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November 25, 2013

OML 2013 – 174

Robert Ritchie, Esq.
Special Town Counsel
1175 Bay Road
Amherst, MA 01002

RE: Open Meeting Law Complaint

Dear Attorney Ritchie:

Our office received two complaints from Kimberly Reichelt, both dated September 24, 2013, alleging that the Wayland Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaints allege that the Board failed to provide sufficient notice that it would discuss terminating the Town Administrator’s employment contract during its August 26, 2013 meeting and that, at some point prior to that meeting, a quorum of the Board deliberated outside of a noticed meeting and agreed to terminate the Town Administrator’s employment. The first complaint was filed with the Board on or about September 3, 2013, and the second was filed with the Board on or about September 18, 2013. The Board responded to both complaints by letter dated September 25, 2013.

Following our review, we find no evidence that the Board improperly deliberated prior to its August 26, 2013 meeting, however we find that the notice for that meeting was not sufficiently specific to inform the public that a discussion about terminating the Town Administrator’s employment would occur. In reaching this determination, we reviewed the September 3, 2013 and September 18, 2013 complaints filed with the Board; the Board’s September 25, 2013 response; and the September 24, 2013 complaints filed with our office. We also reviewed the meeting notices, minutes, and video recordings of the Board’s August 26, 2013; September 9, 2013; September 16, 2013; September 23, 2013; October 2, 2013 and October 7, 2013 meetings. We reviewed the Board’s October 24, 2013 response to our October 8, 2013 request for certain documents and information, and the Board’s response to a Wayland citizen’s public records request, which included documents concerning Town Administrator Frederic Turkington’s annual performance evaluations. We reviewed the August 7, 2013 Report of the Town Administrator, and emails sent by the complainant, by Mr. Turkington, and by members of the Board to our office. Finally, in September 2013 we interviewed each of the

Board members and Mr. Turkington regarding the matters alleged in the complaint, and met again with Chair Leard prior to his resignation from the Board in October 2013.¹

FACTS

The Board is a five-member public body, thus three members constitute a quorum. At the time the events in question occurred, its members were Chair Douglas Leard and Selectmen Anthony Boschetto, Edward Collins, Joseph Nolan and Steven Correia.

In the Town Administrator's August 7, 2013 report, which was provided to the Board, Town Administrator Frederic Turkington noted that his annual performance review was to be completed by September 19, 2013. Mr. Turkington's report laid out a timetable with milestones for accomplishing the review. In an effort to meet those milestones, Chair Leard sent an email to Mr. Turkington on the morning of August 17, 2013 inquiring whether he had provided the Board members with copies of his current employment agreement, job description, and past evaluations. On the morning of August 19, 2013, Mr. Turkington emailed these documents to the Board. Chair Leard planned to discuss the Board's goals and priorities for the Town Administrator at the Board's August 26, 2013 meeting, under a topic listed in the notice as "Review and discuss proposed goals and priorities for October 2013 through September 2014" as part of "Selectmen's Reports and Concerns."

As was his regular practice, the Town Administrator prepared the Board's agenda for its August 26, 2013 meeting and sent it to the Chair for review. On August 19, 2013, at 12:47 PM, Mr. Turkington sent an email to Chair Leard with the subject "DRAFT agenda for Selectmen's meeting on August 26," and included in the text of the email a proposed agenda listing 14 items for discussion. At 1:25 PM that day, Chair Leard forwarded the email to Mr. Boschetto, who was the Vice Chair and had chaired the prior meeting in Mr. Leard's absence, writing, "Hi Tony...do you have anything to add?" Mr. Boschetto replied at 2:37 PM, writing, "Yes Please. I will send you language tonight. thanks. T." At 3:11 PM, Mr. Boschetto sent an email to Chair Leard with the subject line: "do not forward or share...I will call." In the email, Mr. Boschetto wrote:

Please add item 4 below at 7:15 and adjust remaining items accordingly and remove item 13

7:15 4.) Review Town Administrator Contract and Job Description

Remove item 13 and schedule for follow up meeting.

T.

¹We also acknowledge the numerous phone calls, letters, and emails our office received from Wayland residents regarding the events discussed in this determination.

In his October 24, 2013 response to our request for certain documents and information, regarding the added agenda item, Chair Leard wrote:

I believe I received this request via telephone. I believe, at the time I asked Mr. Boschetto the purpose of the specific agenda item and I was simply informed that it was an item for possible discussion.

Mr. Boschetto contends that the Chair never contacted him for additional information or clarification regarding this agenda item.

Two days later, on August 21, 2013, Chair Leard sent an email to Mr. Turkington with the subject: "Agenda for Selectmen's meeting on August 26." In that email, Chair Leard wrote:

Hi Fred.

A member of the BOS would like to make the following changes to the August 26, 2013 Board of Selectmen agenda:

Add to the end of the 7:15 Agenda #4) "Review Town Administrator Contract and Job Description"

Remove the 9:20 #13) Executive Session

I hope to be in attendance on Monday but in the unlikely event I am not, I am forwarding this to Tony (Vice Chair) as well. I concurred with the requested agenda change.

After receiving this email, Mr. Turkington telephoned Chair Leard to inquire about the nature of the new agenda item. Chair Leard informed Mr. Turkington that he received the request for the specific agenda item from a Board member with no explanation of its intent.

The notice for the Board's August 26, 2013 meeting was posted on August 22, 2013. On August 24, 2013, Mr. Correia telephoned Chair Leard and left him a voice message inquiring about the nature of the added agenda item. Chair Leard responded by text message, writing, in relevant part:

The specific agenda item was requested by Tony. I forwarded the agenda to tony because I was/am unsure of my attendance on Monday night. I never got into a lengthy discussion with him, I would suggest speaking with Tony. Thanks.

Mr. Correia responded to the text message, writing in part:

I disagree with your decision. You do the agenda whether you attend or not as chairman. Regardless, you still should know what the agenda item is regarding as chair. Can you please contact him and find out what this is all about? Thx.

Chair Leard did not respond further.

The Board held its regular meeting on August 26, 2013. At the beginning of the meeting, Mr. Correia asked the Chair for clarification regarding the agenda item "Review Town Administrator Contract and Job Description." Mr. Correia noted that he "asked three times since I got the agenda what the purpose of that line item is, and I'm not sure I'm prepared this evening. I didn't get a response, so I'm just wondering what's the purpose of that line item." Mr. Correia additionally noted that the Town Administrator's contract was not up for renewal. After some heated discussion between Mr. Correia and Chair Leard, the Chair deferred discussion of the topic to later in the meeting and moved on to Public Comment.

When the Board reached "Review Town Administrator Contract and Job Description" on the agenda, the Chair immediately recognized Mr. Boschetto, who distributed a motion to the other Board members. The motion read, in relevant part:

I move that the BOS terminate the employment contract of Fredric E. Turkington, Jr. as Town Administrator effective immediately, August 26, 2013 without cause under the terms of section VII(B) of said contract. He shall be immediately relieved of all duties and the Assistant Town Administrator shall serve as Interim Town Administrator on all matters until the Board of Selectmen appoint an interim or permanent replacement and that the BOS shall schedule a meeting with all Department Heads for purpose of creating an interim management structure.

As Mr. Boschetto passed around the motion and began speaking in support of its adoption, Mr. Correia immediately objected, once again noting that he had requested clarification as to the purpose of the topic and that he was not prepared to discuss the contract that evening. Mr. Nolan also objected to what he viewed as a lack of transparency, questioning why Mr. Boschetto had not distributed the motion to the Board members ahead of the meeting. Mr. Boschetto replied that it was not appropriate under the Open Meeting Law, and that the appropriate procedure was to have an agenda and then make a motion during the meeting.

Mr. Boschetto then explained that he believed it was time for the Town to move in a "new direction," and that approving this motion was in the best interest of the Town. Chair Leard noted that the Board could terminate the Town Administrator for "just cause" or "without cause." Mr. Correia argued that Mr. Turkington had stellar performance reviews, and protested what he viewed as a lack of transparency by the Board. After much heated discussion about the procedural appropriateness of considering the motion, Mr. Correia walked out of the meeting in protest.

Mr. Boschetto explained that his motion was to terminate the Town Administrator "without cause." Mr. Collins agreed that if the Board was terminating Mr. Turkington "without cause," then the Board should not discuss causes for termination. Mr. Boschetto and Chair Leard

agreed that there should be no discussion of the merits of terminating Mr. Turkington.² The Board had no substantive discussion regarding the merits of the motion, except for Mr. Nolan's objections and questions to the other Board members. The Board then voted 3-1 to approve the motion. Mr. Boschetto, Mr. Collins, and Chair Leard voted in favor. Mr. Nolan voted against. The entire discussion lasted approximately 20 minutes.

In interviews with our office and in signed written statements, each member of the Board subsequently stated that he did not have any conversation with any other member of the Board regarding the possibility of terminating the Town Administrator's employment contract prior to the August 26, 2013 Board meeting.

Following the August 26, 2013 meeting, a number of citizens and public officials expressed concerns in the press and to our office about what had occurred. In an effort to address those concerns, and to respond to Ms. Reichelt's Open Meeting Law complaints, the Board took the following action. On September 9, 2013; September 16, 2013; and September 23, 2013, the Board held meetings during which it allowed dozens of residents to address the Board and express their opinions regarding the Board's actions. The Board members also made statements during the September 23, 2013 meeting explaining their votes, though the Board voted 3-2 during the executive session portion of that meeting to deny that it violated the Law. However, the Board also suggested adopting a policy to "assure that major decisions of the Board are accompanied by sufficient notice and opportunity for public deliberation of town business."³

In a further effort to address the complaints, the Board posted notice for an October 2, 2013 meeting that included the following topic:

Review Town Administrator Employment Agreement and Job Description, and/or
Discuss all Possible Action as Allowable Under the Terms of the Agreement including
Whether to Exercise the Authority of the Board to Confirm and Ratify Termination of the
Employment Contract of the Town Administrator under the "Without Cause" Provisions
of that Contract

² Section VII of Mr. Turkington's employment contract is entitled "Termination for Just Cause and Termination Without Cause and Severance Pay." The section provides, in relevant part, that:

B. Without Cause

The Board may terminate Turkington and this Agreement at any time without cause by giving Turkington written notice of such termination and paying Turkington twelve (12) month's salary and supplemental retirement benefits, except in the case of non-reappointment under Section IX(A) of this contract.

We express no opinion as to the legal meaning or effect of termination "without cause."

³ This statement was made in the Board's response to the complaint, which was read aloud during this meeting. It is unclear whether such a policy has, in fact, been adopted in the time since this meeting. We encourage the Board to do so, if it has not already.

During the October 2, 2013 meeting, following a discussion during which Mr. Correia made the points he would have made during the August 26, 2013 meeting had he been given an opportunity to prepare for that discussion, the Board voted to reaffirm its decision to terminate the Town Administrator's employment agreement "without cause," and did so by a 3-2 vote. Prior to the vote, Mr. Boschetto read aloud a statement explaining his decision to submit the topic regarding the Town Administrator's contract and job description for the Board's consideration at the August 26, 2013 meeting. Mr. Boschetto stated that during the weekend before the August 26, 2013 Board meeting, he reviewed the Town Administrator's employment agreement, job description, and most recent evaluation. It was during this review that he took note of several contract provisions, including "Performance Evaluation" and "Compensation." Mr. Boschetto stated that:

Based on observation and review of Selectmen's meetings prior to my election, continuing concerns raised by residents, and discussions during posted Board meetings since April 2013, I had become increasingly concerned with the Town Administrator's management style, philosophy, judgment and direction. As indicated by recent results at elections and Town Meetings, a majority of the electorate was looking for a new management approach.⁴ And, I came to believe that the only way to accomplish the desired result was with a change in top management.

In gathering my own thoughts for the upcoming discussion and performance evaluation, I gained an understanding of the contractual provisions that the previous board had negotiated and would come into play in any such change....Mindful of the proscriptions and requirements of the Open Meeting Law, I did not discuss my thoughts or any possible actions with any other member of the Board in advance of the August 26 Board meeting. I drafted two different motions – one not to reappoint the Town Administrator and the other to terminate the contract without cause. I did not share either of those motions with any other member of the Board of Selectmen until the board meeting on August 26, 2013....At the start of the Board meeting, I had not determined whether I would even offer any motion concerning the Town Administrator's employment.

On October 28, 2013, Chair Leard resigned from the Board, citing health concerns.

DISCUSSION

1. We find no Evidence that the Board Deliberated Outside of a Meeting to Agree to Terminate the Town Administrator's Employment.

The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). To that end, 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

⁴ The complainant and the two dissenting members of the Board disagree with this assertion.

convened. See G.L. c. 30A, §§ 20(a)-(b), 21. The Open Meeting Law defines a “meeting” as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. “Deliberation” is defined, in relevant part, 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.” Id. A “quorum” is “a simple majority of the members of the public body, unless otherwise provided in a general or special law, executive order or other authorizing provision.” Id.

All five members of the Board stated verbally, during interviews with our office, and in signed written statements that they did not discuss the possibility of terminating the Town Administrator with any other Board member prior to the Board’s August 26, 2013 meeting. Mr. Boschetto asserts that he independently decided to introduce a motion to terminate the Town Administrator’s contract, and did not consult with any other members of the Board about this decision or the language of the motion prior to the meeting. While he believed that Mr. Collins and Chair Leard would share his perspective and support his motion, he claims that he did not speak with either regarding his planned action prior to the August 26, 2013 meeting.

While it is unusual for such a significant decision to be made by a public body without any prior discussion, Selectmen Boschetto, Collins and Leard assert this is precisely what happened. We acknowledge that the Board members’ accounts are contrary to the impression left by their seemingly orchestrated action however, in the absence of any evidence to the contrary, we credit their account and find they did not improperly deliberate outside of an open meeting. See, e.g. OML 2011-44 (finding that “While a vote to extend an employment contract does itself make a statement about the performance of the person whose contract is being extended, the fact of such a vote does not constitute concrete evidence that a discussion of that employee’s performance preceded.”)⁵

2. The Board Violated the Open Meeting Law by Failing to Post a Sufficiently Detailed Notice for its August 26, 2013 Meeting.

Although we find that the Board did not deliberate prior to its August 26, 2013 meeting, the Board violated the Law by failing to give the public, and the Board’s own members, sufficient notice that this anticipated discussion would occur. The Open Meeting Law requires that meeting notices contain “a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” G.L. c. 30A, § 20(b). Public bodies must list topics in a meeting notice with “sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 CMR 29.03(1)(b).

Mr. Boschetto requested that Chair Leard add the topic “Review Town Administrator Contract and Job Description” to the notice for the Board’s August 26, 2013 meeting. We believe that Mr. Boschetto knew at the time he requested this item be added that he would suggest either terminating or not renewing the contract of the Town Administrator during the

⁵ Open Meeting Law determinations may be found at www.mass.gov/ago/openmeeting.

meeting. However, we credit Chair Leard's account that he did not know specifically what Mr. Boschetto intended to discuss when he received the request to add this item. There is a conflict in the accounts of Mr. Boschetto and Chair Leard regarding whether the Chair subsequently spoke with Mr. Boschetto about the nature of the proposed topic. Mr. Boschetto acknowledged during the Board's October 2, 2013 executive session that he had a brief discussion with the Chair regarding adding the agenda item, and his August 19, 2013 email to Chair Leard requesting that the item be added to the agenda had the subject line: "do not forward or share...I will call." We therefore credit the Chair's assertion that he did speak with Mr. Boschetto about this item, and that Mr. Boschetto responded simply that "it was an item for possible discussion."

Although Chair Leard made some effort to inquire about the nature of the topic at the time it was proposed, we nevertheless find that he fell short of his obligation to post a meeting notice with "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." See 940 CMR 29.03(1)(b). Subsequent to the discussion with Mr. Boschetto, both the Town Administrator and a member of the Board contacted the Chair because they did not understand from the topic as written what would be discussed. At that point, it should have been clear to the Chair that the public also would not understand the nature of the discussion. The Chair had several options at that point. He could have 1) sought additional detail from Mr. Boschetto and updated the notice; 2) removed the unclear item from the agenda; or 3) if the Chair believed that the topic was sufficiently specific because it merely suggested a broad review of the Town Administrator's employment agreement and job description, then he should have limited discussion during the August 26, 2013 meeting to that topic. His failure to do any of these things resulted in a violation of the Open Meeting Law. We do not find that this violation was intentional, however, and we acknowledge that Mr. Boschetto appears to have been intentionally vague about the nature of this topic.⁶

As a final matter, we address Mr. Boschetto's contention during the Board's August 26, 2013 meeting that he was not permitted to provide more detail in his notice topic or distribute his motion to other Board members prior to the start of that meeting because doing so would violate the Open Meeting Law. The Open Meeting Law is designed to ensure government transparency, but includes provisions meant to enable public bodies to operate efficiently and effectively. In particular, the law permits public body members to prepare for meetings by distributing meeting agendas, reports or other documents to be discussed at a meeting, "provided that no opinion of a member is expressed." G.L. c. 30A, § 18 (definition of "deliberation"). Thus, while a member of a public body should not discuss matters within the public body's jurisdiction with a quorum outside of a noticed meeting, it is entirely appropriate to distribute documents, such as anticipated motions, to the public body members for review prior to a planned discussion at an upcoming meeting. The law prohibits any expression of opinion on such documents however, meaning that arguments supporting or opposing the motion should not accompany the document being distributed.

⁶ Furthermore, we acknowledge that before the meeting another member of the Board inquired of the Chair about the vague nature of this topic and that members of the Board raised similar concerns during the August 26, 2013 meeting. Indeed, one member ultimately refused to participate in the discussion and left the meeting.

CONCLUSION

Although we find no evidence that the Board improperly deliberated prior to its August 26, 2013 meeting, we find that the notice for that meeting was not sufficiently specific to inform the public that a discussion about terminating the Town Administrator's employment would occur. We acknowledge that the Board made efforts, in response to the significant public response to its decision, to offer the public an opportunity to comment on this issue and to address the allegations made by Ms. Reichelt. We also note that, following the events discussed in this decision, the Chair resigned from the Board.

Accordingly, we order the Board's immediate and future compliance with the Open Meeting Law, and caution the Board that a similar future violation may be considered evidence of an intentional violation of the Law. Additionally, we order the Board to review the Attorney General's Open Meeting Law Training Video #2: Meeting Notices and certify to our office within thirty (30) days of this decision, using the attached form, that it has done so.⁷

With the issuance of this determination, we now consider this matter closed. This determination does not address any other complaints that may be pending with our office or the Board. If you have any questions regarding this letter, please contact our office at (617) 963-2540.

Sincerely,



Amy L. Nable, Director
Jonathan Sclarsic
Assistant Attorneys General
Division of Open Government

cc: Wayland Board of Selectmen
Mark Lanza, Wayland Town Counsel
Kimberly Reichelt

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.

⁷ The Attorney General's Open Meeting Law training videos may be found here:
<http://www.mass.gov/ago/government-resources/open-meeting-law/video-trainings/>

Certification of Compliance with Order

I _____ hereby certify that I have read the Attorney General's determination
(print name)

number OML 2013-174 and, pursuant to the order therein, reviewed the Attorney General's

Open Meeting Law Training Video #2: Meeting Notices on _____
(date)

Board Member Signature

Date