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March 25, 2021

OML 2021 – 41

Donald Coburn
Chair, Select Board
Town of Monterey
435 Main Road, P.O. Box 308
Monterey, Ma 01245

By email only: admin@montereyma.gov

RE: Open Meeting Law Complaint

Dear Mr. Coburn:

This office received a complaint from John Weingold on September 7, 2020, alleging that the Monterey Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaint was originally filed with the Board on June 23, and you responded, on behalf of the Board, by letter dated July 1. The complaint alleges that the Board i) failed to create sufficient minutes of meetings; ii) deliberated outside of properly posted meetings; iii) failed to discuss certain topics, such as the Town Administrator job description and the Collins Center report, listed on meeting notices; and iv) placed an article on the Town Warrant without any open session discussion. All of these allegations are deemed to have occurred during meetings held between March 18 and June 10.

We appreciate the patience of the parties while we reviewed this matter. Following our review, we find that the Board violated the Open Meeting Law by deliberating outside of a properly posted meeting via email. We find that the Board did not violate the Open meeting Law in the other ways alleged. We decline to review allegations that pertain to the sufficiency of notices of seven meetings held between April 18 and May 20, as well as the sufficiency of minutes of five meetings held between March 18 and April 22 for the reasons discussed below. In reaching this determination, we reviewed the original complaint, the Board’s original and supplemental responses to the complaint, and the complaint filed with our office requesting further review. We also reviewed the notices and open session minutes of the Board meetings held on May 13, May 20, June 3, and June 10.

¹ All dates in this letter refer to the year 2020.

FACTS

We find the facts as follows. The Board is a three-member public body; thus two members constitute a quorum. The complainant is a member of the Board.

In March, the Collins Center for Public Management at UMass Boston issued a report reviewing the functions and services performed at Monterey Town Hall and whether the Town would be better served by having a Town Administrator. Between January 1 and February 24, prior to the issuance of the report, all three Board members² provided suggestions and comments on the report to an individual at the Collins Center; the suggestions and comments were emailed directly to the individual at the Collins Center but were also copied to all Board members. Specifically, the emails included members' thoughts and opinions on whether certain sections of the report should be rephrased or removed, whether characterizations of the Town were false or misleading, and whether Board members' generally agreed with the conclusions reached in the report regarding the need for a Town Administrator. Additional facts will be presented where applicable in the Discussion section that follows.

The Board duly posted notices for meetings to be held on May 13, May 20, June 3, and June 10. One topic listed on each of these four notices was the following: "Continue work on Town administrator job description, review of Collins Center report recommendations and process for moving forward in recruitment." The May 13, May 20, June 3, and June 10 meetings were held as planned. However, the Board did not discuss the Town Administrator topic or the Collins Center report during any of these four meetings.

DISCUSSION

I. The Board Did Not Violate the Open Meeting Law by Failing to Discuss a Topic Listed on Meeting Notices.

The Open Meeting Law requires that public bodies post notice of every meeting "at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays" and that the notice include "the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting." G.L. c. 30A, § 20(b).

The complaint alleges that the Board included a topic on the notices of nine meetings held between April 18 and June 10 but did not discuss that topic. Complaints alleging violations of the Open Meeting Law must be filed with the public body within 30 days of the alleged violation. G.L. c. 30A, § 23(b). When an alleged violation occurs during an open meeting, the alleged violation is reasonably discoverable at the time it occurs. See OML 2014-85; OML 2012-52.³ Here, all nine meetings were held in open session. As such, any violation concerning

² We note that the complainant did not become a member of the Board until July 2020. As such, when we refer to Board members, we specifically mean Kenneth Basler, Donald Coburn, and Steven Weisz. Kenneth Basler is no longer a member of the Board but Donald Coburn and Steven Weisz are still members of the Board.

³ Open Meeting Law determinations and declinations may be found at the Attorney General's website, <https://www.mass.gov/the-open-meeting-law>.

the notices and discussions that occurred during those meetings could have been discovered at the time the meeting occurred. See OML Declination 12-18-20 (Pembroke Board of Health); OML Declination 3-3-14 (Sterling Board of Selectmen). Where the complaint at issue here was filed with the Board on June 23, we limit our review to the Board meetings held on June 3 and June 10 and decline to review any allegations raised in the complaint for meetings held between April 18 and May 20.

The notices for the June 3 and June 10 meetings included a topic to discuss the job description for a new Town Administrator and review the Collins Center report. However, the Board did not discuss either of these matters during the June 3 or June 10 meeting. While the Open Meeting Law requires that a meeting notice list all topics the chair reasonably anticipates will be discussed during a meeting, the law does not prohibit a public body from removing, postponing, or declining to discuss a topic listed on a meeting notice. See OML 2014-35; 2012-23. In fact, the Open Meeting Law does not require a public body to discuss any topic. See OML 2015-73; OML 2014-98; OML 2013-64; OML 2012-23. Thus, the Board did not violate the Open Meeting Law by deciding not to discuss the topics at its June 3 and June 10 meetings.

The complaint also alleges that the Board placed “Article 19” on the Town Warrant without any open session discussion. This allegation does not identify when such discussions occurred, and our office will not conduct broad audits of public bodies based on such generalized allegations. See OML 2014-119; OML 2012-106. The Board admits that it did not discuss this article but “that it has been on the annual warrant for many years.” However, as previously stated, the Open Meeting Law does not require a public body to discuss any topic nor does it require a public body to deliberate on a matter prior to voting on that matter. See OML 2019-130. To the extent that the complainant is concerned that the Board exceeded its authority in placing such an article on the Town Warrant, the Division of Open Government is charged specifically with reviewing complaints to determine compliance with the Open Meeting Law, G.L. c. 30A, §§ 18-25. Thus we decline to review, and offer no opinion on, whether any actions taken by the Board could be a violation of some other law, including Town bylaws, outside the scope of the Division’s review. See OML Declination 1-19-16 (Southborough Zoning Board of Appeals); OML Declination 3-11-13 (Abington Conservation Commission).

II. We Find the Board’s Meeting Minutes to be Sufficiently Detailed.

The Open Meeting Law requires that a public body “create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting, including the record of all votes.” G.L. c. 30A, § 22(a). When reviewing minutes for compliance with the Open Meeting Law, we look for substantial compliance with the accuracy requirement. See OML 2016-105; OML 2013-64. By substantial compliance, we mean that the minutes should contain enough detail and accuracy so that a member of the public who did not attend the meeting could read the minutes and have a clear understanding of what occurred. See OML 2012-106. Meeting minutes must include more than a statement that a public body held a discussion about a specified topic; the law requires that the minutes summarize the discussions that were held. See OML 2019-167; OML 2018-8.

With respect to the requirement to list in the minutes all documents and exhibits used by the public body during the meeting, the Open Meeting Law does not define what it means for a document to be used at a meeting but, at a minimum, it is clear that where a document is physically present, verbally identified, and the contents are discussed by the members of a public body during an open meeting, it has been “used” for purposes of the Open Meeting Law. See OML 2014-12; OML 2012-42. As such, any documents that are physically present, verbally identified, and discussed during a meeting must be separately listed in the minutes. It is not enough that those documents are simply referenced in the body of the minutes or that the minutes include a digital link to the documents. See OML 2019-29; OML 2018-70.

The complaint alleges that minutes of Board meetings held between March 18 and June 10 are either insufficiently detailed or inaccurate. We decline to review the sufficiency of the minutes of Board meetings held on March 18, April 1, April 7, April 15, and April 22 where the minutes of these five meetings were approved by the Board during meetings held between April 1 and April 29. When a public body approves open session minutes, any complaints regarding the sufficiency or accuracy of those minutes must be filed within 30 days of the meeting during which they were approved. See OML Declination 9-4-12 (Manchester-by-the-Sea Zoning Board of Appeals); OML Declination 5-14-12 (Sheffield Planning Board). The complaint here was filed on June 23, more than 30 days after the date that the Board approved these five sets of minutes, and we therefore find these allegations to be untimely and decline to review them. See OML Declination 10-21-20 (Massachusetts Maritime Academy Board of Trustees); OML Declination 7-2-18 (Pembroke Planning Board); OML Declination 1-13-14 (Ashfield Select Board).

With respect to the minutes of Board meetings held on May 13, May 20, June 3, and June 10, we find that the complaint was filed within 30 days of the dates that each of these four sets of minutes were approved, which was between June 3 and June 17, and therefore consider these allegations to be timely. Specifically, the complaint alleges that these minutes are i) inaccurate because they do not include enough detail regarding the Board’s discussions of a new Town Administrator position or the Collins Center report and ii) insufficiently detailed because they fail to include a list of documents used during each meeting that pertain to the Town Administrator position. Although the notices for each of these four meetings included a topic to discuss the job description for a new Town Administrator and review of the Collins Center report, the Board did not discuss either of these topics during the May 13, May 20, June 3, or June 10 meetings. Because the Board did not discuss the Town Administrator position or the Collins Center report during its May 13, May 20, June 3, and June 10 meetings, the minutes necessarily do not include any reference to those topics. See OML 2020-75 (our office reviews meeting minutes to ensure that they accurately reflect the discussions that take place during meetings). As such, we find that the minutes are accurate and sufficiently detailed, and the Board therefore did not violate the Open Meeting Law.

III. We Find that a Quorum of Members Improperly Deliberated via Email.

The Open Meeting Law was enacted “to eliminate much of the secrecy surrounding deliberation and decisions on which public policy is based.” Ghiglione v. School Board of Southbridge, 376 Mass. 70, 72 (1978). The Open Meeting Law defines a “meeting,” in relevant

part, as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. The law defines “deliberation” as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that ‘deliberation’ shall not include the distribution of other procedural meeting [sic] or the distribution of reports or documents that may be discussed at a meeting, provided than no opinion of a member is expressed.” Id. For the purposes of the Open Meeting Law, a “quorum” is a simple majority of the members of a public body. Id.

The complaint generally alleges that a quorum of the Board deliberated by email between March 18 and June 10 to discuss the Town Administrator position and the Collins Center report. Complainants must allege violations with a degree of specificity, as our office will not conduct broad audits of public bodies based on generalized allegations. See OML Declination 3-20-12 (Wilmington Board of Assessors). Here, we confine our review to the emails that were exchanged among the Board between January 6 and February 24 and which were provided to this office by the complainant.⁴

We find that the emails contain improper deliberations because these emails reached a quorum of the Board and included members’ opinions on or suggested resolutions of matters to be discussed by the Board and within the Board’s jurisdiction, namely, issues regarding whether to hire a Town Administrator. See OML 2018-118; 2015-3; OML 2014-108; OML 2013-136; Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 243 (2018). Moreover, we note that a February 10 email sent from Board member Donald Coburn to the other two Board members to also be improper deliberation where it included an attachment containing his thoughts and opinions regarding the Board’s “next steps” with respect to a possible Town Administrator position, even though the body of the email did not contain his thoughts and opinions. See Boelter, 479 Mass. at 241 citing Revere v. Massachusetts Gaming Comm’n, 476 Mass. 591, 610 (2017) (“the Legislature specified that no opinion of a board member could be expressed in any documents circulated to a quorum prior to an open meeting”). The expression of an opinion of by one public body member on matters within the body’s jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds. See OML 2016-104; OML 2015-33; OML 2012-73. Moreover, the Open Meeting Law does not carve out an exception to the definition of “deliberation” for discussions that do not result in a decision or vote. We find that the Board violated the Open Meeting Law by deliberating among a quorum via email and order the Board to publicly release these emails within 30 days of receipt of this determination, if it has not already done so.⁵

In his request for further review, the complainant also suggests that the Board deliberated outside of a properly posted meeting “on a Google Group which is by invitation” and that “scheduling emails contain opinions about ‘priorities’ of the issues and members’ opinions.” We

⁴ We also reviewed two emails dated January 1 and January 2 that were sent from one Board member to either the individual at the Collins Center or to the Board’s Administrative Assistant but not to any other Board member. The Administrative Assistant and the individual at the Collins Center are not members of the Board or otherwise subject to the Open Meeting Law; therefore, these emails do not constitute improper deliberation where they were not shared with a quorum of the Board, even though they contained the thoughts and opinions of a Board member. See OML 2018-132; OML 2017-199; OML 2017-69; OML 2015-77; OML 2011-52.

⁵ We note that these emails have already been released to the complainant.

generally decline to review an allegation that was not included within the original complaint to the Board because the Board has not had an opportunity to respond to it. See G.L. c. 30A, § 23(b); 940 CMR 29.05(3). We find that these allegations were not raised in the original complaint and thus we do not review their merits. However, we remind the Board that while the Open Meeting Law does not restrict an individual's right to make comments to the general public via social media, it does apply to communication between or among a quorum of a public body outside of a meeting. See OML 2017-111. The communicator's intent in posting to a social media platform is relevant; whether other members of the public body happen to see the communication is not determinative. When comments are made in a social media group that is closed to the public, it is reasonably inferable that posts are directed solely at the members of that group, and, when a quorum of a public body belongs to a closed group, especially if the group is small, it becomes likely that posts and comments are targeted towards the other public body members. See OML 2018-145. In addition, a communication between a public body member and the chair for the purpose of adding a topic to a meeting agenda is not deliberation, even if the discussion is between a quorum of the public body, so long as discussion is limited to the request to add the topic to a meeting agenda. See OML 2016-7; OML 2013-4. It is not permissible, however, for the public body member to follow up on that request with a statement about why it is important that the topic be addressed by the public body or to advocate support for a certain position with respect to that topic. See OML 2014-76. We recognize that it is sometimes difficult to determine whether, under the circumstances, a given communication constitutes deliberation under the Open Meeting Law, and therefore our office specifically cautions public bodies on the use of social media and electronic communications. See OML 2017-88; OML 2014-80.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by deliberating via email and we order the Board to publicly release the emails within 30 days of receipt of this determination to the extent it has not already done so.⁶ In addition, we order immediate and future compliance with the law's requirements, and we caution that similar future violations could be considered evidence of intent to violate the law.

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

⁶ The Board may publicly release the e-mails by reading their content during a meeting and listing the e-mails in the meeting minutes, or by referencing the emails during a meeting and posting the e-mails along with the minutes on the municipal website.

Sincerely,



KerryAnne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: John Weingold: By email only – johnweingold@gmail.com

This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by a final order of the Attorney General 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 a final order.