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December 19, 2014

OML 2014 – 148

Mr. Paul L. Kenny, Esq.
Town Counsel
278 Old Sudbury Road
Sudbury, MA 01776

RE: Open Meeting Law Complaint

Dear Attorney Kenny:

This office received seven related complaints alleging that the Sudbury Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaints allege that the Board deliberated outside of an open meeting via email on numerous occasions. Five of the complaints were filed by Mr. Scott Nassa and are dated October 29, 2014. These five complaints were originally filed with the Board on September 1, 2014. Another complainant, Mr. Stephen Lanzendorf, filed one complaint on October 27, 2014. This complaint was originally filed with the Board on August 22, 2014. Finally, the third complainant, Mr. Daniel DePomei, filed one complaint on October 14, 2014. This complaint was originally filed with the Board on September 2, 2014. You responded to all seven complaints on behalf of the Board in a letter dated September 18, 2014.

We appreciate the patience and cooperation of the parties while we reviewed this matter. Following our review, we find that five emails sent by Selectman Leonard Simon to his fellow Board members constituted individual violations of the Open Meeting Law. In reaching this determination, we reviewed the seven complaints; the Board’s response; and the requests for further review filed with our office.

FACTS

We find the facts as follows. The Board is a five-member public body that meets at regular intervals to discuss the governance of the Town of Sudbury (the “Town”). The complaints concern several instances of e-mails being circulated amongst the members of the Board. We consider each incident in turn, in chronological order.

On August 20, 2013, Selectman Simon e-mailed a memorandum to all of the other Board members concerning the Bruce Freeman Rail Trail (the “BFRT”), a trail that extends through several communities and is open to cycling, jogging, and other activities. The memorandum



outlined the history and background of the project, including discussion of a 2012 Town Meeting where residents spoke in favor of the project. The memorandum then states, in part, "I have reviewed and studied each of the four options, and the pros and cons of each." Selectman Simon then states the conclusions he reached, and offers two motions for the Board's consideration at a future meeting.

On October 2, 2013, a Town administrative assistant sent an e-mail to all Board members containing a draft copy of the Town's Alcohol Rules & Regulations. A copy was also sent to the Chief of Police. On October 10, 2013, Selectman Simon e-mailed the Board, along with the Chief, commenting on the rules and suggesting possible changes.

On January 16, 2014, Selectman Simon sent an e-mail to the Community Preservation Committee. All Board members were copied on the e-mail. The e-mail outlines Selectman Simon's positions regarding appropriate funding levels for the BFRT.

On August 4, 2014, Selectman Simon circulated a memorandum by e-mail to the other members of the Board. Again, this memorandum concerned the BFRT. The body of the e-mail reads, "Attached please find a memo I have asked to be included in the packets for our August 19, 2014 meeting." The memorandum begins with, "At the conclusion of the BOS meeting of July 22, 2014, I was concerned about the way the discussion on the [BFRT] unfolded and concluded. Something just did not seem right to me. After thinking about it, the reasons became clear." The memorandum expresses Selectman Simon's opinion regarding the appropriate scope of the BFRT, whether an advisory committee is needed to supervise the project, as well as his preference as to which firm should receive the contract for designing the BFRT.

On August 19, 2014, a constituent sent an e-mail to all members of the Board regarding a chain restaurant that wanted to move into the Town. The e-mail stated that Sudbury should not have another "generic" chain restaurant. Selectman Simon responded to all other Board members, stating, in part, "I think we need to be careful not to alienate or prejudice an individual who wants to make a go of [a] restaurant here in town." No member of the Board responded to any of Selectman Simon's e-mails.

DISCUSSION

I. The Complaints are all Timely

As an initial matter, we address the Board's argument that certain allegations in the complaints are untimely. The Open Meeting Law states that complaints must be filed with the public body within 30 days of the alleged violation. G.L. c. 30A, § 23(b). If the alleged violation could not have been known at the time it occurred, then the complaint must be filed with the public body within 30 days of when the alleged violation could reasonably have been discovered. 940 CMR 29.05(3). Mr. Nassa, who brought the complaints relating to the August 20, 2013; October 12, 2013; and January 16, 2014 e-mails, discovered the e-mails on August 20, 2014, when they were provided to him by an anonymous source. The Board argues that because the e-mails were "public records" at the time they were created, they were reasonably discoverable at the time, and those allegations are therefore now untimely. The only recipients of the e-mails in question were the members of the Board and a handful of other individuals. The emails were not widely circulated, nor were they discussed during an open session meeting.

We therefore conclude that the e-mails were not reasonably discoverable at the time they were sent. Because Mr. Nassa filed his complaints within 30 days of discovering the e-mails, we find the complaints to be timely. G.L. c. 30A, § 23(b).

II. The Emails Constituted Impermissible Deliberation Outside of a Meeting

The Open Meeting Law is intended to “to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based.” Ghighlione v. School Committee 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. The law defines “deliberation” 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; provided, however, that ‘deliberation’ shall not include the distribution of meeting agenda, scheduling information or distribution of other procedural meeting [material] or the distribution of reports or documents that may be discussed at a meeting, *provided that no opinion of a member is expressed.*” *Id.* (emphasis added) Expression of an opinion on matters within a body’s jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds. See OML 2013-29; OML 2013-27; OML 2012-15.

Here, we find that Selectman’s Simon’s practice of sending memoranda and other messages via e-mail to a quorum of the Board violated the Open Meeting Law. These communications were sent to all other members of the Board, and they expressed Selectman Simon’s opinions on issues within the Board’s jurisdiction. The October 12, 2013 e-mail concerning the alcohol regulations addressed whether to adopt changes to Town policy. The January 16, 2014 e-mail contained Selectman Simon’s opinion regarding appropriate levels of funding for the BFRT. Both met the statutory definition of deliberation, thus the communication therein should have taken place during an open meeting.

The Board argues that Selectman Simon’s August 20, 2013 memorandum was not deliberation, however, rather it was the mere distribution of two motions to be considered at a future meeting. The Open Meeting Law specifies, however, that such distribution is to be done without the expression of an opinion by a public body member. See G.L. c. 30A, § 18. Here, Selectman Simon offered suggestions and opinions. We therefore conclude that the circulation of the August 20, 2013 memorandum also constituted improper deliberation. Likewise, the August 4, 2014 memorandum contained multiple opinions on topics within the Board’s jurisdiction. Although intended for inclusion in the packets provided to the Selectmen, we find that the August 4, 2014 memorandum was not intended for discussion at a meeting, rather it was meant to express Selectman Simon’s opinion to the Board members in advance of the meeting. As for the August 19, 2014 e-mail concerning the restaurant chain, the Board denies that this was deliberation because the Board does not possess any authority to take action on the constituent’s e-mail (the Board described it as merely “a social issue.”). Because issues relating to a new restaurant opening in town could conceivably come before the Board, we find that this discussion was within the Board’s jurisdiction and should have taken place during an open meeting. Although we find that these e-mails violated the Open Meeting Law, because it appears that no member of the Board responded to Selectman Simon, we find that it was an individual violation, rather than a violation by the Board as a whole.

CONCLUSION

For the reasons stated above, we find that Selectman Simon individually violated the Open Meeting Law. We order immediate and future compliance with the Open Meeting Law, and we caution that similar future violations may be considered evidence of an intentional violation of the Law. We also order that the Board release to the public, within 30 days following its receipt of this determination, all e-mails and memoranda referenced in this letter.

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 our office or the Board. Please feel free to contact the Division at (617) 963 - 2540 if you have any questions.

Sincerely,



Kevin W. Manganaro
Assistant Attorney General
Division of Open Government

cc: Mr. Scott Nassa
Mr. Stephen Lanzendorf
Mr. Daniel DePomei
Sudbury 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.