



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

October 4, 2018

OML 2018 – 134

Katherine M. Feodoroff, Esq.
Mead, Talerman & Costa, LLC
730 Main Street, Suite 1F
Millis, MA 02054

RE: Open Meeting Law Complaint

Dear Attorney Feodoroff:

This office received a complaint from Stephen Morgan, dated June 27, alleging that the Ashland Board of Health (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaint was originally filed with the Board on June 1, and, after an extension of time was granted by our office, the Board responded by letter on or about June 27. In his complaint, Mr. Morgan alleges that the Board violated the Open Meeting Law by: (i) deliberating outside of a noticed meeting, (ii) failing to follow proper procedure in responding to an Open Meeting Law complaint, and (iii) discussing a topic that had not been listed on a meeting notice.

Following our review, we find that the Board did not violate the Open Meeting Law. In reaching a determination, we reviewed the original complaint, the Board’s response, and the request for further review filed with our office. We also reviewed the notice of a Board meeting held on May 31, as well as a video recording of the May 31 meeting.² Finally, we spoke with the Board’s legal counsel by telephone on September 18.³

FACTS

We find the facts as follows. The Board is a five-member public body, thus three members constitute a quorum. On May 22, the Board’s administrative assistant sent an e-mail to all five Board members. Attached to this e-mail were draft responses to three recent Open Meeting Law complaints prepared by the Board’s legal counsel.⁴ The e-mail stated that the

¹ Unless otherwise indicated, all dates in this letter refer to the year 2018.

² The video recording is available here: https://www.youtube.com/watch?v=YUY7_IYN1Bk&list=PLieg8-rmMShGzoUPW4PF0JcXiBVxBUogE&index=2.

³ For the sake of clarity, we refer to you in the third person.

⁴ Two of the complaints at issue were filed by the complainant in the present matter. The third complaint was filed by a separate individual.



Board would vote on these draft responses at an upcoming meeting. After this e-mail was sent, one Board member contacted the Board's legal counsel by email without contacting any other Board members. Based on this conversation with the Board member, the Board's legal counsel changed her legal analysis of the three Open Meeting Law complaints. On May 29, the Board's administrative assistant sent another e-mail which enclosed revised responses to the three Open Meeting Law complaints. The May 29 e-mail did not state that the responses had been revised based on conversation between the Board's legal counsel and a Board member.

The Board timely posted notice of a meeting to be held on May 31. This notice listed as topics for the Board's discussion the three Open Meeting Law complaints, including the complainant's names and filing date of each complaint. The Board met on May 31 as planned. During the meeting, the Board voted to approve counsel's revised responses to the three complaints but did not discuss the substance of the complaints in depth. The Board also discussed the process for responding to future complaints, including whether the Board was required to entertain comment from complainants during meetings.

DISCUSSION

I. The Board Did Not Deliberate Outside of a Noticed Meeting.

The Open Meeting Law requires that all 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. A "meeting" is defined, in relevant part, as "a deliberation by a public body with respect to any matter within the body's jurisdiction." G.L. c. 30A, § 18. 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." Id.

Here, the complaint alleges that the redistribution of the revised Open Meeting Law complaint responses constituted impermissible deliberation because those revised drafts contained the input of the Board member who had corresponded with the Board's legal counsel. After the Board's administrative assistant distributed draft responses, one Board member contacted legal counsel to share his feedback on the drafts. Based on that input, the Board's legal counsel drafted new responses, and the administrative assistant circulated those revised responses to all Board members.

Recently, the Supreme Judicial Court held that the distribution of an aggregated employment review prior to a meeting violated the Open Meeting Law. See Boelter v. Board of Selectmen of Wayland, 479 Mass. 233 (2018). In that case, public body members submitted performance evaluations to its chair, who then aggregated the individual evaluations into a single document that was distributed in advance of a noticed meeting. Id. at 235-36. In holding that this practice violated the Open Meeting Law, the court stated that "the effect of the circulation of the individual and composite evaluations was that all five board members were aware of the opinions of four of the members in advance of the open meeting; thus, the circulation, in effect, constituted a deliberation, or a meeting, to which the public did not have access." Id. at 243. Here, neither the revised responses nor the administrative assistant's e-mail indicated that the revisions were based on comments from a Board member. Therefore, unlike in Boelter, a quorum of the public body members was not aware that that the communication at issue

contained the opinion of another member. We also note that the Board member who contacted the Board's legal counsel without copying the other Board members acted in accordance with our office's guidance to avoid improper deliberation, and apparently did not know or expect that his input would be communicated to any other Board members outside of an open meeting. This fact also distinguishes this situation from Boelter, in which each of the board members sent feedback to a board member, who then compiled and sent the collective feedback to the entire board.

Although we recognize that the present question is a close one in light of Boelter, on these facts we do not find a violation of the Open Meeting Law. We note, however, that the best practice would have been for the Board's legal counsel to distribute the revised responses during a noticed meeting.

II. The Board Followed Proper Procedure in Responding to the Open Meeting Law Complaints.

When an individual files an Open Meeting Law complaint with a public body, the body must meet to review the complaint's allegations, take remedial action if appropriate, and send the complainant a response and a description of any remedial action taken. 940 CMR 29.05(5). The chair is required to disseminate copies and the public body must meet to review the complaint and formulate a response or meet to delegate that authority. See OML 2012-90.⁵

Here, the complaint alleges that the Board failed to follow proper procedure in responding to the three Open Meeting Law complaints at issue. Specifically, the complaint states that the Board failed to hold a "substantive discussion" regarding the merits of the complaints. Indeed, the Board voted to approve the three revised responses prepared by its legal counsel without elaboration. The Open Meeting Law does not require the Board to discuss the merit of each complaint in detail. Rather, the law permits a body to vote to approve a response prepared by legal counsel. See OML 2017-67. We find that the Board did not violate the Open Meeting Law with respect to this allegation.

III. The Board's Discussion of New Procedures Stemmed from a Properly Listed Topic.

The Open Meeting Law requires that public bodies post notice 48 hours in advance of a meeting and include a "listing of topics that the chair reasonably anticipates will be discussed at the meeting." G.L. c. 30A, § 20(b). Public bodies are required to 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). We generally consider a topic to include sufficient specificity when a reasonable member of the public could read the topic and understand the anticipated nature of the public body's discussion. See OML 2013-157; OML 2011-44.

Here, the complaint alleges that the Board violated the law by discussing procedure for responding to future Open Meeting Law complaint during the May 31 meeting, as this topic was not listed on the meeting notice. After reviewing a video recording of the May 31 meeting, we conclude that the discussion of procedure flowed naturally from the Board's discussion of the

⁵ Open Meeting Law determinations may be found at the Attorney General's website: www.mass.gov/ago/openmeeting.

three complaints, each of which were properly listed on the meeting notice. We therefore find that the Board did not violate the Open Meeting Law with respect to this allegation. See OML 2014-58; OML 2014-44 (public body not required to anticipate course of deliberation).

CONCLUSION

For the reasons stated above, we find that the Board did not violate the Open Meeting Law. We now consider the complaint addressed by this determination to be resolved. This determination does not address any other complaints that may be pending with our office or the Board. 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: Stephen Morgan
Ashland Board of Health

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.