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December 15, 2014

OML 2014 – 145

Elizabeth A. Lane, Esq.
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110

RE: Open Meeting Law Complaint

Dear Attorney Lane:

This office received a complaint from Mr. David Osborne, dated July 7, alleging that the Winthrop Town Council (the Council) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaint was originally filed with the Council on June 19, and you responded on behalf of the Council in a letter dated July 3. In his complaint, Mr. Osborne alleges that the Council failed to sufficiently state the purpose for an executive session. Subsequently, Mr. Osborne filed a second complaint with the Council on July 28, and a second request for further review with our office on August 22, alleging that the Council failed to discuss his original complaint during a meeting.

Following our review, we find that the Council did not violate the Open Meeting Law with respect to its June 17 executive session, but did fail to follow proper procedure in responding to the complaint about that meeting. In reaching a determination, we reviewed the complaints and requests for further review; the Council's response; and the notice, agenda, and open session meeting minutes for a Council meeting held on June 17. Additionally, we reviewed, *in camera*, drafts of executive session minutes from the June 17 meeting.

FACTS

We find the facts as follows. The Council is a nine-member public body which meets at regular intervals to discuss matters of town governance. At issue is a meeting that took place on June 17. The agenda posted prior to the meeting reads, in pertinent part, as follows: "The council anticipates going into executive session to discuss strategy with respect to potential litigation and ongoing litigation. Discussion of these matters in an open meeting could have detrimental effect on the negotiation process."

¹ Unless otherwise indicated, all dates in this letter refer to the year 2014.



During this meeting, the Council entered executive session twice. The minutes reflect that the first executive session took place right after the open session began and was announced as follows: "Council President Gill requests motion to go in to Executive Session to discuss strategy with respect to potential litigation. Discussion of these matters in an open session could have detrimental effect on the negotiation process." The motion to enter executive session passed unanimously. Following this executive session discussion, the Council resumed its meeting in open session.

Towards the end of the meeting, another motion was made to enter into executive session. The minutes reflect the following: "The council anticipates going into executive session to discuss strategy with respect to potential litigation and ongoing litigation. Discussion of these matters in an open meeting could have detrimental effect on the negotiation process." It was stated that the Council would resume in open session following the executive session only for the purpose of adjourning the meeting.

DISCUSSION

The Open Meeting Law requires that meetings of a public body be conducted in an open session, with some exceptions. G.L. c. 30A, §§ 20-21. Public bodies may enter a closed, executive session for any of ten purposes enumerated in the Open Meeting Law, provided that the chair of the public body first announces in open session the purpose for the executive session, "stating all subjects that may be revealed without compromising the purpose for which the executive session was called." G.L. c. 30A, § 21(b)(3). This level of detail must also be included in the meeting notice. See OML 2011-15. One permissible reason to hold an 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). The mere possibility of litigation is not sufficient to invoke executive session Purpose 3. See OML 2012-5; OML 2011-30. Litigation must be pending or clearly and imminently threatened or otherwise demonstrably likely. See *Perryman v. School Committee of Boston*, 17 Mass. App. Ct. 346, 352 (1983); OML 2012-43. When entering into executive session pursuant to Purpose 3, a public body should identify the litigation matter or bargaining unit that it intends to discuss, if doing so will not compromise the executive session purpose. See OML 2013-91.

Because the minutes of the June 17 executive session have not been publicly disclosed by the Council, we do not recount the details of the litigation matters discussed. We note, though, that three topics were discussed in executive session involving both anticipated and ongoing litigation. Furthermore, we find that naming the parties involved in these matters would have compromised the Council's litigating position. G.L. c. 30A, § 21(b)(3). We therefore find that the Council did not violate the Open Meeting Law with respect to its June 17 meeting.

However, we find that the Council failed to respond to the complaint about the June 17 meeting in the manner prescribed by law. The Open Meeting Law requires that within 14 days of receipt of a complaint, the public body must review the complaint's allegations; take remedial action, if appropriate; and send to the Attorney General a copy of the complaint and a description of any remedial action taken. G.L. c. 30A, § 23(b); 940 CMR 29.05(5). Mr. Osborne filed his original complaint with the Council on June 19. The Council responded via its attorney on July 3, which was within with the required time period. However, it appears from our review that the

Council passed the complaint along to its attorney without first reviewing the allegations during a meeting. While we applaud the Council's efforts to respond quickly to Mr. Osborne's complaint, we find that its failure to discuss the complaint violated the Open Meeting Law. See 940 CMR 29.05(5). Proper procedure would have been for the Council to review the complaint before authorizing legal counsel to respond on its behalf.² See OML 2012-95; OML 2012-90; OML 2011-6. Furthermore, we note that the Council did not respond to Mr. Osborne's second complaint, as required by the Open Meeting Law. See G.L. c. 30A, § 23(b). Failure to respond to an Open Meeting Law complaint is itself a violation of the law. See OML 2014-78; OML 2014-15. We therefore find that the Committee violated the Open Meeting Law as alleged in the second complaint.

CONCLUSION

For the reasons stated above, we find that the Council did not violate the Open Meeting Law with respect to its June 17 executive session, but did fail to follow proper procedure in responding to that complaint about that meeting. We order immediate and future compliance with the Open Meeting Law, and we caution that future similar violations may be evidence of intent to violate the 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 our office or the Council. 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: David Osborne
Winthrop Town Council

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.

² We note that a public body may meet in executive session to review an Open Meeting Law complaint, if it so chooses. See G.L. c. 30A, § 21(a)(1); OML 2013-82.