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March 2, 2021

OML 2021 – 26

Joel B. Bard, Esq.
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101 Arch Street, 12th Floor
Boston, MA 02110

By email only: [REDACTED]

RE: Open Meeting Law Complaints

Dear Attorney Bard:

This office received complaints from Deanna Markham and Sage Radachowsky on April 28, 2020, and a complaint from Virginia Schwerin on May 4, 2020, each alleging that the Lenox Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ Ms. Markham’s complaint was originally filed with the Board on March 5, Mr. Radachowsky’s complaint was originally filed with the Board on March 9, and Ms. Schwerin’s complaint was originally filed with the Board on March 10. Chief Administrative Officer Christopher Ketchen responded to all three complaints, on behalf of the Board, by separate letters dated March 23. The complaints allege that the Board improperly met in executive session between February 1 and February 10.² Mr. Radachowsky’s complaint also alleges that the Board failed to timely release the executive session meeting minutes once the purpose for the executive session had concluded.

We appreciate the patience of the parties while we reviewed these matters. Following our review, we find that the Board met in executive session for a proper purpose but has not met

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

² Two of the complaints also allege that the Board improperly met in executive session for purposes of mediation in the Fall of 2018. Our office will not conduct broad audits of public bodies. See OML 2013-180. Nonetheless, we have reviewed minutes of Board meetings held between September 5, 2018, and December 19, 2018, and note that the Board did not convene in executive session under Purpose 9 during that time period. See G.L. c. 30A, § 21(b)(9) (a public body may convene in executive session to meet or confer with a mediator with respect to any litigation or decision on any public business within its jurisdiction involving another party, provided that the decision to participate in mediation is made in open session).

its burden of justifying continued nondisclosure of executive session minutes and therefore find that the Open Meeting Law no longer authorizes withholding of the February 5 executive session meeting minutes. At the outset, it is important to note that this decision is the result of an investigation solely into whether the Board violated the Open Meeting Law, and has no bearing on the merits of the Housatonic Rest of River Settlement Agreement or whether it is good policy, issues which underlie the complaints.

In reaching this determination, we reviewed the original complaints, the Board's responses to the complaints, and the complaints filed with our office requesting further review. In addition, we reviewed the notice and open and executive session minutes of the Board meeting held on February 5, as well as the Housatonic Rest of River Settlement Agreement and the February 6 Statement from the Housatonic Rest of River Municipal Committee.

FACTS

We find the facts as follows. In 1999, the Environmental Protection Agency, General Electric Company ("GE") and the City of Pittsfield signed a settlement agreement to clean-up the former General Electric site in Pittsfield and the first two miles of the Housatonic River which had become contaminated with polychlorinated biphenyls (PCBs). In October 2013, the municipalities of Great Barrington, Lee, Lenox, Pittsfield, Sheffield and Stockbridge entered into an Intergovernmental Agreement to begin negotiations with GE regarding compensation for damages to the municipalities associated with the contamination and clean-up of the Housatonic River. As part of the Intergovernmental Agreement, the municipalities created the Housatonic Rest of River Municipal Committee (the "Committee") to advocate common clean-up goals for the remainder of the Housatonic River. Each municipality appointed two representatives to the Committee. The members of the Committee for the Town of Lenox included the Chief Administrative Officer and one member of the Board.³

In 2016, the EPA issued a Rest of River clean-up plan requiring GE to ship all waste removed from the river out of state; GE appealed this plan. The EPA then initiated mediated negotiations between GE, the Committee, and several other interested parties. In January 2020, after years of litigation and a year of mediation, the Committee approved a settlement agreement with GE.⁴ However, the terms of the settlement agreement had to be separately approved by each of the five municipalities that were members of the Committee.

The Board duly posted notice for a meeting to be held on February 5 at 7:00 P.M. The notice listed five topics, including an executive session to discuss "Strategy with respect to ongoing litigation and mediation relative to Environmental Appeals Board proceedings between G.E. and EPA (Housatonic Rest of River cleanup)."

³ The Board is a five-member public body; thus three members constitute a quorum.

⁴ The Environmental Protection Division of the Attorney General's Office is aware of the settlement agreement and the outcome reached in the agreement but did not participate in the mediation between GE, the EPA and the Committee.

The February 5 meeting was held as planned. The Board convened in open session and discussed the noticed topics. The Board then approved a unanimous vote by roll call to convene in executive session to discuss “strategy with respect to ongoing litigation and mediation relative to Environmental Appeals Board proceedings between G.E. and EPA (Housatonic Rest of River cleanup).”

The Board met in executive session for approximately thirty minutes and reviewed the settlement agreement initially approved by the Committee. The Board voted to approve the settlement agreement and authorized Chair Edward Lane to sign and execute the agreement on behalf of the Town of Lenox.⁵

DISCUSSION

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 requires that meetings of a public body be properly noticed and open to members of the public, unless an executive session is convened. See G.L. c. 30A, §§ 20(a)-(b), 21.

A public body may enter an executive, or closed, session for any of the ten purposes enumerated in the Open Meeting Law provided that it has first convened in an open session, that a majority of members of the body have voted to go into executive session, that the vote of each member is recorded by roll call and entered into the minutes, and the chair has publicly announced whether the open session will reconvene at the conclusion of the executive session. G.L. c. 30A, §§ 21(a), (b); see also OML 2014-94. Before entering the executive session, the chair must state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called. See G.L. c. 30A, § 21(b)(3); see also District Attorney for the N. Dist. v. Sch. Comm. of Wayland, 455 Mass. 561, 567 (2009) (“[a] precise statement of the reason for convening in executive session is necessary ... because that is the only notification given the public that a [public body] would conduct business in private, and the only way the public would know if the reason for doing so was proper or improper”). This level of detail about the executive session topic must also be included in the meeting notice. See OML 2016-72.

One permissible reason to convene in executive session is “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 public body and the chair so declares.” G.L. c. 30A, § 21(a)(3) (“Purpose 3”). This purpose offers the narrow opportunity to discuss strategy with respect to litigation that is pending or clearly and imminently threatened or otherwise demonstrably likely; the mere possibility of litigation is not sufficient to invoke Purpose 3. See Doherty v. School Committee of Boston, 386 Mass. 643, 648 (1982); Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 352 (1983); OML 2012-05. When convening in executive session pursuant to Purpose 3, a public body should identify the litigation matter to be discussed, if doing so will not compromise the lawful purpose for secrecy. See OML 2016-12; OML 2013-97. While we generally defer to a public body’s assessment of whether the inclusion

⁵ Edward Lane is still a member of the Board but he is no longer Chair.

of such information would compromise the purpose for the executive session, a public body must be able to demonstrate a reasonable basis for such a claim if challenged. See OML 2015-14.

The complaints allege that the Board improperly met in executive session between February 1 and February 10 to “deliberat[e] and vot[e] on, mediation over litigation with” GE regarding clean-up of the Housatonic River. Here, the Board met in executive session on February 5 and discussed a settlement agreement pertaining to GE’s proposed clean-up of the Housatonic River. We find that the executive session discussions were appropriate under Purpose 3 because they related to pending litigation and a settlement agreement that was a proposed resolution to that litigation. Accordingly, the Board did not violate the Open Meeting Law by meeting in executive session. See OML 2017-180; OML 2013-108; OML 2012-43. The Board was not required, as the complaints suggest, to announce or ratify the settlement agreement in open session where the Board convened in executive session under Purpose 3 and not under Purpose 9. See OML 2018-70; see also *Doherty v. School Committee of Boston*, 386 Mass. 643, 647 (1982) (holding that closed door votes are permissible where a body meets in executive session to protect its litigating position). Compare G.L. c. 30A, § 21(b)(9) (a public body may meet or confer with a mediator with respect to any litigation or decision on any public business within its jurisdiction involving another party, provided that no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session). However, once an agreement has been executed, we recommend as best practice that the public body publicly announce the agreement in open session and describe the terms reached. Ideally, this should occur either during the same meeting or at the public body’s next scheduled meeting. See OML 2015-52; OML 2013-84.

One of the complaints also alleges that the Board failed to release the February 5 executive session meeting minutes once the purpose for the executive session had concluded. Executive session minutes may be withheld from disclosure to the public “as long as publication may defeat the lawful purposes of the executive session, but no longer.” G.L. c. 30A, § 22(f). When the purpose for a valid executive session has been served, the minutes and any documents or exhibits used at the session must be disclosed unless the attorney-client privilege or an exemption to the public records law applies to withhold them, in whole or in part, from disclosure. See *id.* The burden of justifying continued nondisclosure of executive session minutes lies with the public body. *Foudy v. Amherst-Pelham Regional School Committee*, 402 Mass. 179, 184 (1988); OML 2017-151.

On February 6, the Committee issued a public statement announcing that the five municipalities, including the Town of Lenox, had “signed a Settlement Agreement to enhance and accelerate the cleanup of PCB contamination in the Housatonic River.” On or about February 10, the EPA issued a public statement announcing that a settlement agreement had been reached and released a copy of the settlement agreement signed by each municipality. As such, we are not persuaded that the purpose for the February 5 executive session remains ongoing so as to support continued nondisclosure of these executive session meeting minutes. Therefore, the Board may no longer rely on the Open Meeting Law as a basis for withholding the minutes from the public, and the Board must release the February 5 executive session minutes, unless the attorney-client privilege or an exemption to the Public Records Law applies. See G.L. c. 30A, § 22(f) (when the purpose for the executive session has concluded, the minutes must be disclosed but the public

body may assert an exemption under the Public Records Law to withhold the minutes, in whole or in part, from disclosure).

CONCLUSION

We find that the Board did not violate the Open Meeting Law by improperly meeting in executive session. However, we are not persuaded that the purpose for the executive session remains ongoing and order the Board to release the February 5 executive session meeting minutes, unless the attorney-client privilege or an exemption to the Public Records Law applies. We now consider the complaints addressed by this determination to be resolved. This determination does not address any other complaints that may be pending with the Board or with our office. Please feel free to contact our office at (617) 963-2540 if you have any questions regarding this letter.

Sincerely,



KerryAnne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: Deanna Markham – By email only: [REDACTED]
Sage Radachowsky – By email only: [REDACTED]
Virginia Schwerin – By email only: [REDACTED]
Lenox Select Board c/o Christopher Ketchen, Chief Administrative Officer – By email only: [REDACTED]

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.