



THE COMMONWEALTH OF MASSACHUSETTS
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March 1, 2021

OML 2021 – 24

Board of Selectmen
c/o Town Administrator Rhonda LaBombard
Town Hall
21 Depot Square
Sheffield, MA 01257

By email only: [REDACTED]

RE: Open Meeting Law Complaint

Dear Ms. LaBombard:

This office received a complaint from Peter and Melissa Martin on May 4, 2020, alleging that the Sheffield Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaint was originally filed with the Board on March 10, and Board Chair Rene Wood responded to the complaint, on behalf of the Board, by letter dated March 12. The complaint alleges that the Board improperly met in executive session between February 1 and 10.

We appreciate the patience of the parties while we reviewed this matter. Following our review, we find that the Board met in executive session for a proper purpose but did not provide sufficient notice regarding the executive session topic. 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 complaint.

In reaching this determination, we reviewed the original complaint, the Board’s response to the complaint, and the complaint 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 3, as well as the Housatonic Rest of River Settlement Agreement and the February 6 Statement from the Housatonic Rest of River Municipal Committee.

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

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 Sheffield 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 3 at 7:00 P.M. The notice listed fifteen topics, including an executive session to discuss “Rest of River.” The February 3 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 “for the purpose of Rest of River.”

The Board met in executive session for approximately fifteen minutes and reviewed the settlement agreement initially approved by the Committee. The Board unanimously voted to approve the settlement agreement and authorized Chair Rene Wood to sign and execute the agreement on behalf of the Town of Sheffield.

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.

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.

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.

The complaint alleges 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 3 and discussed a settlement agreement pertaining to GE’s proposed clean-up of the Housatonic River. First, we find that the Board did not provide sufficient detail in its meeting notice with respect to the executive session topic, stating only that the discussions in executive session would pertain to “Rest of River.” While a public body is not required to provide the specific statutory citation of the executive session it plans to convene under, the public body must at least provide a sufficient description of the executive session purpose. See OML 2016-95. Here, the Board provided neither a statutory citation nor a sufficient description of the executive session purpose. Neither the meeting notice nor the announcement by the chair preceding the executive session referred to Purpose 3 or identified the discussion as a litigation matter. As such, we conclude that the executive session topic listed on the February 3 meeting

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

notice was vague and did not offer the public an understanding of the anticipated executive session discussion. See OML 2018-80; OML 2014-43.

However, we conclude that the discussions in executive session fell within a proper statutory purpose. Here, the Board's 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. See OML 2017-180; OML 2013-108; OML 2012-43. Although we find that the Board did not violate the Open Meeting Law by meeting in executive session, we find that the Board did violate the law by providing insufficient detail with respect to the executive session topic in both the meeting notice and the announcement by the chair preceding the executive session. As such, we order the Board to release to the public the February 3 executive session meeting minutes. The Board may not redact or withhold the minutes in any way. See G.L c. 30A, § 22(f) (the minutes of any executive session may be withheld from disclosure to the public as long as publication may defeat the lawful purposes of the executive session; *provided, however, that the executive session was held in compliance with the Open Meeting Law's provisions regarding executive sessions*); District Attv. for Plymouth Dist. v. Bd. of Selectmen of Middleborough, 395 Mass. 629, 634 (1985) ("We view [the Open Meeting Law] as a statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute."); OML 2019-164; OML 2017-23; OML 2015-120.

CONCLUSION

We find that the Board violated the Open Meeting Law by providing insufficient detail with respect to the executive session topic in both the meeting notice and the announcement by the chair preceding the February 3 executive session. 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. Additionally, we order the Board to release the executive session minutes of the February 3 meeting. The Board must certify to this office within thirty (30) days of the date of this letter that it has released the executive session minutes. See 940 C.M.R. 29.07(4).

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 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: Peter and Melissa Martin – 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.