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January 17, 2013

OML 2013 – 5

John Bladon
Chairman
Board of Selectmen
41 Cochituate Road
Wayland, MA 01778

RE: Open Meeting Law Complaint

Dear Mr. Bladon:

Our office received a complaint by Mr. George Harris, dated May 29, 2012, alleging a violation of the Open Meeting Law, G.L. c. 30A, §§18-25, by the Wayland Board of Selectmen (the "Board"). Specifically, the complaint alleges that the Board "privately engaged in the deliberation of the town administrator's professional competence through the exchange of written communications prior to an open meeting held March 28, 2012." The complaint was initially filed with the Board on or about April 25, 2012. The Board responded to the complaint by letter dated May 2, 2012.

Following our review, we find that then Board did not violate the Open Meeting Law because the Chair performed an administrative task exempt from the law's definition of deliberation. In reaching our determination, we reviewed the April 25, 2012 complaint; the Board's May 2, 2012 response; and the May 29, 2012 complaint filed with our office. Additionally, we reviewed the draft minutes of the Board's March 28, 2012 open meeting. Finally, we reviewed evaluations of the Town Administrator created by members of the Board and provided to our office by Mr. Harris.

FACTS

The Wayland Board of Selectmen is a five-member public body. Prior to the Board's May 28, 2012 meeting, Board Chair Thomas Fay prepared a draft performance evaluation for the Town Administrator, Frederick Turkington. The evaluation was a composite prepared by Chair Fay based on the input from individual Board members. Three of the other four Board members provided their comments to Chair Fay by email between February 4 and March 14, 2012. Chair Fay then distributed the composite evaluations to the Board members prior to the Board's March

28, 2012 meeting, as part of the Board's regular packet of materials to be discussed at the meeting.

During the Board's March 28, 2012 meeting, the Board discussed the performance evaluation of the Town Administrator. The minutes read that the Board "praised F. Turkington for his availability and responsiveness to the public, his work ethic, his relationship with town staff, and his accessibility to board and committee members." The Board then voted unanimously to "approve the evaluation of Town Administrator Fred Turkington as presented."

DISCUSSION

The Open Meeting Law seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently. To that end, 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 a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed." G.L. c. 30A, § 18. All deliberations must occur during a meeting. Id. Performance evaluations and discussions of an employee's professional competence must occur in open session. G. L. c. 30A, § 21(a)(1); District Attorney for the Northern District v. School Committee of Wayland, 455 Mass. 561, 569 (2009).

The Attorney General has provided the following guidance regarding performance evaluations by public bodies, available at the Attorney General's website, www.mass.gov/ago/openmeeting:

May the individual evaluations of an employee be aggregated into a comprehensive evaluation?

Yes. Members of a public body may individually create evaluations, and then submit them to an individual to aggregate into a master evaluation document to be discussed at an open meeting. Ideally, members of the public body should submit their evaluations for compilation to someone who is not a member of the public body, for example, an administrative assistant. If this is not a practical option, then the chair or other designated public body member may compile the evaluations. However, once the individual evaluations are submitted for aggregation there should be no deliberation among members of the public body regarding the content of the evaluations outside of an open meeting, whether in person or over email.

The Board followed this directive when members submitted their individual evaluations of the Town Administrator to Chair Fay via email. Chair Fay then distributed the composite evaluation to the Board members for their review ahead of a discussion that occurred during an open meeting. By performing this administrative task by email, Chair Fay did not violate the Open Meeting Law.

Generally, the Open Meeting Law restricts communications between and among a quorum of a public body with respect to “any public business within its jurisdiction.” Given this restriction, our advice has always been that public bodies should refrain from virtually all email communication between a quorum of members to avoid even the appearance that members are deliberating outside an open meeting. That is still our advice. Nonetheless, we recognize that the law excludes from the definition of “deliberation” certain administrative tasks such as “the distribution of a meeting agenda” and “the distribution of reports or documents that may be discussed at a meeting.” That exception includes a strong caveat, however: such administrative communications are permissible “provided that no opinion of a member is expressed.” G.L. c. 30A, § 18.

Here, Chair Fay’s email did no more than distribute a document to be discussed at the Board’s meeting that night. The email did not contain any advocacy by Chair Fay, and it did not invite comment from other Board members, nor was any comment provided. Although the document itself may have contained the opinions of Board members, we find compiling evaluations to be a permissible and necessary function for public bodies to conduct ahead of meetings, so long as discussion of the evaluations occurs during an open meeting. We, therefore, determine that Selectman Fay’s email distribution of a composite evaluation for discussion at an open meeting constituted an administrative task permitted by the Open Meeting Law.

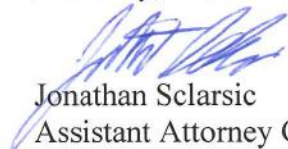
We note, however, that determining which tasks are merely “administrative” can be challenging, and that email communications between a quorum of public body members – however innocent – creates at least the appearance of a potential Open Meeting Law violation. Therefore, our best advice continues to be that public bodies not communicate over email at all except for distributing meeting agendas, scheduling meetings and distributing documents created by non-members to be discussed at meetings, which are administrative tasks specifically sanctioned under the Open Meeting Law.

CONCLUSION

For the reasons stated above, we find that the Board did not violate the Open Meeting Law.

We now consider this complaint resolved and this matter closed. This letter does not resolve any other complaints which may have been filed with our office or the Board. Please contact me if you have any questions.

Sincerely,



Jonathan Sclarsic
Assistant Attorney General
Division of Open Government

cc: George Harris
Mark Lanza, Wayland Town Counsel

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.