



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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July 9, 2014

OML 2014 – 79

Mark Andrews
Town Administrator
Town of Wenham
138 Main Street
PO Box 576
Wenham, MA 01984

RE: Open Meeting Law Complaint

Dear Mr. Andrews:

This office received a complaint from Michelle Bailey on December 30, 2013, alleging that the Joint Subcommittee on Inter-Municipal Agreements and the Wenham 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 October 30, 2013, and you responded, on behalf of the Board, by letter dated November 12, 2013.¹ In her complaint, Ms. Bailey alleges that, based on a discussion during the Board's meeting held on October 1, 2013, it appears that a subcommittee was formed and met to discuss inter-municipal agreements without following the Open Meeting Law.² In addition, Ms. Bailey alleges that the Board failed to respond to her request for executive session minutes in a timely manner and failed to conduct a review of these executive session minutes as required.

We reviewed the October 30, 2013 complaint; your November 12, 2013 response, on behalf of the Board;³ and the December 30, 2013 request for further review filed with our office. We also reviewed the notice for and minutes from the joint meetings of the Wenham and Hamilton Finance Advisory Committees held on July 31, 2013 and September 25, 2013, as well as the recording from the July 31, 2013 meeting. In addition, we reviewed the notice for and open and executive session minutes from the Board's meeting held on September 3,

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

² Ms. Bailey alleges that, in the alternative, the Board improperly discussed the inter-municipal agreements outside of a meeting or during its September 3, 2013 executive session.

³ For purposes of clarity, we will refer to you in the third person hereafter.



2013, along with the minutes from the Board meetings held on August 20, 2013; September 17, 2013; and October 1, 2013. We spoke by telephone with former Board Chair Kenneth Whittaker, Wenham Finance Committee Chair Michael Lucy, Wenham Town Administrator Mark Andrews, and Hamilton Town Manager Michael Lombardo. Finally, we reviewed Ms. Bailey's request for minutes and the Board's response.

Following our review, we find that the Board violated the Open Meeting Law by failing to promptly provide executive session minutes that were released in response to a request. However, we find that the group referred to by the complainant as the Joint Subcommittee on Inter-Municipal Agreements was not a public body subject to the Open Meeting Law and that, therefore, it did not violate the Law by deliberating outside of a properly posted meeting. Additionally, we find that the Board did not violate the Law in the other ways alleged.

FACTS

We find the facts as follows. The Board is a three-member public body; therefore, two members constitute a quorum. The Wenham Finance Committee is a six member public body; therefore four members constitute a quorum. The complainant alleges two separate violations, which we address in turn.

I. Inter-Municipal Agreement Discussion

The complainant alleges that a subcommittee which she labeled the "Joint Subcommittee on Inter-Municipal Agreements (AKA IMA Review Committee)," consisting of Board Chair Kenneth Whittaker, Wenham Finance Committee Chair Michael Lucy, Wenham Town Administrator Mark Andrews, as well as Hamilton Town Manager Michael Lombardo, Hamilton Board of Selectmen Chair Mark Johnson and Hamilton Finance Committee Chair John McWane, conducted deliberations outside of a properly posted meeting. On July 31, 2013, the Finance Committees of Hamilton and Wenham convened a joint meeting to discuss, in part, the possible review and revision of various inter-municipal agreements (IMAs) between the two towns.⁴ The meeting notice listed the following topic: "6) Inter-Municipal Agreements (IMA) Review Process: Formation of Joint Sub-Committee on Inter-Municipal Agreements to review, update and upgrade all HW [IMAs]; Suggested composition: Chair of each Board of Selectmen; Chair of each FinCom; Hamilton Town Manager; Wenham Town Administrator and each Town Counsel (Advisory)." According to the minutes, during the July 31, 2013 meeting Mr. Lucy noted that many of the IMAs were "aging" and should be reviewed and "suggested a joint ad hoc subcommittee be made up of designees from BOS, FinCom, Town Counsels, to review the existing IMAs by November if possible." He said, "by consensus, is everyone on board?" to which there was no formal response by the group. The towns have not conducted this broad review of the IMAs in the time since this meeting.

⁴ Mr. Whittaker and Mr. Johnson were present, but did not participate during the meeting.

Realizing the larger review of the IMAs would take time, the Hamilton Town Manager expressed concern that one of the IMAs concerning administrative fees paid to Wenham for running the library was outdated and needed immediate attention. As a result, Hamilton refused to continue paying the library fees until the towns could reach an agreement. During the Board's August 20, 2013 meeting, Mr. Whittaker announced that town representatives were meeting to review and update the IMAs. In particular, he stated that "there is a difference of opinion regarding the payments of the library and COA van fees from Hamilton to Wenham," which "continues to be discussed." On September 3, 2013, the Board convened in executive session under G.L. c. 30A, § 21(3) to discuss litigation strategy concerning Hamilton's refusal to pay the library fees.

In the meantime, Mr. Lombardo expressed to Mr. Andrews that Hamilton would like to discuss the library fees immediately. Mr. Lombardo and Mr. Andrews scheduled a meeting for September 10, 2013. Along with Mr. Lombardo and Mr. Andrews, the chairs of the towns' respective Boards of Selectmen and Finance Committees- Mr. Whittaker, Mr. Lucy, Mr. Johnson, and Mr. McWane- attended the meeting. No public notice was posted for this meeting, and it was not conducted as an open meeting. The group came up with a draft Memorandum of Understanding (MOU) regarding a reduction in the library fees, which was presented to and executed by the finance committees at their joint meeting held on September 25, 2013. The MOU was then reported to the Board at its October 1, 2013 meeting.

II. Request for Executive Session Meeting Minutes

The complainant alleges that the Board failed to timely respond to her request for its September 3, 2013 executive session minutes. On October 6, 2013, the complainant sent Mr. Andrews an email requesting a copy of the Board's September 3, 2013 executive session minutes. Mr. Andrews acknowledged receipt of the request on October 7, 2013 and updated her by email on October 11, 2013. That same day, Mr. Whittaker emailed the complainant to explain that he was responsible for the Board's delay in responding to her request because he was out of state until October 21, 2013. In response, the complainant agreed to an extension of time to respond to her request until October 23, 2013. During its October 22, 2013 meeting, the Board approved and released the September 3, 2013 executive session minutes. The Board then revised the minutes during its October 30, 2013 meeting to purportedly clarify the nature of the discussion, although the Board voted to condense the summary of the 45-minute discussion from one paragraph to one sentence.⁵ On October 31, 2013, Mr. Andrews' office provided the complainant with a copy of the September 3, 2013 executive session minutes that were released on October 22, 2013.

DISCUSSION

The Open Meeting Law's purpose is "to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." Ghiglione v. School Committee

⁵ We remind the Board that while meeting minutes (for both open and executive sessions) do not have to be a transcript, they should include sufficient detail and accuracy so that a member of the public who did not attend the meeting could read the minutes and have a clear understanding of what actually occurred. See OML 2013-14.

of Southbridge, 376 Mass. 70, 72 (1978). The Law requires that all 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 “meeting” is defined, in relevant part, as “a deliberation by a public body with respect to any matter within the body’s jurisdiction[.]” G.L. c. 30A, § 18. A “public body” subject to the Open Meeting Law is any “multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose.” *Id.* The Law defines “deliberation,” in 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.*

I. Inter-Municipal Agreement Discussion

The Hamilton Town Manager and the Wenham Town Administrator organized a meeting on September 10, 2013 to discuss the specific question of library fees, a topic of immediate concern for the towns. Along with the Hamilton Town Manager and Wenham Town Administrator, this meeting, which was not posted or otherwise treated as a “meeting” under the Open Meeting Law, involved the chairs of the towns’ Boards of Selectmen and Finance Committees. The discussion was not about the larger IMA review process discussed during the joint finance committee meeting on July 31, 2013. Further, we note that even if the topic of discussion at this meeting had been identical to that contemplated by the finance committees, no vote was taken during their July 31, 2013 joint meeting to create such a body or officially delegate this task. We therefore find that the group that met on September 10, 2014 was not a public body subject to the Open Meeting Law, and did not need to comply with its requirements. Furthermore, because this meeting did not involve a quorum of the Board (or any other public body), there was no improper deliberation by that body under the Open Meeting Law.

II. Request for Executive Session Meeting Minutes

Executive session minutes may be withheld from disclosure as long as publication may defeat the lawful purposes of the executive session, but no longer. G.L. c. 30A, § 22(f). A public body must periodically review executive session minutes to determine if non-disclosure continues to be warranted. G.L. c. 30A, § 22(g)(1). If a public body receives a request for executive session minutes, it must respond to the request within 10 days. G.L. c. 30A, § 22(g)(2). If the public body has not yet performed a review of its minutes, it must perform the review and release the non-exempt minutes, or any portion thereof not later than the public body’s next meeting or 30 days, whichever first occurs. *Id.*

Here, the Board acknowledged the request for executive session minutes within 10 days. G.L. c. 30A, § 22(g)(2); OML 2013-99. While the Board did not undertake the required review of the requested minutes before its next meeting, held on October 15, 2013, the complainant had agreed to an extension so that Mr. Whittaker could participate in the Board’s discussion at its October 22, 2013 meeting. On that date, the Board performed its

review and ultimately decided to release the September 3, 2013 executive session minutes. Thus, we find that the Board properly undertook a review of its executive session minutes within the requisite time period. Id. at § 22(g)(2). However, the Board should have provided the complainant with the released minutes as soon as possible after this meeting, rather than waiting until October 31, 2013. Id. (a public body shall “release the non-exempt minutes, or any portion thereof, not later than the public body’s next meeting or 30 days, whichever first occurs”). We therefore find that the Board violated the Open Meeting Law in this regard.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by failing to promptly provide executive session minutes that were released in response to a request. 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.

We now consider the complaint addressed by this determination to be resolved. This determination does not address any other complaints which 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: Michelle Bailey
Wenham 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.