent or a town administrator, appoints a committee to accomplish something that individual has sole authority for, however, that committee is not a subcommittee of a governmental body for purposes of the Open Meeting Law.

The term "**deliberation**" is defined as:

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.

Finally, the term "**quorum**" is defined as:

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. [emphasis added]

The fact that a **quorum** is not present at a meeting does not suggest that the members can sit and discuss substantive matters, however. Instead, the members should either vote to adjourn to a date and time certain, or simply disband.

Once a *quorum* is present, however, the general rule relative to quantum of vote is that all that is needed to take action is a majority of those present and voting. Note that a vote of 1 – 0 can never constitute approval. A higher quantum of vote may be established by statute, special act, charter or bylaw.

III. Notice Required

Non-Emergency

A notice of every meeting of a governmental body must be filed with the town clerk at least 48 hours prior to the meeting, including Saturdays but not Sundays and legal holidays. The notice must also be posted in the office of the clerk or on the principal official bulletin board of each town.

The written notice shall be in easily readable type and must contain the date, time and place of each meeting. The filing and the posting is the responsibility of the person calling the meeting. In some municipalities, the Town Clerk may assist boards or committees by offering to post notice of meetings; however, such assistance is not required by law and does not relieve the person calling the that such meeting of responsibility for ensuring notice is posted.

Often, boards will do a single filing for the entire year. Such a filing is consistent with the Open Meeting Law, provided that it includes the required elements and the intent of such board is to actually hold such meetings.

The Open Meeting Law does not require that an agenda of an open meeting be prepared or posted. Instead, in most instances, agenda-related requirements are governed by special act, charter, local by-law or practice. If a governmental body has a practice of preparing and/or posting an agenda, failure to comply with such practice does not invalidate the meeting or the action taken thereat.

Emergency

An *emergency* meeting may be held without complying with the above requirements. A *determination* of what constitutes an emergency must be made on a case-by-case basis depending on the facts of a particular situation, consistent with the definition given above.

a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

In most cases, however, an *emergency* will be created by a set of circumstances resulting from a threat to public health or safety. As an example, a board of health may need to meet without the required notice if a building were in imminent danger of falling down. A board of selectmen may need to meet without the required notice if a public safety emergency due to a flood required immediate action. In general, a filing deadline or similar scheduling minutes do not constitute “emergencies” for purposes of the Open Meeting Law.

If an *emergency* requires a board or committee to meet without complying with notice and posting requirements, or to meet in some other way inconsistent with the Open Meeting Law, the board or committee should take whatever steps possible to comply with the law. For example, if a meeting is required to be held in less than 48 hours time, the meeting should nevertheless be posted to the extent that the same is possible. The board or committee must limit its deliberations to the emergency matter, and may not move on to discuss matters unrelated to the emergency. Further, the governmental body should take minutes of its meeting and those minutes should be reviewed and included with the minutes of the next regularly scheduled meeting. Additionally, if an emergency meeting must be held, the governmental body should also consider posting a regular meeting as well, to allow it to ratify the action taken at the emergency meeting.

IV. Minutes

Accurate minutes of executive session and open meetings must be created in a written format and so maintained.

The minutes of each open session meeting must contain:

1. Date;
2. Time;
3. Place;
4. Members present **and** absent, and
5. Action taken at each meeting.

It is not required that the minutes of an open meeting contain an exact transcript of the exchange between board members. However, it is necessary that the minutes contain enough information to fairly describe the “action taken” at each meeting. There is no prohibition, however, against keeping minutes in a “transcript” type of format. The level of detail contained in the minutes is a matter for each board to decide, and may depend on factors such as what is being discussed or the type of record the board wishes to create for decision making or litigation purposes.

Additionally, open session minutes must reflect the following when a board votes to go into executive session:

1. The roll call vote of each member to go into executive session;
2. Cited statutory purpose of the executive session; and
3. Whether the governmental body will return to public session after the executive session is concluded.

In executive session, one additional requirement applies: all votes taken must be roll call votes and recorded in the minutes.

Although a municipality may make audiotapes of its meetings, written minutes must also be prepared. Audiotapes or handwritten notes used to aid in the creation of written

materials may be destroyed without the permission of the Supervisor of Public Records, provided, however, that there is no outstanding public records requests or litigation involving the tapes or notes. There is no specific time frame for preparing written minutes of a meeting, but it is generally recommended that such minutes be prepared in a “reasonable time” following the meeting.

Drafts of minutes of open sessions are considered public records as of the moment of their creation. If a request for such minutes is made but a governmental body has not yet voted to approve the same, it is recommended that each page of the draft minutes be stamped with the word “draft” or “unofficial” to clarify the status of the minutes.

V. Executive Session

Executive session may be used only for a limited number of purposes, as specified in the Open Meeting Law. An ***executive session*** is defined as:

any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.

In each case, the members of the board or committee must vote to enter ***executive session*** on a recorded roll call vote, and the presiding officer must announce the purpose of the session and whether the board will reconvene in open session.

Executive session minutes do not become subject to mandatory disclosure upon creation. Rather, executive session records become public only when the purpose of the executive session has been met.

The following are allowable purposes for ***executive session***:

(1) To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual.

Individual rights are applicable, as follows: 48 hours written notice; opt to have meeting in open session; be present at the executive session; have counsel or a representative present; speak on his or her own behalf.

(2) To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, to be present at such executive session during discussions or considerations which involve that individual.

Individual rights, as described above, are applicable.

(3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

- (4) To discuss the deployment of security personnel or devices.
- (5) To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.
- (6) To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.
- (7) To comply with the provisions of any general or special law or federal grant-in-aid requirements.
- (8) To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a prior preliminary screening.
- (9) To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section.

VI. Taping of Open Meetings

The Open Meeting Law provides that a meeting of a governmental body may be recorded by any person in attendance, by means of a tape recorder or other means of sonic reproduction, or by means of videotape equipment. However, such video equipment may be placed only in the one or more locations designated by the governmental body. Such recording may not **actively** interfere with the conduct of the meeting.

Interestingly, G.L. c. 272, §99 prohibits secret recordings of oral communications. In an effort to give meaning to both statutes, a governmental body may wish to post a sign indicating that the meeting may be recorded by any person or by having the chairperson announce as a part of the chairperson's standard opening remarks, that any person in attendance may record the meeting by means of sonic reproduction.

IX. E-mail and Voice Mail

Although the Open Meeting Law does not specifically reference e-mail or voice mail, guidelines issued by various district attorneys state that e-mail or voice mail exchanged among a quorum of members of a governmental body may constitute a violation of the Open Meeting Law. There is also nearly unanimous understanding among Massachusetts district attorneys that receipt of an e-mail by a quorum of members of a governmental body, even under circumstances where no response is made, may constitute a violation of the Open Meeting Law. It appears that the rationale for these positions is that when a quorum of members is engaged in a “verbal exchange” regarding public business, whether electronically, simultaneously or serially, such action may not take place outside of a properly posted meeting and therefore cannot occur by voice mail or e-mail. Examples of e-mail or voice mail exchanges that may be found to constitute a violation of the Open Meeting Law include:

1. An e-mail or voice mail originally addressed to one member of a governmental body subsequently forwarded to a quorum of members;
2. An e-mail or voice mail sent to a quorum of members of a governmental body; and
4. A web-based discussion group or chat room where a quorum is participating.

Further, e-mail creates an issue under the Public Records Law. All e-mail related to municipal business is likely to be considered a public records subject to mandatory disclosure upon request. For that reason, whether municipal-related e-mail is created at Town Hall or on a person’s private computer, such e-mail is likely to be considered a public record subject to all the requirements of the Public Records Law. If a violation of the Open Meeting Law occurs as a result of an e-mail exchange, such e-mail will likely need to be produced and placed in the public record, either as an addendum to the minutes of a properly posted meeting or filed with the Town Clerk.

X. Open Meeting Myths

There are several matters which people assume are governed by the Open Meeting Law, but which are not. A few such myths are debunked below:

- (1) The Open Meeting Law does not require that a meeting of a governmental body begin with the pledge of allegiance.
- (2) The Open Meeting Law does not require that an agenda be prepared or posted.
- (3) The Open Meeting Law does not require that notice of a meeting be published in a newspaper, aired on cable television, or mailed to abutting property owners.
- (4) The Open Meeting Law does not require that persons be provided with the opportunity to speak.

(5) The Open Meeting Law does not require that a meeting be continued because of the lateness of the hour or because a particular individual cannot attend a meeting.

(6) The Open Meeting Law does not dictate when during an open meeting the governmental body chooses to enter executive session; the body may enter executive session immediately after the meeting opens, in the middle of the meeting, or at the end of the open meeting.

(7) Notice provided pursuant to the requirements of the Open Meeting Law does not alter or substitute for notice required under other statutes.

(8) The Open Meeting Law does not require governmental bodies to audiotape or videotape their meetings.

(9) The Open Meeting Law does not require that decisions made in executive session be announced in open session.

XI. Enforcement

The district attorney of the county in which the violation occurred has authority to enforce the Open Meeting Law. The district attorney has a range of enforcement options available, including issuance of a request for particular action or an administrative order requiring certain action. Additionally, three or more registered voters of the Town, the appropriate district attorney, or the Attorney General may bring a complaint, ordinarily in the Superior Court, seeking an order requiring the governmental body, member or officer thereof to carry out the provisions of the Open Meeting Law at future meetings. Under certain circumstances, a court order may invalidate any action taken at any meeting at which any provision of the Open Meeting Law has been violated, and may also issue fines.

PUBLIC RECORDS LAW, G.L. c.66, §10 and G.L. c.4, §7(26)

I. Introduction

What is referred to as the "Public Records Law" is a combination of the following:

- G.L. c.66, §10 - public records requests,
- G.L. c.4, §7(26),- the exemptions to the public records law, and
- 950 CMR 32.00, et seq.- the Public Records Access Regulations.

There is a presumption that all records of a town agency or office are "public" unless explicitly exempted under G.L. c.4, §7 or another statute. The Public Records Law applies to any kind of "document" made or received by a public officer or employee [papers, maps, recordings, computer data, etc.]. It is the nature of the information, not the form in which it is maintained, which makes it a public record.

Public records must be available for inspection and copying upon written request to the custodian of the records. If some, but not all, of the information in a particular record is protected, it is the duty of the custodian to make available a redacted copy.

II. Records Retention

Town records must be retained for seven years, or according to the applicable "records disposal schedule" adopted by the Supervisor of Public Records. G.L. c.66, §8. Most records may not be disposed of without the prior permission of the Supervisor of Public Records.

Town Meeting warrants, meeting minutes, and reports of town officers are permanent records. G.L. c.66, §8.

Meeting minutes must be maintained in written form. Although an audiotape may be utilized to assist in preparing the written minutes, such a format is not appropriate for permanent storage of the record given that it may deteriorate. Audiotapes of meetings created for the purpose of assisting the clerk to prepare the minutes may be erased, taped over or destroyed once written minutes of the hearing have been approved.

There are both criminal and civil penalties for the unlawful destruction of public records.

III. Public Records Requests

Any person may make a request to a records custodian. A "custodian" is defined as the person who has regular access to or control of documents in the normal course of business. Such request may be made in person or in writing. A request made by telephone will not constitute a request for purposes of the Public Records Law, although a records custodian may respond to such request at his or her discretion. A records custodian may not ask the requester the purpose of his or her request (see discussion of exemption (n), however). However, records custodians are expected to use their "superior knowledge" of the records to assist requesters. This means that even if a

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records custodian does not have a record exactly responsive to the request, the custodian must use his or her knowledge of the records to provide the requester with record information responsive to the request.

A custodian has 10 days from receipt of the request to provide a response, which may be:

- (1) making the records available for inspection;
- (2) producing copies of the records;
- (3) providing an estimate of up-front search, segregation and copying costs; if the response is anticipated to cost more than \$10.00 the custodian is required to provide such an estimate;
- (4) denying the request or a portion thereof; or
- (5) some combination of the above.

The requester dictates whether he or she wishes access to or copies of the requested records, and is entitled, upon payment of any applicable fee, to copies of such records in the form in which they exist.

A custodian may charge \$.20/page for photocopies, \$.50/page for computer printouts, and the actual cost of copying something not susceptible to ordinary means of copying, such as blueprints. In addition, a custodian may charge the prorated salary of the lowest paid person in the office capable of searching for requested records, and/or for segregating public/non public portions of the same.

If a record or portion thereof is denied, it is the custodian's burden to explain in writing the application of an exemption.

If no timely response is given, the requester may appeal to Supervisor of Public Records, provided that the original request was in writing. The Supervisor may order disclosure of the responsive records, but has no other enforcement powers. If a government official refuses to disclose records after receipt of an enforcement order from the Supervisor, the Supervisor may refer the matter to the Attorney General. The requester, at his or her discretion, may also go straight to court.

IV. Frequently Asserted Exemptions

Exemption (a) applies to those records which are "specifically or by necessary implication exempted from disclosure by statute."

This exemption applies when a statute specifically states that records of a certain type will be exempt from disclosure. For example, executive session minutes are protected from disclosure under the Open Meeting Law, G.L. c.39, §23B, and are thus exempt from disclosure pursuant the provisions of G.L. c.39, §23B as it operates through exemption (a) of the Public Records Law.

Exemption (c) applies to those records that constitute "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy."

This exemption is known as the “privacy exemption” and protects two types of records. The first clause of exemption (c) protects personnel and medical files maintained by the town. The Supreme Judicial Court in Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000), defined personnel records to include any records which would be helpful in making determinations regarding hiring and firing, including resumes and job applications. The second clause of exemption (c) protects from disclosure records which are “personal in nature” and refer to a specific individual. Accordingly, records containing intimate details highly personal in nature such as parental status, marital status, substance abuse, government assistance, family disputes and reputation may be withheld if the public interest in disclosure outweighs the privacy interest associated with disclosure of highly personal information.

Exemption (d) applies to “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.”

This exemption is known as the “policy development” or “deliberative process” exemption. This exemption is applicable to documents created when a particular board has not yet reached a final decision, or created a final document. Further, if a board requests a study to be done which contains both facts and recommendations, the recommendations portion of the study may be withheld from disclosure until the board has determined its response to the same. This exemption will also allow withholding of certain litigation or pre-litigation communications and documents.

Exemption (f) applies to “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

In addition to protecting records which are part of an ongoing investigation, this exemption permanently protects from disclosure the names and identifying details of voluntary witnesses and complainants.

Exemption (n) allows a records custodian, who believes that disclosure is “likely to jeopardize public safety” to withhold records including, but not limited to, “blue prints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons, buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth.”

Although a custodian is generally prohibited from inquiring as to the identity and motivation of the requester in making a request, it is within the discretion of the custodian to deny access to covered records if the custodian believes that

disclosure may jeopardize public safety. Thus, a custodian may inform a requester that if the requester wishes to volunteer additional information about the requester or the motive for requesting the records, the custodian may be able to evaluate the request differently. In no case, however, may a custodian require a requester to produce additional information.

Exemption (o) allows a municipality to withhold “the home address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories”.

It is arguable that this exemption allows, but does not require, withholding of the home addresses and telephone numbers of all municipal employees, including elected and appointed officials, in records identifying the employees as such. In light of the relatively recent adoption of this amendment, the full scope of its application remains somewhat unsettled.

V. Topical Issues

a. E-mail

E-mail is a public record to the same extent that all other records held by a municipality are public records, unless material in the e-mail is exempt from disclosure. As with any other record, e-mail should be retained pursuant to the appropriate records disposal schedule. If e-mail may properly be deleted, be sure that deletion is actually accomplished - deletion alone may not expunge it from system (see SPR Bulletin 1-99). As with any record, if an e-mail exists and is requested, it must be produced unless falling within one of the applicable exemptions to the Public Records Law.

For purposes of the Public Records Law, if the e-mail relates to public business it does not matter where the record was created or where it was received. As a result, if a municipal official or employee creates or receives an e-mail on their home computer that relates to municipal business, that e-mail is a public record subject to disclosure upon request.

To avoid the risk of improperly deleting e-mails relative to municipal business that reside on a home computer, it may be helpful for each board or officer to adopt a policy relative to the same. Such policy may include, for example, a requirement that e-mail created outside of Town Hall related to Town business be copied to a Town Hall employee or may mandate that municipal officials and employees working outside of Town Hall print their e-mails and deliver them on a regular basis to Town Hall.

To the extent that e-mails made or received by a governmental official or employee are public records subject to mandatory disclosure upon request,

consideration should be given to the content of such e-mails. For example, municipal officials and employees should consider whether to include personal information or social banter in an e-mail, as it is possible that such e-mail may ultimately require disclosure. While an exemption to the Public Records Law may be applicable to such personal information, disputes regarding the status of such information can be time consuming and embarrassing.

b. Creation of a Document

A custodian cannot be compelled to create a document or to answer questions. However, if the custodian does choose to create a record, the custodian is not bound by the Public Records Law and regulations promulgated thereunder with regard to the fee. In other words, the custodian may charge whatever it likes to create the record, although the fee charged must reflect the cost to the custodian to create the record. See Emerson College v. City of Boston, 391 Mass. 415, (1983).

c. Unlisted telephone numbers

Although an owner has a privacy interest in an unlisted telephone number, if the number appears in an otherwise public document the interest will be protected only if the owner has taken “measures” to identify in the record that the number is unlisted.

The names, addresses and telephone numbers of police and other public safety officers who live in and work for the same municipality are expressly exempt from disclosure pursuant to the provisions of G.L. c.66, §10. Further, a municipality may withhold the home address and telephone numbers of town employees. See also G.L. c.4, §7(26)(o).

d. Grandfather Clause

This clause provides that any records which were public prior to the adoption of the Public Records Law will remain a public record. An example of such a provision was a statute that stated that if a document was substantively discussed in an open session, that document became a public record in its entirety.

e. Attorney-Client Privilege

The Massachusetts Supreme Judicial Court recently affirmed the ability of governmental bodies to assert the application of the attorney-client privilege to withhold confidential communications between a governmental entity and their legal counsel. See Suffolk Construction. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-50 (2007). Although the attorney-client privilege is technically not an exemption to the Public Records Law, it will allow withholding of documents in response to a request for the same.

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The Suffolk Construction decision sets out the following test for determining whether a particular communication may be withheld from disclosure on the basis of attorney-client privilege:

This burden [of proving a valid attorney-client privilege] extends not only to a showing of the existence of the attorney-client relationship but to all other elements involved in the determination of the existence of the privilege, including: (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived.

Municipal officials wishing to assert this privilege must therefore be prepared to demonstrate that each of these elements has been met.

There are still many unanswered questions regarding the application of the attorney-client privilege, particularly with regard to the manner in which it will interact with the Public Records Law. It is possible, therefore, that excessive invocation of the privilege may create an appearance that a board or official is attempting to circumvent the requirements of the so-called "sunshine laws" that protect the general public's access to the decisions of government. In order to avoid litigation over the scope of the privilege, care should be taken to ensure that legitimate and compelling reasons exist to withhold from disclosure documents such as opinions of counsel, where prior to the Suffolk Construction decision, such documents were often considered public records.