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CITY OF BURLINGTON, VERMONT
OFFICE OF
THE CITY ATTORNEY
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MEMORANDUM RE: CHANGES TO OPEN MEETING LAW

To: Mayor, City Council, Clerk/Treasurer's Office, Department Heads
From: Eileen Blackwood, City Attorney
Gene Bergman, Sr. Asst. City Attorney
Re: Act 143, 2014 Changes to the Vermont Open Meeting Law
Date: July 28, 2014

On May 23, 2014, the Governor signed into law Act 143, a bill (H. 497) that made the first changes to Vermont's open meeting law in many years. The Act went into effect on July 1. This memo is meant to assist you and the other City committees and boards in understanding and meeting the obligations of the amended law.

Public body

The open meeting law was enacted to enable the people of Vermont to monitor the effectiveness and accountability of their governing bodies; the right of the people to have an open government is enshrined in the Vermont constitution. *Vt. Const. Ch. I, Art. VI*; *1 V.S.A. § 311*. As such, every "public body" is subject to the requirements spelled out in Title 1 of the Vermont Statutes in sections 310 through 314. The amended law does not change the definition of "public body," except that it specifically exempts "meetings of restorative justice panels and meetings to conduct restorative justice group conferencing or mediation" from the law. 24 V.S.A. § 1964(b) (2014). The City Council and all the boards and commissions established by the Charter or by City Council resolution or ordinance are defined by the law as public bodies, as are all of the committees these bodies create to assist them in their work. *1 V.S.A. § 310 (3)* (definition of "public body"). It is likely that a group of citizens who meet together, but do not have an established set of members that make up that committee, even if they are recognized by the City Council, may not be a public body, but it should be assumed that all committees fall within this definition unless the City Attorney's Office has given a clear opinion that the specific committee or council is not a public body.

The City of Burlington will not tolerate unlawful harassment or discrimination on the basis of political or religious affiliation, race, color, national origin, place of birth, ancestry, age, sex, sexual orientation, gender identity, marital status, veteran status, disability, HIV positive status or genetic information. The City is also committed to providing proper access to services, facilities, and employment opportunities. For accessibility information or alternative formats, please contact Human Resources Department at 865-7145.

Open meetings

The purpose of the open meeting law is to give the public access to the meetings of public bodies so people can observe, be heard and participate in the deliberations and decisions of the public body. *State v. Vermont Emergency Bd.*, 136 Vt. 506, 508 (1978). Consequently, all public body meetings must be open to the public at all times of the meeting except during a legally called executive session, and no action can be taken by a public body unless it is taken at a meeting that is open to the public at all times of the meeting. *1 V.S.A. § 312 (a) (1).* This means that the doors to the building and the meeting room must remain open throughout the duration of the meeting (except during an executive session). This is not a change from existing law.

At the meeting, the public must be given a reasonable opportunity to express its opinion on the matters being considered by the body during the meeting, as long as order is maintained. The chair may create reasonable rules to govern public comment--such as providing a public forum period or limiting verbal comments to a reasonable length of time to allow all to participate. *1 V.S.A. § 312 (h).* The chair should, however, allow every member of the public who wishes to speak an opportunity to do so before the public body acts on a question. This is not a change from existing law.

Meeting defined

The law defines a meeting as "a gathering of a quorum of the member of a public body for the purpose of discussing the business of the public body or for the purpose of taking action." *1 V.S.A. § 310 (2).*

The new law excludes from being considered a "meeting" the exchange between members of the body (even if it is between a quorum) of written correspondence or electronic communications (i.e. email, phone calls, teleconferencing) "for the purpose of scheduling a meeting, organizing an agenda, or distributing materials to discuss at a meeting." *Act 143 § 1, page 1, amending 1 V.S.A. § 310 (2)*, as long as those communications are available for inspection and copying under the Vermont Public Records Law. This means that if, for example, emails are sent by another means than the City's system, the individual member of the public body must make sure they are maintained, or that method may not be used for City business. Generally, all written or recorded information related to scheduling, organizing the agenda, and materials to discuss for any public body of the City should be considered a public record subject to the Public Records Act and must be made available to the public on request.

Given the purpose of the law, the courts' interpretation of the statute that broadly favors openness and, the new clarification of the definition excluding scheduling, a "meeting" under the open meeting law should be seen as happening whenever a quorum of the public body gets together and discusses business under its jurisdiction, whether or not the members came together for the purpose of discussing this business. Certainly, any time a quorum of the public body meets together for the purpose of taking action, the members are meeting and must follow all the requirements of the law.

An example would be when a quorum, a majority of the body, attends a social event or party and begins to talk about city business; this should not happen unless all the requirements of the open meeting law have been satisfied--which includes posting an agenda and keeping minutes.

The changes to the law also clarify that a meeting occurs when members of the public body discuss an issue over the phone or by email, if all or at least a quorum of the body is on the call or cc'd on the email (even if they aren't all reading it at the same time or responding), unless the task is only one of the three areas identified above (scheduling, organizing an agenda, or distributing materials). Discussions of City business that involve a quorum or more of the public body cannot be held by email! You may distribute information to be discussed at the meeting, but you may not discuss it. This means that with three-person committees, two of the members may not discuss committee business (except those three routine administrative activities) outside the meeting, no matter how informally.

The law recognizes three types of meetings: regular, special, and emergency. A "regular" meeting is one set by statute, charter, regulation, ordinance, or bylaw or by a resolution or formal action of the public body. So, public bodies who plan to have regular meetings that aren't designated in a formal legal document should take formal action to set the date and time of those meetings. A "special" meeting is a meeting that occurs outside that schedule. An "emergency" meeting is what it sounds like--a meeting to deal with an unforeseen condition that requires immediate attention. The requirements for notice and posting below vary depend on what type of meeting is being held.

Accessible meetings

The "open at all times" requirement was clarified in the new law to make it clear that meetings must comply with the public accommodation mandate established by the public accommodations law in chapter 139 of Title 9 of the Vermont Statutes. *Act 143, § 1, page 3, amending 1 V.S.A. §312(a)(1).* The open meeting law, therefore, requires officials of the public body who are scheduling, setting up, and conducting a meeting to: (1) ensure the meeting is accessible to persons with disabilities; (2) allow service animals accompanying a person with disabilities and persons training service animals for a person with disabilities; and (3) make reasonable accommodations, including the provision of auxiliary aids and services, to allow access to and participation in the meeting by persons with disabilities.

Attendance without being physically present

Members of the body may attend a meeting through electronic or other means without being physically present in the designated meeting location. If a member attends by electronic or other means, then the member must identify himself or herself when the meeting is convened and must be able to hear the conduct of the meeting and be heard throughout the meeting. *Act 143, § 2 amending 1 V.S.A § 312 (a) (2).* All votes must be taken by roll call. This is a new requirement.

If a quorum attends without being physically present at the designated location, then at least 24 hours before the meeting or as soon as practicable prior to an emergency meeting, the body shall (1) "publicly announce" the meeting, (2) post a meeting notice in or near the clerk's office and at least 2 other designated public places in the city, (3) designate in the public announcement and posted notice at least 1 physical location where a member of the public can attend and participate in the meeting, and (4) ensure that at least one member of the body or at least one staff or designee of the body is physically present at each designated meeting location. *Act 143, § 2 amending 1 V.S.A § 312 (a) (2).* These are new requirements.

Remember that voting may not be done by email or proxy, because it must be done in open session.

Notice

All meetings of public bodies must be noticed. Any adjourned meeting is considered a new meeting unless the time and place for the adjourned meeting is announced before the meeting adjourns. *1 V.S.A. § 312 (c)(4).* All regular meetings must have the time and place of the meeting clearly designated by either statute, charter, regulation, ordinance, bylaw, resolution, or other legitimate action of the body; however, this information must be made available to any person upon that person's request. The request does not need to be in writing. *1 V.S.A § 312 (c) (1).* None of this is a change to existing law. It is recommended that each public body that plans to meet on a regular basis act formally (by making a motion, for example) to adopt a regular meeting schedule.

"Special" meetings are those meetings that don't qualify as being either "regular" or "emergency." This means that all meetings that are not pre-designated in time or place by an authorized means (e.g. resolution) are either special or emergency meetings. The time, place, and purpose of a special meeting must be "publicly announced" at least 24 hours before the meeting. *1 V.S.A § 312 (c)(2).* Again, this is not a change from existing law.

"Publicly announced" means that a notice is sent to an editor, publisher, or news director of a newspaper or radio station serving the area in which the body has jurisdiction and to any person who has requested notice in writing—this written notice being good only for the calendar year in which it is made unless it is made in December, in which case it goes through the next year. *1 V.S.A §§ 310 (4), 312 (c)(5).* The newspaper and radio notices, therefore, must be sent to, at a minimum, one paper or radio station that serves Burlington. While the requirement of providing public announcements to the media is not new, the ability of any person to request personal notice of special meetings is new; that ability was previously limited to media personnel.

"Special" meeting notices must be posted in or near the City Clerk's Office and in at least 2 other designated public places in the city at least 24 hours before the meeting. *1 V.S.A. §312(c)(2).* The City Council has designated the posting places as noted below. Notice of the special meeting must also be given to each member of the body (orally or in writing) at least 24 hours before the meeting (except the member may waive notice). *Id.*

In addition to posting the notice of a regular or special meeting, the amended law requires that the agenda for the meeting must also be posted; these could be printed on the same page. For a regular meeting, the agenda must be posted at least 48 hours before the meeting in four places: on the City's website, in or near the municipal office and in at least two other public places. The City Council has designated the following locations for all municipal public notices: outside the Clerk/Treasurer's Office, on the Fletcher Free Library bulletin board, and on the bulletin board at the Parks/Public Works building on Pine Street. The agenda for a special meeting must be posted in the same places at least 24 hours before the meeting. Agendas must be made available to any person before the meeting on request, oral or written, and any person (previously this just applied to news media) may request in writing (for the calendar year) that s/he be notified of all special meetings of a public body. When such a request is received, both the clerk of the public body and the Clerk/Treasurer's Office should be informed.

Another new requirement is that additions to or deletions from an agenda must be made as the first act of business at the meeting, but any other adjustment can be made at any time during the meeting. *Act 143, § 2, amending 1 V.S.A. § 312 (d).* We believe this means you can still vote to table or postpone action on a matter when you get to it on the agenda, as that is taking an action on the item.

"Emergency" meetings are meetings needed to respond to an unforeseen occurrence or condition that requires immediate attention by the body. Emergency meetings can be held without a public announcement, without posting any notice, and without giving members 24 hour notice as long as some public notice is given as soon as possible before the meeting. There was no change in this provision of the law. *1 V.S.A. § 312 (c)(3).*

Minutes

Minutes must be taken of all meetings of public bodies. *1 V.S.A. § 312 (b).* The minutes must cover all topics and motions that come up in the meeting and give a true indication of the business that occurred in the meeting. Because the minutes are the basic notes of the meeting, a record of what was done, the audio or video recording of the meeting cannot be used as the minutes of that meeting.

There is no change to the requirements of the content of the minutes: Minutes must still include at least (1) a listing of all members of the body who were present, (2) a listing of all the other "active" participants in the meeting, (3) all the motions, proposals, and resolutions that were made, offered, and considered and what happened with them, and (4) the results of any votes, with a record of individual votes if a roll call is taken. *1 V.S.A § 312 (b) (1).* None of this is a change from existing law.

Minutes are public records and must be kept by the clerk of secretary of the body and must be available for inspection within 5 days from the date of the meeting. The new law, however, requires that the minutes be posted no later than 5 days from the meeting date to the body's designated website. *Act 143, § 1 amending 1 V.S.A § 312 (b) (2).* The City Council has designated the City's website, www.burlingtonvt.gov, as the designated website for posting.

Because for most of the City's bodies, the minutes will not be adopted within 5 days, they may posted as "subject to approval" or "draft" until approval is obtained.

Executive sessions

Members may go into executive session (which means a session from which the public is excluded) only for certain specific, limited purposes. *1 V.S.A. § 313(a).* To go into executive session there must be a vote by a majority of those members who are present in an open meeting, and the result of that vote must be recorded in the minutes. There must be a motion to go into the session, and the motion must indicate the nature of the executive session's business by specifically stating which of the permissible purposes in the statute apply. No other business may be conducted in the session. *1 V.S.A. § 313 (a).* None of these requirements is new.

No formal action can be taken in executive session except for actions relating to the securing of options for the purchase or lease of real estate. Therefore, if the public body needs to take action, it must come out of executive session, resume its public meeting, and then take the action needed. *1 V.S.A. §313(a).* No minutes of the session need to be taken and if they are, they are not made public by the provisions of § 312 (b). Again, none of these reasons is new.

These are the only reasons an executive session can only be held under 1 V.S.A. § 313:

(1) If the public body makes a specific finding that premature general public knowledge would clearly place the body or a person involved at a substantial disadvantage, the body can go into executive session to discuss contracts, labor agreements with employees, arbitration or mediation, non-tax grievances, pending or probable civil litigation or a prosecution to which the body is or may be a party, or confidential attorney-client communications made to provide professional legal services to the body. The requirement of a specific finding is new, and the legal topics have been changed. A statement of that finding of substantial disadvantage should be placed on the record as a motion. Then, a vote should be taken on that finding. Then a separate motion should be made to go into executive session. For instance, in the case of a contract under negotiation, the motion might be: "I move to find that premature general public knowledge of the city's contract with ABC Company would clearly place this council at a substantial disadvantage because the council risks disclosing its negotiation strategy if it discusses the proposed contract terms in public." In this hypothetical situation, the "substantial disadvantage" is the risk of losing the competitive edge in the negotiations by talking about the specific terms in public. For instance, once ABC Company hears the council talk about the maximum price it can afford to pay, ABC Company may refuse to take anything less than that amount. The second motion follows from the first and should recite the specific statutory provision that gives authority to enter into such session. For instance: "Based on the finding of substantial disadvantage, I move that we enter into executive session to discuss the city's contract with ABC Company under the provisions of Title 1, Section 313(a)(1)(A) of the Vermont Statutes."

(2) The body can go into executive session to discuss the negotiating or securing of real estate purchase or lease options.. The word "lease" is new.

(3) The body can go into session to discuss the appointment or employment of a public officer or employee, but the body must make a final decision to hire or appoint in an open meeting and must explain the reasons for its decisions at the open meeting. The requirement to explain reasons for hiring or appointment in public session is new.

(4) The body can go into executive session to discuss a disciplinary or dismissal action against a public officer or employee, although the officer or employee has a right to a public hearing if formal charges are brought. This provision is unchanged.

(5) The body can go into executive session to discuss a clear and imminent peril to public safety. This provision is unchanged.

(6) The body can go into executive session to discuss records that are exempt from disclosure under the Public Records Act as long as the discussion of the record does not extend into the general subject to which the record pertains (unless it meets another purpose for executive session and that purpose has been stated on the record). There was some change to the language of this provision, but no real substantive changes.

(7) The body can go into executive session to discuss the academic records or suspension or discipline of students. This provision is unchanged.

(8) The body can go into executive session to discuss municipal or school security or emergency response measures if the disclosure could jeopardize public safety. This is a new provision.

Exceptions to Requirements:
Quasi-judicial proceedings, site inspections, & routine day-to-day administrative matters

The deliberations of a quasi-judicial public body are not subject to the requirements of §§ 312 or 313 (executive sessions). *1 V.S.A. §312(e).* That means they are not required to be open to the public; prior notice and agendas do not have to be posted; and minutes do not have to be kept. A quasi-judicial proceeding is a proceeding in which the legal rights of a person or persons are adjudicated, which is conducted in a way so all parties have the chance to present evidence and cross examine witnesses, and which results in an appealable written decision. *1 V.S.A. §310(5).* Please note that this only applies to the deliberations of that body. Deliberations do not include conducting business matters (electing officers, for example), taking evidence, or hearing the arguments of the parties--these sections of the meeting must be open to the public. *1 V.S.A. §§ 312 (e).*

Similarly, the written decision of a quasi-judicial proceeding need not be adopted at an open meeting, as long as the decision will be a public record, *1 V.S.A. sec. 312 (f).* This exemption means that after all the evidence has been taken, and the public body has entered into a deliberative session, it may discuss drafts of a written decision or issues that have arisen while preparing the written decision by email or phone without holding a formal meeting. This is intended to be a limited exception, however.

Also, site inspections for assessing damage or making tax assessments or abatement are not subject to the open meeting law. Neither is clerical work or staff work assignments. Routine day-to-day administrative matters that don't require action by the body can be conducted outside of a meeting as long as no money is appropriated, expended, or encumbered. *1 V.S.A. § 312 (g).*

Enforcement and Response to Complaints

Learning these changes to the Open Meeting Law is important because a member of a public body or another person, on behalf of the public body, who knowingly and intentionally violates these provisions or knowingly and intentionally participates in the wrongful exclusion of a person from an open meeting shall be guilty of a misdemeanor and shall be fined up to $500. While members of public bodies were subject to these remedies in the past, staff or other persons acting on their behalf had not been explicitly included.

The law delays the effective date for prosecutions of violations of posting to the website so that a failure to post minutes of a meeting held before July 1, 2015 will not be subject to prosecution for knowingly and intentionally violating the law. *Act 143, § 4, amending 1 V.S.A. § 314 (a).* But starting next year, the failure to post will be subject to prosecution.

The new law now requires the Attorney General or an aggrieved party to notify the public body in writing of the specific violation and request a specific cure; if the public body cures the violation, it will not be liable for attorney's fees or costs. *1 V.S.A. §314(b)(1).*

The new law also now requires a public response to any written notice of the violation. *1 V.S.A. §314(b)(2).* When the public body receives a written notice from the AG or any other aggrieved person, asserting that there is a violation and requesting a cure, the public body must respond within seven business days by acknowledging the violation and stating an intent to cure it within 14 calendar days or by stating that it has determined there is no violation. *Id.*

Logistically, this means that the public body must immediately call a special meeting and provide adequate notice and warning of that meeting, including an agenda. During the meeting, the body should publicly discuss the situation and determine whether there was an inadvertent violation of the law. Based on this determination, it should issue a statement that either denies the allegation and states that no cure is necessary, or acknowledges that there was an inadvertent violation that will be cured within 14 calendar days. The public body should not publicly acknowledge a violation that is anything other than inadvertent without specific legal advice to do so. In the event that the public body is sued for a violation of the law, the court will assess attorneys' fees and costs based in part on whether there was a timely response to a notice of violation. *1 V.S.A. § 314(d).*

Members of public bodies who receive a written complaint (including email) should immediately forward it to the chair of the public body, the City Attorney's Office, and the CAO so that the appropriate response may be made within the seven business days required. The chair of the public body is responsible for ensuring that the response is ultimately made, but that

response should not be made until the chair has consulted with the City Attorney's Office. The failure of a public body to respond within seven business days is treated as a denial. *1 V.S.A. §312(b)(3).*

The cure that must occur within 14 calendar days, if the public body finds a violation, is made by either ratifying or declaring as void any action taken at (or resulting from) the meeting that was in violation and adopting specific measures that actually prevent future violations. *1 V.S.A. §314(b)(4).* This requirement to respond and cure is new. Thus, how to cure a violation should be discussed with the City Attorney's Office before the cure is carried out.

The AG or any person aggrieved by a violation may bring an action in state civil court, but no later than one year after the meeting involved. *1 V.S.A. §314(c).* This one-year limitation is new. If a court finds a violation, it must assess reasonable attorney's fees and costs incurred unless the public body had a reasonable basis in fact and law for its position and acted in good faith. Part of that good faith requires responding to the notice of violation in a timely manner. The court also need not assess attorney's fees and costs if the public body cured the violation. *1 V.S.A. section 314(d).*