THE COMMONWEALTH OF MASSACHUSETTS
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February 8, 2017

OML 2017 – 23

Brian Maser, Esq.
KP Law, P.C.
101 Arch Street
Boston, MA 02110

**RE: Open Meeting Law Complaint**

Dear Attorney Maser:

This office received a complaint from Patrick Higgins on October 14, alleging that the Webster 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 or about September 13, and you responded on behalf of the Board in a letter dated October 7. In his complaint, Mr. Higgins alleges that, during its August 31 meeting, the Board discussed matters in executive session that were not appropriate for executive session.

Following our review, we find that the Board violated the Open Meeting Law by improperly discussing a personnel matter in executive session and by failing to comply with the procedural requirements for convening an executive session. Further, we find that the Board's actions constituted an intentional violation of the law, because they occurred after two clear warnings from our office to the Board regarding the same conduct. Therefore, we refer this matter to a hearing pursuant to 940 CMR 29.07(3) with a recommendation of a $2,000 fine. In reaching a determination, we reviewed the original complaint, the Board's response to the complaint, and the complaint filed with our office requesting further review. We also reviewed the notice and the open and executive session minutes of the Board's August 31 meeting. Finally, we reviewed a video-recording of the Board's September 13 meeting, which the Board provided to our office.

## FACTS

We find the facts as follows. In August, the Board was in the process of hiring a new town administrator. A Town Administrator Search Committee had recommended five candidates to the Board for its consideration. The Board had asked the five candidates to sign the Town's Waiver of Liability and Release form (the "release form") to allow Detective

[1] All dates in this letter refer to the year 2016.

Sergeant James Hoover of the Webster Police Department to conduct a background check. The Board then planned to hear the results of those background checks in executive session on August 31. The Board relied on G.L. c. 30A, §21(a)(1) ("Purpose 1") to hold this discussion in executive session, however it did not provide notice to the individual candidates about the anticipated executive session. The notice listed this topic as follows:

> Executive Session- To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or discuss the discipline or dismissal of, or complaints or charges against, a public officer, employee, staff member or individual.
>
> - Waiver of Liability and Release Forms
> - Detective Sergeant Hoover- Candidates for Town Administrator

During its August 31 meeting, the Board voted by roll call to convene in executive session, describing the purpose as listed on the notice, to return to open session following the closed door session. Detective Sergeant Hoover joined the Board in executive session to discuss the release form and the background checks. Because the Board has not publicly released the minutes of its executive session, we do not recount what occurred in full detail here. During the executive session, the Board first received information on two of the five candidates who either refused to sign the release form or altered it in some way. As a result, Detective Sergeant Hoover did not conduct background checks on those two candidates. Detective Sergeant Hoover then provided the results of the background checks conducted on the three candidates who did sign the release form, which included their criminal, driving, and credit histories.[2] Detective Sergeant Hoover also reported on the results of other inquiries into the three candidates' reputation and/or character.[3]

Following this closed door discussion, the Board returned to open session and decided not to interview the two candidates who refused or altered the release form. Due to concerns about whether this executive session violated the Open Meeting Law, the Board met on September 13 to take remedial action, on advice of counsel. The meeting notice included the following topic:

> Address action taken at August 31, 2016 Board of Selectmen Meeting – Confirm use of executive session for consideration of information of a personal nature, and decision to schedule interviews of three of the five finalists recommended by the Town Administrator Search Committee.

During this meeting, Chair Donald Bourque read aloud a statement about the Board's August 31 executive session. Upon a motion to validate, ratify, and confirm this executive session, the Board began a discussion about whether to disqualify the candidates who did not sign the release form. Two Board members argued in favor of interviewing all five of the candidates. Following this discussion, the Board decided to interview all five of the candidates.

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[2] Generally, we maintain the confidentiality of all executive session minutes and materials provided to our office and review them *in camera*. However, the Board disclosed this information in its response to this complaint.

[3] Rather than disclose the specific details of the discussion here, we conclude that it concerned individuals' reputation and/or character. See OML 2011-34.

The Board then voted to "confirm the use of executive session for the August 31, 2016 Board of Selectmen's meeting."

## 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 Committee of Southbridge, 376 Mass. 70, 72 (1978). The 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. One executive session purpose allows a public body to enter executive session "to discuss the reputation, character, physical condition or mental health, rather than professional competence of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual." G.L. c. 30A, § 21(a)(1) ("Purpose 1"). The individual to be discussed during such an executive session must be notified in writing by the public body at least 48 hours prior to the proposed executive session, and has the right to be present during deliberations, has the right to have counsel present, and has the right to speak on her own behalf. Id.

The complaint alleges that the Board convened in executive session for an improper purpose. The purpose of the closed-door discussion was to discuss the release form and to receive findings from Detective Sergeant Hoover on the background checks he had conducted on the three candidates for Town Administrator who had signed the release form. The Board relied on Purpose 1 to convene in executive session, but did not provide notice to any of the candidates. In its response to this complaint, the Board asserted that it could have also relied on Purpose 7 to convene in executive session "[t]o comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements." G.L. c. 30A, § 21(a)(7). The Board cited the Criminal Offender Record Information statute, G.L. c. 6, §§ 168-172 ("CORI"), as the statute requiring confidentiality. CORI limits the dissemination of records and data which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release.

We agree that the limited portion of the discussion related to the criminal background checks could have been deemed confidential under CORI had the Board cited to it as a purpose for the executive session. However, the Board could not have relied on CORI for the entire discussion about the candidates. Most of the discussion would have been appropriate under Purpose 1 as it related to individuals' reputation and/or character. See G.L. c. 30A, § 21(a)(1). However, the Board's failure to notify the candidates of the executive session clearly violated the Open Meeting Law's requirements for convening in executive session under Purpose 1. See id. As a result of this misstep, the Board's discussion should have been held in open session. The Board therefore violated the Open Meeting Law by discussing the candidates in executive session. See OML 2016-64.[4]

Even if the Board had complied with the notice requirements for Purpose 1, however, the Board should not have discussed in executive session whether the candidates signed the release

[4] Open Meeting Law determinations may be found at the Attorney General's website, www.mass.gov/ago/openmeeting.

form as that topic did not fit within the parameters of either Purpose 1 or Purpose 7, or any other executive session purpose. By discussing this personnel matter behind closed doors, the Board violated the Open Meeting Law. We order the Board to release to the public the executive session minutes concerning this discussion. The Board may not redact or withhold that portion of 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 in their entirety ... as long as publication may defeat the lawful purposes of the executive session, but no longer; provided, however, that the executive session was held in compliance with section 21"); OML 2014-42. Additionally, due to the Board's failure to notify the candidates about the executive session, the Board may not rely on the Open Meeting Law to withhold the remaining portion of the executive session minutes, although it was appropriate for discussion under Purpose 1. Id. The Board may, however, continue to withhold that portion of the minutes, in whole or in part, if an exemption to the Public Records Law or the attorney-client privilege applies. Id. However, because the candidates had a right to be present during the executive session discussion regarding them and to make their own independent record of those proceedings, but were denied those rights by the Board, we order the Board to provide the subjects of the executive session (all three candidates) with an unredacted version of the portion of the minutes concerning themselves within thirty (30) days of the Board's receipt of this determination. See OML 2015-54.

On May 18, our office issued a determination finding that the Board intentionally violated the Open Meeting Law by improperly discussing personnel matters in executive session. See OML 2016-64. We found that, while Purpose 1 may have been appropriate for some of the discussion, the Board did not invoke Purpose 1 to justify its executive session, nor did the Board provide any individual with notice and the right to be present. Id. Our office found the violation to be intentional because just five days prior to the meeting, our office issued another determination finding that the Board violated the law by discussing general personnel matters in executive session. See OML 2015-126. In both decisions, we wrote that, "future similar violations may be considered evidence of intent to violate the Law." On August 2, our office executed a settlement agreement with the Board to resolve OML 2016-64 prior to a hearing. The Board agreed to comply with all applicable sections of the Open Meeting Law and the Attorney General's regulations in the future. The meeting at issue in this decision occurred just weeks later.

We again find that the Board improperly discussed a personnel matter in executive session and that, although most of the discussion may have been appropriate under Purpose 1, the Board did not notify the individuals and give them an opportunity to be present for the discussion about themselves. An intentional violation of the Open Meeting Law is "an act or omission by a public body or a member thereof, in knowing violation of the Law." 940 CMR 29.02. Evidence of an intentional violation includes that a public body was previously advised by the Attorney General that the conduct violates the Open Meeting Law. Id. Because the Board has already been warned twice about discussing general personnel matters in executive session and once for discussing individuals without providing them notice and an opportunity to participate, we find these violations to be intentional. We refer this matter for a hearing pursuant to 940 CMR 29.07(3) and recommend that the Board be assessed a fine of $2,000 for its improper personnel discussion in executive session and for its failure to notify the candidates about whom it improperly discussed in executive session, pursuant to G.L. c. 30A, § 23(c)(4)

("Upon the finding of a violation, the attorney general may issue an order to . . . impose a civil penalty upon the public body of not more than $1,000 for each intentional violation").

## CONCLUSION

We find that the Board violated the Open Meeting Law by improperly discussing a personnel matter in executive session and by failing to comply with the procedural requirements for convening an executive session. Because the Board had been previously warned by our office about this same conduct, we find these to be intentional violations of the Open Meeting Law. We therefore refer this matter to a hearing pursuant to 940 CMR 29.07(3). We recommend the following orders be imposed:

1) A civil penalty of $1,000.00 for each intentional violation of the law for a total of $2,000.00;

2) Release the Board's August 31, 2016 executive minutes to the public, in accordance with the above guidance;

3) Provide the subjects of the executive session (all three candidates) with an unredacted version of the portion of the minutes concerning them within thirty (30) days of the Board's receipt of this determination; and

3) An order of immediate and future compliance with the Open Meeting Law.

This determination does not address any other complaints that may be pending with this office or with the Board. We invite the Board to contact our office at (617) 963-2540 to discuss the hearing process.

Sincerely,

Hanne Rush
Assistant Attorney General
Division of Open Government

cc: Patrick Higgins
Webster 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 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.**