



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

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OML 2021 – 27

Jeremia A. Pollard, Esq.
Hannon Lerner, P.C.
184 Main Street
P.O. Box 697
Lee, MA 01238

By email only: [REDACTED]

RE: Open Meeting Law Complaints

Dear Attorney Pollard:

This office received a complaint from Suzanne Salinetti on March 27, 2020, a complaint from Clare Lahey on April 24, 2020, and two complaints from Matt Kelly on May 1, 2020, all alleging that the Lee Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ Ms. Salinetti’s complaint was originally filed with the Board on February 21, and you responded to the complaint, on behalf of the Board, by letter dated March 5. Ms. Lahey’s complaint was originally filed with the Board on March 9, and you responded to the complaint, on behalf of the Board, by letter dated March 23. Mr. Kelly’s complaints were originally filed with the Board on February 28, and you responded to the complaints, on behalf of the Board, by letter dated March 5. The complaints allege that the Board did not hold an open meeting or allow the public to participate with respect to the approval of the Housatonic Rest of River Settlement Agreement pertaining to clean-up of the Housatonic River.

We appreciate the patience of the parties while we reviewed these matters. Following our review, we find that the Board did not violate the Open Meeting Law in the ways alleged. 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.

¹ Unless otherwise indicated, all dates in this letter refer to the year 2020.

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 4, as well as the Housatonic Rest of River Settlement Agreement and the February 6 Statement from the Housatonic Rest of River Municipal Committee. Finally, we spoke with you by telephone on February 4, 2021.

FACTS

We find the facts as follows. In 1999, the Environmental Protection Agency (the "EPA"), General Electric Company ("GE") and the City of Pittsfield signed a settlement agreement to clean-up the former GE 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 Lee included the Town Administrator and one member of the Board.²

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.³ 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 4 at 6:30 P.M. The notice listed eight topics, the first of which was 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), because an open meeting discussion would have a detrimental effect on the town's litigation strategy."

The February 4 meeting was held as planned. The Board convened in open session and 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) because an open meeting discussion would have a detrimental effect on the town's litigation strategy."

² The Board is a three-member public body; thus two members constitute a quorum.

³ 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 Board met in executive session for approximately twenty minutes and reviewed the settlement agreement initially approved by the Committee. The Board voted to approve the settlement agreement and authorized Chair Thomas Wickham to sign and execute the agreement on behalf of the Town of Lee. The Board then reconvened in open session and discussed the noticed topics.

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 2014-94.⁴ 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 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.

⁴ Open Meeting Law determinations may be found at the Attorney General’s website, <https://www.mass.gov/the-open-meeting-law>.

The complaints allege that the Board did not hold an open meeting or allow the public to participate with respect to the Housatonic River settlement agreement and therefore must have done so secretly sometime in early February.⁵ Here, the Board met in executive session on February 4 and discussed a settlement agreement pertaining to GE's proposed clean-up of the Housatonic River. First, we find that the Board provided sufficient detail in its meeting notice with respect to the executive session topic and complied with the required procedural steps prior to convening in executive session on February 4. We also 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.

In addition, the Open Meeting Law does not require that a public body allow public participation, but rather provides that "[n]o person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent." G.L. c. 30A § 20(f). The law permits the Chair of the Board to decide who may speak at a meeting and for how long. See OML 2017-189; OML 2014-23; OML 2012-23. Thus, it is not a violation of the law if the chair decides not to allow any public participation during a meeting. We do, however, encourage public bodies to allow for as much public participation as time and circumstances permit. See OML 2015-12; OML 2014-129; OML 2012-59.

CONCLUSION

We find that the Board did not violate the Open Meeting Law. 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.

⁵ Ms. Lahey's complaint also suggests that the Board improperly met in executive session during 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 4, 2018, and December 18, 2018, and note that the Board did not convene in executive session to discuss litigation or mediation relating to the Housatonic River.

Sincerely,



KerryAnne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: Suzanne Salinetti – By email only: [REDACTED]
Clare Lahey – By email only: [REDACTED]
Matt Kelly – By email only: [REDACTED]
Lee Select Board c/o Christopher Ketchen, Chief Administrator 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.