



THE COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX DISTRICT ATTORNEY

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OML 99 - 3
March 10, 1999

Barry M. Bresnick
Chairman, Ashland Board of Selectmen
101 Main Street
Ashland, MA 01721

Re: Open Meeting Law

Dear Mr. Bresnick:

As you know, this office received a complaint from Mr. Timothy Gassert of the Community Newspaper Company, alleging that the Ashland Board of Selectmen ("Board") violated the Open Meeting Law, G.L. c. 39, §§ 23A-24, by conducting public business among a quorum of Board members by means of electronic ("e-mail") messages. I have reviewed the Board's minutes from the October 7, October 28, and November 4, 1998 open meetings. In addition, I have reviewed hard copies of the e-mail communications which circulated among Board members during this same time period. I have also spoken by telephone with every member of the Board, as well as with Town Manager Dexter Blois. Based on the information provided in this investigation, I conclude that the Board did violate the Open Meeting Law.

FACTS

The minutes from the open meetings make clear that during the relevant time frame the board was actively evaluating a development proposal for a portion of the former Nyanza Chemical Company site, currently owned by New Hampshire resident Robert Gayner. The plan proposed the construction of an apartment complex comprised of more than 800 units, and it called for an amendment to the applicable zoning law. Although it was not obliged to express any opinion to Town Meeting on the proposed zoning amendment, the Board customarily votes on every article submitted on the Town Meeting warrant.¹ In this instance, the Board voted 3 to 2 to support the zoning amendment. (See 11/4/98 Minutes, page 3.)

¹ The Planning Board brought the zoning amendment article to the floor of the November 10, 1998 Town Meeting, where the article was ultimately defeated.

During the period when the Board was evaluating the proposal, members exchanged numerous e-mail messages, many of which eventually reached a quorum. Hard copies of most of these e-mail communications were created. The content of the e-mail communications was reviewed in open meeting in a forthright manner. (See 10/28/98 Minutes, page 4.) Hard copies of the e-mail messages were made available, upon request, to members of the public. The Board was concerned about the propriety of these communications as they related to the Open Meeting Law. (See 11/4/98 Minutes, page 3.)

DISCUSSION

The Open Meeting Law requires that "[a]ll meetings of a governmental body shall be open to the public" and that "no quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section." G.L. c. 39, § 23B. "Meetings" covered by the Law include discussion or consideration by a quorum of "any public business or public policy matter over which the governmental body has supervision, control, jurisdiction, or advisory power." G.L. c. 39, § 23A.

It is beyond question that the e-mail communications involved here were substantive discussions concerning public business over which the Board exercised advisory power and were thus within the jurisdiction of the Board. Like private conversations held in person or over the telephone, these e-mail conversations among a quorum of the Board deprived the public of the opportunity to attend and monitor the e-mail "meetings." Since the fundamental purpose of the Law is to provide the public with the opportunity to gain knowledge about the considerations underlying public policy, such private conversations are a serious violation of the Law. Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72-73 (1978).

In this case, however, the private communications were not prejudicial: the Board reviewed the e-mail communications in open meeting; the Board contemporaneously generated hard copies of the e-mails; the Board provided the hard copies to the public; and the Board's recommendation to Town Meeting was non-binding and was in fact rejected. Moreover, the emerging use of e-mail technology presents novel aspects of the "openness" issue. This office has not had prior occasion to issue an opinion letter addressing e-mail communications in the context of the Open Meeting Law. For all of these reasons, this office has determined that no further action in this case is necessary.

This office advises that governmental bodies avoid e-mail messages except for matters of a purely housekeeping or administrative nature. To assist Board members in compliance with the Law, I enclose the District Attorney's Guidelines For Use Of E-Mail By Members Of Governmental Bodies. Please provide a copy to each member of the Ashland Board of

Selectmen. If you have any further questions, please do not hesitate to call me or any other member of the Open Meeting Law team.

Very truly yours,

Loretta M. Lillios

Loretta M. Lillios
Assistant District Attorney
Tel: (617) 494-4062

cc: Timothy Gassert
Dexter Blois

Enclosure



THE COMMONWEALTH OF MASSACHUSETTS
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OML 04-03
February 27, 2004

Attorney Joan E. Langsam
Counsel for Town of Reading
Brackett & Lucas
165 Washington St.
Winchester, MA 01890

Re: Open Meeting Law

Dear Attorney Langsam:

As you know, this office received a complaint from Thomas J. Ryan, dated June 7, 2003, alleging that the Reading School Committee violated the Open Meeting Law, G.L. c. 39, §§ 23A-24 (the "Law"), by communicating via electronic mail ("e-mail") on various dates between April 30 through May 13, 2003, on the subject of the Reading Community Television, Inc. ("RCTV") proposal to amend its bylaws and appoint all of its own board members.

I appreciate the full cooperation this office has received from Town Counsel and the school committee in responding to our inquiry and following up with relevant information. I have reviewed the complaint and the accompanying and follow-up materials submitted by Mr. Ryan as well as materials you furnished in response to our office's inquiries. Further, I have conducted telephone interviews with Mr. Ryan, school committee members John Carpenter, Peter Dahl, John Russo, and Robert Spadafora, and Town Manager Peter Heckenbleikner. Based upon my review of all this information, I conclude that the school committee violated the Open Meeting Law.



FACTS

The underlying issue in this case involves a bylaw amendment proposal of RCTV, a non-profit private entity that serves as the Town of Reading's ("Town") public access television provider. From its formation in 1998, RCTV was overseen by a board of directors ("RCTV board"), composed of seven members, three appointed by the Reading board of selectmen, one appointed by the Reading school committee, and the remaining three elected by RCTV members. In the spring of 2003, the RCTV board considered amending its bylaws to eliminate the positions appointed by the board of selectmen and the school committee, and have all of the positions elected by RCTV members, cable-subscribers who paid an extra fee to join RCTV.

By letter dated April 18, 2003, RCTV informed the school committee of its plan to consider amending its bylaws. On April 30, 2003, Mr. Carpenter, a member of the school committee, sent an e-mail message to Mr. Spadafora, a fellow school committee member. Mr. Carpenter sent copies of the message to additional people, including Mr. Dahl, another school committee member. In his message, Mr. Carpenter inquired if Mr. Spadafora had received the April 18th RCTV letter. Mr. Carpenter summarized what he viewed as the letter's salient points and then speculated on the reasons underlying the RCTV proposal. Neither Mr. Spadafora nor Mr. Dahl responded to the e-mail message.

On May 6, 2003, an individual, who was not on the school committee but had been forwarded Mr. Carpenter's message, e-mailed a response, sharing the gist of a conversation he had had with an RCTV official. Among the recipients of this response were Mr. Carpenter, Mr. Spadafora, and Mr. Dahl. Again, neither Mr. Dahl nor Mr. Spadafora responded. The next day, however, Mr. Carpenter e-mailed a reply to all, this time also including the Town Manager, Peter Heckenbleikner, as a recipient. On or about July 25, 2003, a fourth school committee member, Mr. Russo, received by facsimile printout copies of the above-mentioned e-mail messages from a Reading citizen not on the original recipient list.

During a regular open meeting on May 12, 2003, the school committee voted 5 to 1 to oppose the RCTV proposal and to inform RCTV of its opposition. Nevertheless, on May 14th, RCTV approved the bylaw changes, replacing the town-appointed positions with a non-voting liaison and subjecting all board positions to election by RCTV members. In July 2003, responding to the bylaw changes, the board of selectmen and the RCTV board of directors jointly formed an "Ad Hoc Committee" to develop a written contract setting out the roles and duties of the Town and RCTV respective to each other. The nine-member ad-hoc committee included two members of the school committee.

Finally, hard copies of the e-mail communications in question were never made available to the public.

DISCUSSION

The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). The Law is intended "to advance democracy by providing broad access to governmental decision-making." Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 308-309 (1990). The Open Meeting Law requires that all meetings of a governmental body be open to the public unless they fall within one of the exceptions permitting an executive session. G.L. c. 39, § 23B.

The Law defines "meeting" broadly to include "any corporal convening and deliberation of a governmental body" covered by the Law "at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered" G.L. c. 39, §23A. "Deliberation," in turn, is defined as a "verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." G.L. c. 39, §23A.

It is clear that the e-mail communications here involved substantive discussions concerning public business over which the school committee exercised "supervision, control, jurisdiction, or advisory power." G.L. c. 39, § 23A. Even if the committee did not have direct authority to intervene in the process of amending RCTV's bylaws, its interest was affected by the proposed amendments and it did have power to influence the process by its response. This is reflected by its public vote on May 12, 2003 to oppose the proposal and to advise RCTV of its opposition.

Like private conversations held in person or over the telephone, e-mail messages concerning a substantive matter of public business among a quorum of a governmental body deprives the public of the opportunity to attend and monitor the e-mail "meetings." Since the fundamental purpose of the Law is to provide the public with the opportunity to gain knowledge about the considerations underlying public policy, such private conversations that reach a quorum violate the Open Meeting Law. Ghiglione, 376 Mass. at 72-73; see also OML 99-3.

I acknowledge that Mr. Carpenter may not have intended that the e-mail discussion reach a quorum of the seven-member school committee. Nonetheless, it did. It is this very lack of control over an e-mail message by the original sender that underscores the high risk that the consequent discussion may eventually reach a quorum, even without the original sender's knowledge. See OML 99-3. I also recognize that the other school committee members may have been cognizant of the Open Meeting Law implications of communicating by e-mail and avoided replying in kind. Nonetheless, their receipt and observation of the contents of the e-mail discussion constituted a participation in the deliberative process to which the Open Meeting Law applies.

Because of the high risk of violating the Open Meeting Law, even inadvertently, as occurred in this case, this office has consistently recommended that e-mail messages be avoided except for matters of a purely housekeeping or administrative nature.

CONCLUSION

Based on all of the circumstances, I conclude that the school committee violated the Open Meeting Law. To remedy this violation, the committee should create a hard copy of the e-mail messages at issue and immediately place it in a central file, where it can be provided as a public record on request.

I appreciate the time and effort expended by the complainant, school committee, Town Counsel, and Town Manager in assisting the resolution of this matter. To assist committee members in compliance with the Law, I enclose the District Attorney's Guidelines for Use of E-mail By Members of Governmental Bodies. Please feel free to contact me if you have any questions regarding this matter or the Open Meeting Law in general.

Very Truly Yours,



Lillian Cheng
Assistant District Attorney
(617) 679-6573

cc: Thomas Ryan

Enclosure

**MIDDLESEX COUNTY DISTRICT ATTORNEY'S OFFICE
MARTHA COAKLEY, DISTRICT ATTORNEY**

OML GUIDELINES ON USE OF E-MAIL

INTRODUCTION

In light of the proliferation in the use of personal computers in recent years, it has become more common for persons, both at home and at work, to communicate through electronic mail, commonly known as "e-mail." In order to assist members of governmental bodies to comply with the Open Meeting Law in their use of this new technology, the following guidelines have been prepared. As every case will present its own set of circumstances, these guidelines must be considered general in nature. Specific questions concerning the proper use of e-mail, or other questions concerning Open Meeting Law, may be directed to the District Attorney's Open Meeting Law Team at (617) 679- 6540.

DISCUSSION

The Open Meeting Law requires that "[a]ll meetings of a governmental body shall be open to the public" and that "no quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section." G.L. c. 39, § 23B. "Meetings" covered by the Law include discussion or consideration by a quorum of "any public business or public matter over which the governmental body has supervision, control, jurisdiction, or advisory power." G.L. c. 39, 23A.

Thus, no substantive discussion by a quorum of members of a governmental body about public business within the jurisdiction of the governmental body is permissible except at a meeting held in compliance with the requirements of the Open Meeting Law. Like private conversations held in person or over the telephone, e-mail conversations among a quorum of members of a governmental body that relate to public business violate the Open Meeting Law, as the public is deprived of the opportunity to attend and monitor the e-mail "meeting."

Members of governmental bodies should also be cautious about communicating via e-mail on an individual basis. This is because private, serial conversations may reach a quorum of members without the knowledge of all participants. Private, serial discussions of public business involving a quorum violate the Open Meeting Law regardless of the knowledge or intent of the parties.

Certain housekeeping matters may, of course, be communicated outside of a meeting. Questions concerning meeting cancellations and scheduling often must be discussed outside of a meeting. Similarly, requests to put items on the agenda, so long as no substantive discussion occurs, are properly communicated outside a meeting. Other

proper uses of e-mail may be to permit members of a governmental body to communicate with town department heads or staff. Both members of governmental bodies and town employees, however, must take care not to utilize such communications to poll board members or otherwise engage in deliberations.

Additionally, whenever an e-mail message is sent or received by a member of a governmental body, it is the recommendation of this office that a hard copy be created and immediately placed in a central file, where it can be provided as a public record on request.

CONCLUSION

Despite the convenience and speed of communication by e-mail, its use by members of a governmental body carries a high risk of violating the Open Meeting Law. Not only do private e-mail communications deprive the public of the chance contemporaneously to monitor the discussion, but by excluding non-participating members such communications are also inconsistent with the collegial character of governmental bodies. For these reasons, e-mail messages among members of governmental bodies are best avoided except for matters of a purely housekeeping or administrative nature.