



THE COMMONWEALTH OF MASSACHUSETTS
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March 1, 2021

OML 2021 – 23

Stephen Bannon
Chair, Select Board
Town Hall
334 Main Street
Great Barrington, MA 01230

By email only: [REDACTED]

RE: Open Meeting Law Complaints

Dear Mr. Bannon:

This office received a complaint from Holly Hardman on April 8, 2020, and a complaint from Susan Jennings on May 4, 2020, alleging that the Great Barrington Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ Ms. Hardman’s complaint was originally filed with the Board on March 1, and you responded to the complaint, on behalf of the Board, by letter dated March 9. Ms. Jennings’ 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. Both complaints allege that the Board improperly met in executive session between February 1 and February 10.²

We appreciate the patience of the parties while we reviewed this matter. 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.

² Ms. Hardman’s complaint also alleges 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 17, 2018, and December 17, 2018, and note that the Board did not convene in executive session to discuss litigation or mediation relating to the Housatonic River.

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 notices and open session minutes of Board meetings held on February 4 and February 10, 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 Assistant Town Manager and Director of Planning Christopher Rembold by telephone on December 18.

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 Great Barrington included the Town Manager and the Assistant Town Manager.

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 held meetings on February 4 and February 10 but did not convene in executive session during either meeting. During the February 4 meeting, the Board met jointly with the Finance Committee and only discussed numerous Town Departments' operating budgets, as well as capital requests. During the February 10 meeting, the Board received a report from Assistant Town Manager Christopher Rembold regarding the "positive outcome of the lengthy litigation, settlement agreement" for the clean-up of the Housatonic River.⁴ Mr.

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.

⁴ We note that the notice for the Board's February 10 meeting listed ten topics, one of which was "Town Manager's Report." The topic of Town Manager's Report included two subheadings - Department Updates and Project Updates. When a meeting notice has included as a topic a report or presentation by somebody who is not a member of the public body, such as "Superintendent's Report" or "Administrator's Report" or "Report from Department Heads," we have declined to find a violation of the Open Meeting Law for lack of specificity where the public body chair did not anticipate the specific nature of the deliberations to be had. Nonetheless, we have encouraged public body chairs as a best practice to solicit from the Town Manager and include on the meeting notice more detail

Rembold explained that a *Berkshire Eagle* news article as well as the EPA website had additional details of the agreement. In addition, he advised that there would be three public information meetings where representatives from the Committee would provide information.

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 2014-94.⁵ 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.

regarding the precise matters to be discussed. See OML 2019-94; OML 2018-33; OML 2012-19. We remind the Board of its obligations under the law.

⁵ 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 improperly met in executive session between February 1 and February 10 to “deliberat[e] over and vot[e] on, mediation over litigation with” GE regarding clean-up of the Housatonic River. Although the Board held meetings on February 4 and February 10, the Board did not convene in executive session during either meeting. The Open Meeting Law does not require public bodies to meet in executive session but rather, if a public body chooses to meet in executive session, it must do so only for one of the enumerated purposes and after following proper procedures. Because the Board did not convene in executive session on either February 4 or February 10 to discuss the settlement agreement, it did not violate the Open Meeting Law. See OML 2019-28.

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.

Sincerely,



KerryAnne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: Holly Hardman – By email only: [REDACTED]
Susan Jennings – By email only: [REDACTED]
Christopher Rembold, Assistant Town Administrator and Director of Planning – 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.