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OML 2014 – 42

Regina Tate, Esq.
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Crown Colony Plaza
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Quincy, MA 02169

RE: Open Meeting Law Complaint

Dear Attorney Tate:

This office reviewed two complaints alleging that the Wayland School Committee (the Committee) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The first complaint, by George Harris, was originally filed with the Committee on or about June 27, 2013, and a request for further review of this complaint was filed with our office on September 5, 2013. The second complaint, by Donna Bouchard, was originally filed with the Committee on or about July 1, 2013, and a request for further review of this complaint was filed with our office on September 11, 2013. You responded to both complaints on behalf of the Committee by letters dated July 22, 2013.¹

Both complaints allege that, on June 3, 2013, the Committee entered into executive session to comply with G.L. c. 214, § 1B, during the discussion of a personnel matter. The complaints allege that the Committee entered executive session under an improper purpose, that the Committee followed improper procedure in convening the executive session, and that the agenda item, "Personnel Matter," included in the meeting notice was insufficiently specific.

We find that the Committee violated the Open Meeting Law by meeting in executive session on June 3, 2013 for an improper purpose, by utilizing improper procedure to convene the executive session, and by failing to include sufficient detail in the notice for this executive session meeting. We find that the last violation was intentional. In reaching this determination, we reviewed the June 27, 2013 and July 1, 2013 complaints filed with the Committee; the

¹ For the purpose of clarity, we will refer to you in the third person hereafter.



Committee's July 22, 2013 response; the September 5, 2013 and September 11, 2013 complaints filed with our office; a memorandum of law accompanying Mr. Harris' complaint; the minutes of the Committee's June 3, 2013 open session meeting; the redacted minutes of the Committee's June 3, 2013 executive session meeting; a letter from Sullivan, Rogers & Company, LLC, a certified public accounting firm, to the Town of Wayland; a fraud examination report compiled by Daniel M. Sullivan of Sullivan, Rogers & Company, LLC; a MetroWest Daily News article headlined "Wayland school employee fired for unauthorized account access," dated September 23, 2013; a letter from Donna Bouchard, dated October 4, 2013; and the agenda for the June 3, 2013 meeting. Additionally, we spoke by telephone with Mr. Harris, Ms. Bouchard, Attorney Tate, Committee Chair Barbara Fletcher, and Superintendent of Schools Paul Stein in September and October of 2013.

FACTS

Because our review of the material listed above included executive session minutes that remain confidential, we are unable to provide a full recitation of the facts. The publicly available facts are as follows:

The Committee timely posted notice for its June 3, 2013 meeting. The agenda indicated that the Committee would meet in an executive session on a variety of topics, including "(b) Personnel Matter" without further explanation. During the meeting, the chair stated that she would entertain a motion to enter executive session. Another member of the Committee moved to enter executive session "for section 30A/21(a)(7) which is to comply with another law, which is Massachusetts General Law Chapter 214, Section 1B, which is the right of privacy. This is a personnel matter." The Committee so moved and, after a roll call vote, entered an executive session.

The portion of the executive session at issue here concerned an employee who was accused of accessing accounting software without proper authorization. The Superintendent later terminated the employee. The Committee and the Superintendent assert that power to terminate employees of the School District rests with the Superintendent.

DISCUSSION

The Open Meeting Law requires that meetings of a public body be conducted in an open session, with some exceptions. G.L. c. 30A, §§ 20-21. Public bodies may enter a closed, executive session for any of ten purposes enumerated in the Open Meeting Law, provided that the chair of the public body first announces in open session the purpose for the executive session, "stating all subjects that may be revealed without compromising the purpose for which the executive session was called." G.L. c. 30A, § 21(b)(3). The exceptions to the general rule that meetings of a public body shall be open are narrowly construed. See McRea v. Flaherty, 71 Mass. App. Ct. 637, 641 (2008). The public body bears the burden of demonstrating applicability of the relevant exception as the reason for the executive session. See District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 566 (2009).

Additionally, the Open Meeting Law requires that public bodies post notice 48 hours prior to a meeting and include a “listing of topics that the chair reasonably anticipates will be discussed at the meeting.” G.L. c. 30A, § 20(b). Public bodies must list topics for discussion with “sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 CMR 29.03(1)(b). We generally consider a topic sufficiently specific when a reasonable member of the public could read the topic and understand the anticipated nature of the public body’s discussion. OML 2011-44.² Executive session topics must include as much detail as possible without compromising the purpose for which the executive session was called. District Attorney for N. Dist., 455 Mass. at 567 (“[a] precise statement of the reason for convening in executive session is necessary under the open meeting law because that is the only notification given to the public that the school committee would conduct business in private, and the only way the public would know if the reason for doing so was proper or improper.”); see G.L. c. 30A, §§ 20(b), 21(b)(3); 940 CMR 29.03(1)(b).

1. The Board improperly entered executive session under Purpose 7 because the issue discussed was not protected by the statutory right to privacy.

One of the ten permissible reasons for executive session is “[t]o comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements.” G.L. c. 30A, § 21(a)(7) (Purpose 7). A public body entering executive session under Purpose 7 must state the specific law that requires the public body to keep its deliberations confidential. See District Attorney for N. Dist., 455 Mass. at 569 (explaining proper use of Purpose 7 to enter executive session requires enumeration of enabling law).

At its June 3, 2013 meeting, the Committee voted to enter into executive session under Purpose 7 “to comply with another law, M.G.L. Chapter 214 (1) (b), which relates to a person’s right to privacy” The right to privacy embodied in G.L. c. 214, § 1B proscribes the “disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest.” Bratt v. International Business Machs. Corp., 392 Mass. 508, 518 (1984); see also Howell v. Enterprise Publ. Co., 72 Mass. App. Ct. 739, 749 (2008), overturned on other grounds, 455 Mass. 641 (2010). The subject of the executive session at issue here was an investigation concerning unauthorized access to the Town’s accounting software by an employee. The Committee’s unwillingness to subject the reputation of the employee to public scrutiny prior to any public discussion of the actions of the employee served as its justification for invoking the individual’s statutory right to privacy.

The Committee’s invocation of the statutory right to privacy to convene this executive session was in error. “[I]n order to be an actionable invasion of privacy, the facts disclosed about a person must be of no legitimate public concern.” Howell, 72 Mass. App. Ct. at 749. The discussions that took place during the executive session involved the implications of unauthorized access to municipal accounting software by a public employee and the risk of -- if not the actual -- unauthorized shifting and paying out of public funds. Such a discussion of the disposition of public monies is a matter of legitimate public concern. See id. at 750; George W.

² Open Meeting Law determinations may be found in the Attorney General’s website, www.mass.gov/ago/openmeeting.

Prescott Publ. Co. v. Register of Probate for Norfolk County, 395 Mass. 274, 279 (1985) (legitimate public interest in knowing that public servants perform duties efficiently and lawfully). Furthermore, no evidence demonstrates that the conversation turned to issues of a highly personal or intimate nature. Therefore, the statutory right to privacy was not a valid justification for entering executive session because a legitimate, countervailing public interest existed.³

Notwithstanding the inapplicability of Purpose 7, the discussion was of the sort that may be held behind closed-doors. If the Committee wished to discuss the matter in private to protect the employee's reputation, it could have done so by citing the executive session purpose allowing discussion of "reputation, character . . . discipline or dismissal of, or complaints or charges brought against, a public employee, staff member or individual." G.L. c. 30A, § 21(a)(1) (Purpose 1).⁴ The Committee's stated intent—to protect the reputation of the individual who was the subject of the executive session discussion—falls squarely within the policy underlying executive session Purpose 1. See OML 2013-20. When relying on executive session Purpose 1, the Open Meeting Law does require that the individual being discussed be afforded certain procedural protections. See G.L. c. 30A, § 21(a)(1). For example, the individual must be notified in writing by the public body at least 48 hours prior to the proposed executive session. G.L. c. 30A, § 21(a)(1). The individual must also be afforded the right to be present during deliberations that involve that individual, the right to speak on his or her own behalf, the right to have counsel present, and the right to have an independent record of the meeting made at the individual's own expense. Id. Because the Committee did not afford the employee these rights, the executive session discussion of the "personnel matter" was not properly held under this purpose either.⁵ See id.

³ In support of its position, the Committee cites OML 2013-23, in which a public body entered executive session to discuss recouping a vacation overpayment to a deceased employee. In the notice and at the meeting at issue in that complaint, the public body cited as the basis for its executive session Purpose 3, "[t]o discuss strategy with respect . . . to litigation . . ." G.L. c. 30A, § 21(a)(3). After an Open Meeting Law complaint was filed, the public body revised its meeting notice to add additional executive session purposes that it believed justified the executive session, including Purpose 7 to comply with G.L. c. 214, § 1B. We acknowledge that dicta in that decision suggested the Purpose 7 justification may have been appropriate, and therefore do not find the Committee's violation in this respect to be intentional. We note, however, that our finding in OML 2013-23 that the executive session was proper was based entirely on the purpose cited by the public body at the time the executive session occurred – Purpose 3.

⁴ Our discussion of Purpose 1 as an alternative for entering executive session is not to the exclusion of any other purpose the Committee may have utilized, though we find it an appropriate choice. We address the suitability of Purpose 1 as an alternative only because both complaints argued that the Committee should have notified the individual who was the subject of the executive session discussion and afforded him the procedural protections set forth in Purpose 1.

⁵ Furthermore, the Committee argues that Purpose 1 was inapplicable because the sole authority to terminate the employee's tenure lay with the Superintendent and the Committee could take no action. The Committee therefore characterizes the Superintendent's report on the employee's actions as an "update" and not a "discussion" under Purpose 1. The plain language of Purpose 1 makes no reference to whether the public body has the power to act upon the complaint or charges laid against a public employee. The nature of the deliberation—not the power of the public body—governs the applicability of this executive session purpose.

Accordingly, we order, as a remedial measure, the public release of the portion of the June 3, 2013 executive session minutes related to the “Personnel Matter” as well as any documents used by the Committee during that executive session discussion. See G.L. c. 30A, § 22(f) (minutes of an executive session may be withheld from disclosure to the public as long as publication may defeat the lawful purposes of an executive session, *provided that the executive session was held in compliance with the Open Meeting Law*); OML 2014-30; OML 2014-17. Prior to such release, the Committee shall give 7 days written notice to the subject of the executive session that the release of the minutes is imminent.

2. The Committee Improperly Entered Executive Session When a Member Other Than the Chair Stated the Purpose for the Executive Session.

Mr. Harris’ complaint also alleges that the Committee failed to follow proper procedure to enter into executive session because a member of the Committee other than the Chair stated with insufficient precision the purpose for the executive session. The Open Meeting Law specifically states that the Chair shall state the purpose for the executive session. G.L. c. 30A, § 21(b)(3); OML 2013-170. Although the Chair did not herself state the purpose for the executive session, a member of the Committee did state the purpose prior to the vote to enter into executive session, and the statement contained sufficient detail. We therefore find that the Committee relayed the necessary information to enter executive session but did not fully comply with the procedural requirements for entering into executive session. This procedural deficiency was a violation of the Open Meeting Law.

3. The Topic “Personnel Matter” in the Committee’s Posted Notice was Insufficiently Specific.

Mr. Harris’ complaint also alleges that the executive session topic listed in the meeting notice lacked sufficient specificity. The agenda item “Personnel Matter” was the only posted notice for the portion of the executive session in question. As we stated in a prior determination directed to the Committee, “personnel” is not a sufficiently specific statement of the purpose for an executive session. OML 2011-9. At a minimum, the Committee should have stated in its notice the statutory purpose that formed the basis for the executive session it anticipated 48 hours in advance. Doing so would have provided the public with more information about the Committee’s intended discussion without compromising the purpose for the executive session. See OML 2013-141. We therefore find the Committee’s notice was insufficiently specific to comply with the requirements of the Open Meeting Law.

Furthermore, the Committee was advised by the Attorney General previously that the language used in its notice did not comply with either the current or the prior version of the Open Meeting Law.⁶ See OML 2011-9. Although the prior decision by our office did not order remedial action, as the violations occurred prior to the date the Attorney General assumed responsibility for enforcing the Open Meeting Law, it clearly advised the Committee of the

⁶ The Supreme Judicial Court also reviewed the Committee’s use of this language and found it insufficient to satisfy the requirements of the Municipal Open Meeting Law in effect prior to July 1, 2010. District Attorney for the N. Dist. v. School Committee of Wayland, 455 Mass. 561 (2009).

requirements of the current law. See OML 2011-9. While the Committee's makeup has changed slightly since that decision was issued, a quorum of the body's members served on the Committee at the time of both offenses. See OML 2013-163. Accordingly, because we find that the Committee had been previously advised by the Attorney General that this conduct violated the Open Meeting Law, we find that this violation was intentional. See G.L. c. 30A, § 18; 940 CMR 29.02; OML 2013-63. We refer this matter for a hearing pursuant to 940 CMR 29.07(3) and recommend that the Committee be assessed a fine of \$1,000 pursuant to G.L. c. 30A, § 23(c) ("Upon the finding of a violation, the attorney general may issue an order to . . . impose a civil penalty upon the public body of not more than \$1,000 for each intentional violation"). We invite counsel for the Committee to contact this office to discuss the hearing process.

CONCLUSION

For the reasons stated above, we find that the Committee violated the Open Meeting Law. In addition to referring this matter to a hearing on the issue of an intentional violation of the Open Meeting Law, we order the following remedial action:

1. Immediate and future compliance with the Open Meeting Law, G.L. c. 30A, §§ 18-25, and the Attorney General's Open Meeting Law Regulations, 940 CMR 29.00 et seq.;
2. Following written notice to the subject of the executive session discussion, publicly release of the portion of the June 3, 2013 executive session minutes related to the "Personnel Matter," as well as any documents used by the Committee during that executive session discussion.

We now consider the complaints addressed by this determination to be resolved. This determination does not address any other complaints which may be pending with our office or the Committee. Please feel free to contact the Division at (617) 963-2540 if you have any questions.

Sincerely,



Mark M. Higgins
Assistant Attorney General
Division of Open Government

cc: Wayland School Committee
George Harris
Donna Bouchard

This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by this order may obtain judicial review through an action filed in Superior Court pursuant to G.L. c. 30A, § 23(d). The complaint must be filed in Superior Court within twenty-one days of receipt of this order.