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July 21, 2014

OML 2014 – 80

Jodi Ross, Town Manager
Town of Westford
55 Main Street
Westford, MA 01886

RE: Open Meeting Law Complaint

Dear Ms. Ross:

This office received a complaint from Samantha Allen of the *Lowell Sun* dated April 10, 2014, alleging that the Westford Board of Selectmen (the Board) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on or about March 13, 2014, and you responded on behalf of the Board by letter dated March 25, 2014.¹ In her complaint, Ms. Allen alleges that, based on the Town's response to her public records request, the Board engaged in improper deliberations by email concerning former Fire Chief Richard Rochon's retirement (hereinafter "the emails").

Following our review, we find that the Board violated the Open Meeting Law by sending electronic communications discussing public business within its jurisdiction to a quorum of its members. In reaching this decision, we reviewed the March 13, 2014 complaint filed with the Board; your March 25, 2014 response on behalf of the Board;² and the April 10, 2014 complaint filed with our office, requesting further review. We also reviewed the emails at issue.

¹ We remind the Board that, while a public body may authorize an individual such as the Town Manager or Town Counsel to respond on the public body's behalf, the Open Meeting Law and the Attorney General's regulations require that the public body first review the Open Meeting Law complaint. See G.L. c. 30A, § 23(b); 940 CMR 29.05(5). Here, the Board did not review this complaint prior to the Town Manager's response.

² For the purpose of clarity, we will refer to you in the third person hereafter.



FACTS

We find the facts as follows. The Board consists of five members, thus three members constitute a quorum. The events at issue preceded the July 2013 retirement of then-Fire Chief Richard Rochon.³

On June 24, 2013, the Board authorized counsel to negotiate a separation agreement (the “agreement”) with Chief Rochon. Town Manager Jodi Ross and former Board Chair Kelly Ross assisted counsel with the various drafts of the agreement. The Town Manager kept the Board apprised of these negotiations by email.

Following a Board meeting on July 12, 2013, the Town Manager emailed the entire Board and attached a draft version of the agreement, notified the Board that Chair Ross was tracking the changes made, and invited Board members Andrea Peraner-Sweet and Scott Hazelton to call her with questions about the draft. (“Email 1”) Later that evening, Chair Ross responded to the Town Manager and copied the entire Board, summarizing the changes that were made to the draft agreement. (“Email 2”) In response, Mr. Hazelton sent an email to Chair Ross, copying the Board, on July 13, 2013, asking, “[i]s it normal practice to bury personell (sic) records this completely?” He went on to state, “[w]hat really disturbs me is #10.” (“Email 3”) Later that day, the Town Manager responded to Mr. Hazelton and copied the Board, stating, “[n]o, it is not normal practice to bury personnel records and we are not agreeing to this...[w]e are also not agreeing to #10. Our attorney will redraft on Monday and I will then send to all of you.” (“Email 4”)

On July 25, 2013, the Town Manager sent an email to the Board notifying it about Chief Rochon’s retirement party and stated that Chair Ross had offered to sign a letter from the Board because the Board would not be meeting before the party (“Email 5”), to which Mr. Hazelton responded, copying the Board, stating that he would be “happy to drop by Town Hall or otherwise meet to sign the card personally.” (“Email 6”) On July 29, 2013, Chair Ross sent an email to the Board with a draft letter addressed to Chief Rochon and asked for comments. (“Email 7”) The letter congratulated Chief Rochon on his retirement and briefly outlined some of his accomplishments as Fire Chief. Hours later, Mr. Hazelton sent an email back to Chair Ross, copying the Board, with his suggested edits, noting, “[i]n mentioning his accomplishments like the manned stations and paramedic services, I think another of his legacies to the town will be ‘state of the art fire, rescue and safety equipment.’” (“Email 8”) Chair Ross responded, copying the Board, “I’ll make the changes.” (“Email 9”) On July 31, 2013, Chair Ross sent a follow-up email to the Board with the revised letter to Chief Rochon, stating, “I really need to know if you all will be able to sign this letter – ideally by going to Town Hall after it is printed and before the retirement celebration on August 8, or at least at the 8/13 BOS meeting.” (“Email 10”) Ms. Peraner-Sweet responded to Chair Ross, copying the Board, “I’m good with the letter...And, I am able to sign the letter prior to Rich’s retirement party.” (“Email 11”)

³ Our review focused on emails sent between or among the Board concerning Chief Rochon’s departure. We note that there were several other one-way communications sent by the Town Manager to the Board for its reference only. Such emails would not implicate the Open Meeting Law. See OML 2013-32; OML 2012-105.

DISCUSSION

The Open Meeting Law was enacted “to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based.” Ghiglione v. School Board of Southbridge, 376 Mass. 70, 72 (1978). The Open Meeting Law therefore requires that “[e]xcept as provided in [G.L. c. 30A, § 21(a)], all meetings of a public body shall be open to the public.” G.L. c. 30A, § 20(a). “Meeting” is defined, in 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,” in relevant part, 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.” Id.

We find that Emails 1 and 5 did not constitute improper deliberation because they were one-way communications to the Board from the Town Manager, who is not a member of the Board. However, Emails 2, 3, and 4 constituted improper deliberation outside of an open meeting. In Emails 2 and 3, Chair Ross and Mr. Hazelton discussed items of public business within the Board’s jurisdiction by sending amendments to and questions about the draft agreement to the entire Board. The agreement was ultimately presented to the Board for its approval during its July 17, 2013 meeting,⁴ and was clearly a matter of public business within the Board’s jurisdiction.

Additionally, just as the Chair Ross’ and Mr. Hazelton’s emails should not have been sent to the entire Board, the Town Manager’s response to Mr. Hazelton’s questions about the draft agreement in Email 4 should not have included the rest of the Board. A public body may not use a non-member, such as the Town Manager, to communicate on matters that the Board would otherwise save for discussion at an open meeting. See District Attorney for the Northern District v. School Board of Wayland, 455 Mass. 561, 570-571 (2009) (“Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form.”). While the Town Manager may send one-way communications to the Board, she may not facilitate communication between Board members. See OML 2012-105.⁵ The Town Manager’s email constituted an improper deliberation among the Board through a third party. Accordingly, the opinions, questions, comments and revisions concerning the draft agreement in Emails 2, 3, and 4 should not have been shared with a quorum of the Board’s members outside of a properly posted open meeting.

⁴ The Board cited attorney-client privilege as the purpose for several executive sessions held in July 2013 concerning this matter. While a public body may meet in executive session to communicate with counsel, it may do so only for one of the enumerated purposes for executive session. See District Attorney for Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (Mass. 1985). The attorney-client privilege is not an explicitly enumerated purpose for which a public body may enter executive session. OML 2012-55; OML 2010-6. Those minutes have since been released to the public. Therefore, we do not address the propriety of these closed door discussions, and we note that these discussions with counsel could not be otherwise conducted by email.

⁵ Open Meeting Law determinations may be found at the Attorney General’s website, www.mass.gov/ago/openmeeting.

Finally, while we do not find a violation, we note our concern about the content of one of the emails sent concerning Chief Rochon's farewell letter. The signing of a form farewell letter to a retiring employee may be considered an administrative task and thus permitted by the Open Meeting Law; however, Mr. Hazelton's substantive revisions to the letter in Email 8 about Chief Rochon's accomplishments as Fire Chief should have been reserved for the Board's consideration during an open meeting. In discussing Chief Rochon's accomplishments, Mr. Hazelton's revisions went beyond merely administrative edits, such as correcting spelling mistakes. Determining which tasks are merely "administrative" can be challenging and email communication between a quorum of public body members — however innocent — easily may create the appearance of secret deliberation. See OML 2014-2; OML 2013-130. Therefore, our best advice continues to be that members of public bodies not communicate over email at all except for distributing meeting agendas, scheduling meetings, and distributing documents to be discussed at meetings.

CONCLUSION

We find that the Board violated the Open Meeting Law by sending electronic communications discussing public business within its jurisdiction to a quorum of the Board. We order immediate and future compliance with the Open Meeting Law, and caution that future similar conduct may be considered evidence of intent to violate the Open Meeting Law. Additionally, we order the Board to publicly disclose Emails 2, 3, and 4 at the Board's next meeting.

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.

Sincerely,



Hanne Rush
Assistant Attorney General
Division of Open Government

cc: Samantha Allen, *Lowell Sun*
Westford Board of Selectmen

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