

Guidance Spotlight: The Open Meeting Law and Employee Evaluations

This month in the Division of Open Government we offer guidance to public bodies on conducting employee evaluations in accordance with the requirements of the Open Meeting Law. The Open Meeting Law applies when a quorum of a public body, or its designated subcommittee, conducts a performance evaluation and therefore such evaluations must occur in a properly posted open meeting.

The Open Meeting Law seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently. Meetings of a public body must be properly noticed and open to members of the public unless an executive session is convened for one of the ten permitted purposes.

A public body may not perform an evaluation of an employee in executive session. Executive session Purpose 1 allows a public body to discuss the reputation, character, physical condition or mental health, *rather than the professional competence*, of an individual. As such, discussions that are conducted for the explicit purpose of evaluating the professional competency of an individual may only occur in open session. Discussions of professional competency may occur under Purpose 1 if they are directly related to an individual's reputation or character.

In addition, how a performance evaluation affects a contract negotiation can be an appropriate part of an executive session discussion under Purpose 2, which allows a public body to conduct strategy sessions in preparation for negotiations with nonunion personnel or to engage in contract negotiations with nonunion personnel. For example, as part of the discussion in preparation for renegotiating a superintendent's contract, a school committee may wish to consider the results of an annual professional competency evaluation. The evaluation results may be considered as part of deliberations about strategy held in executive session.

Members of a public body may individually create evaluations. Once individual evaluations of an employee have been created or completed by members of the public body, those evaluations can then be aggregated into a comprehensive master evaluation. As a best practice, to avoid the appearance of improper deliberation, members should submit their evaluations to someone who is not a member of the public body, such as an administrative assistant or executive secretary. Where an administrative assistant or executive secretary is not available for such purpose, an individual member may receive and compile the evaluations. In either event, once compiled, the aggregated evaluation may not be circulated to a quorum of members prior to a meeting nor should there be deliberation among members of the public body regarding the content of the evaluations outside of an open meeting, whether in person or over email.

We note that performance evaluations that are created by members of a public body, and that are used during an open session meeting or used in the preparation of meeting minutes, are public records in their entirety and must be provided upon request. However, materials used in a performance evaluation that bear on an individual's professional competence that were not created by a member of the public body are considered personnel information and are exempt from disclosure.

A recent Supreme Judicial Court decision suggested that aggregated evaluations may be distributed to a quorum of the members in one of two ways: (i) at a properly noticed open meeting, or (ii) via public posting to a municipal website in a manner that is also available to members of the public, as long as paper copies are also made available in the city or town clerk's office. See Boelter v. Wayland Board of Selectmen, 479 Mass. 233, 243-244 (2018). Even if the public body posts the aggregated evaluation to a publicly available municipal website, a quorum of the members of the body may not discuss it outside of a properly noticed public meeting. Please note that the Division has not yet addressed the propriety of this procedure in any determinations and we caution a public body's use of it.

OML Determinations Regarding Employee Evaluations:

- **OML 2021-45**
- **OML 2019-150**
- **OML 2019-57**