



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

August 1, 2022

OML 2022 – 145

VIA EMAIL ONLY

Elizabeth J. Kazinskas
President, Gardner City Council
ekazinskas@gardner-ma.gov

RE: Open Meeting Law Complaint

Dear President Kazinskas:

This office received two complaints from Scott Graves¹ alleging that the Gardner City Council (the “Council”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The first complaint was filed with the Council on or about September 1, and, after an extension of time granted by our office, you responded on behalf of the Council by letter on September 29.² The second complaint was filed with the Council on or about October 18, and you responded on behalf of the Council by letter on November 5.

We understand the September 1 complaint to allege that 1) the Council met in executive session on August 2 for an improper purpose; and 2) the Chair’s announcement before entering executive session on August 2 was insufficient. We understand the October 18 complaint to allege that the Council 1) failed to meet to review the September 1 complaint and delegate authority to respond before responding to the complaint; and 2) deliberated outside of a meeting when a proposed response to the September 1 complaint was emailed to the full Council.³

We appreciate the parties’ patience while we reviewed these matters. Following our review, we find that the Council violated the Open Meeting Law by improperly deliberating via email. We find that the Council did not otherwise violate the Open Meeting Law as alleged. In

¹ At the time the complaints were filed with the Council, Mr. Graves was a member of the Council.

² All dates are in 2021 unless otherwise stated.

³ The Complainant raises additional allegations and issues that, even if true, would not constitute violations of the Open Meeting Law. Because the Division of Open Government’s statutory authority concerns compliance only with the Open Meeting Law, G.L. c. 30A, §§ 18-25, we decline to review these additional allegations.

reaching this determination, we reviewed the Open Meeting Law complaints; the Council's responses; and the requests for further review. We also reviewed the notices and meeting packets for Council meetings held on August 2, September 7, and September 20, as well as video recordings of those same meetings. Additionally, we reviewed the September 16 email circulating the meeting packet for the Council's September 20 meeting.⁴ Finally, we communicated a few times with Council President.⁵

FACTS

We find the facts to be as follows. The Council is an eleven-member public body; therefore, six members constitute a quorum. In July of 2021, the Complainant, in his capacity as a City Councilor, filed a lawsuit in Worcester Superior Court naming John Flick, in his capacity as City Solicitor for the City of Gardner, and the Commonwealth's Supervisor of Records as defendants.⁶ The lawsuit pertains to the City's refusal to provide records that the Complainant requested as part of a public records request, and the Supervisor of Record's determination that the records did not have to be produced. The September 1 complaint relates to an executive session held on August 2 during which the Council discussed the Complainant's lawsuit.

The August 2 Meeting

At some point prior to August 2, the Mayor requested that the Council appropriate funds to hire outside counsel to defend against the Complainant's lawsuit. The Mayor asked that the Council meet in executive session to discuss this funding request and related litigation matter. The Council posted notice for a meeting to be held on August 2 at 7:30 p.m. Included on the notice was the topic

VIII. EXECUTIVE SESSION

Entered under Exemption 3 of the Massachusetts Open Meeting Law: "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." M.G.L. c.30A, §21(a)(3)

o For the purpose of discussing **S. Graves et al. v. City of Gardner et al.**

During the August 2 meeting, when the Council reached the executive session topic, Council President Elizabeth Kazinskas, acting as chair, called on Councilor Aleksander Dernalowicz who made a motion to "move into executive session." The motion was seconded by Councilor George Tyros. Thereafter President Kazinskas stated that the executive session would be held under "exemption 3 of the Massachusetts Open Meeting Law" stating that this allows a public body to enter executive session to "discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigation position of the public body and the chair so declares." President Kazinskas then explained that the specific purpose for the

⁴ Video recordings of the Council's meetings may be found at <https://www.gardner-ma.gov/637/3619/Video-On-Demand>.

⁵ For the sake of clarity, we refer to you in the third person.

⁶ Graves v. Flick, Mass. Sup. Ct., No. 2185CV00791 (Worcester County, July 16, 2021).

executive session that evening was “to discuss S. Graves versus City of Gardner and other parties filed in the Massachusetts Superior Court.” Thereafter, President Kazinskas stated that “as required by Chapter 30A of the General Laws, I declare that discussing these matters in open session would not be appropriate as the discussion involves an item in active litigation against the City.” President Kazinskas then asked if there was any discussion regarding the motion to enter executive session. There was none. The Council then voted by roll call to enter executive session. Finally, President Kazinskas announced that the Council would reconvene in open session.

The minutes of the August 2 executive session have not been released to the public yet, and we therefore do not recount their content in detail here. However, we note that the Council was provided with background information regarding the Complainant’s lawsuit. The Council also discussed conflicts of interest within the City’s law department with respect to the Complainant’s lawsuit and the request to hire outside counsel, including the cost of hiring outside counsel and the request to appropriate funds.

After adjourning executive session, the Council reconvened in open session and voted to transfer “\$15,000.00[] from [the] Mayor’s Unclassified Termination Leave Account to [the] Mayor’s Unclassified S. Graves versus City Et Al Lawsuit Account.”

The Response to the September 1 Open Meeting Law Complaint

The Council posted notice for a meeting to be held on September 7 at 7:30 p.m. Included on the notice was the topic “An Open Meeting Law Complaint filed by Councillor Scott Joseph Graves.” During the September 7 meeting, the Council determined that it needed additional time to respond to the September 1 complaint and voted to refer the matter to the law department to request an extension of time from our office.

At some point between the September 7 meeting and September 16, President Kazinskas drafted a proposed response to the September 1 complaint. President Kazinskas submitted the proposed response to the City Clerk for inclusion in the meeting packet for the Council’s upcoming September 20 meeting. On September 16 the meeting packet was posted online. That same day the City Clerk emailed a link to the meeting packet to the full Council. Included on page 418 of the meeting packet was President Kazinskas’ proposed response to the September 1 Open Meeting Law complaint.

The Council posted notice for a meeting to be held on September 20 at 7:30 p.m. Included on the notice was the topic “An Open Meeting Law Complaint filed by Councillor Scott Joseph Graves (*In the City Council and Referred to Law Department to request an extension 9/7/2021*).” During the September 20 meeting, President Kazinskas introduced the Open Meeting Law complaint topic and then recognized Councilor Tyros. Councilor Tyros moved “to approve the proposed response.” The motion was seconded by Councilor Dernalowicz. President Kazinskas then asked for discussion on the motion. The Complainant announced that he would abstain. Thereafter, Councilor James Boone spoke regarding the Complainant’s Superior Court lawsuit. There was no further

discussion and the Council voted in favor of the motion to approve the proposed response. Thereafter, on September 29, the Council sent its response to the Complainant, copying our office.

DISCUSSION

I. The Council Met in Executive Session on August 2 for a Proper Purpose and the Announcement Before Entering Executive Session Was Sufficient.

Executive Session Purpose 3

The Open Meeting Law requires that all meetings of a public body be conducted in an open session, with some exceptions allowing a public body to convene behind closed doors in executive session. G.L. c. 30A, §§ 20(a), 21(a). One permissible reason to convene in 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 public body invoking Purpose 3 must have a bargaining or litigating position to protect and must declare in open session that having the discussion in open session may have a detrimental effect on that position. See G.L. c. 30A, § 21(a)(3); OML 2011-47.⁷ Under Purpose 3, a public body has a litigating position to protect if there is pending litigation in which the public body has a litigating position, or if litigation is clearly and imminently threatened or otherwise demonstrably likely. See OML 2020-53.

The Complainant alleges that the Council did not have a litigating position with respect to his lawsuit because the City, not the City Council, was a party to the lawsuit. Although we recognize that the Complainant’s lawsuit raises some peculiarities with respect to the Council’s role in the litigation, we have found that public bodies responsible for appropriating funds that do not otherwise have a litigating position may meet in executive session to consider appropriation of litigation expenses. See OML 2011-47, citing Filippone v. Mayor of Newton, 392 Mass. 633, 625 (1984) (holding that a finance committee could enter executive to consider appropriation of litigation expenses where the mayor was the named party). We find that the Council properly met in executive session under Purpose 3.

The Announcement Before Entering Executive Session

The Open Meeting Law requires that before entering executive session the chair must “state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called [and] . . . shall publicly announce whether the open session will reconvene at the conclusion of the executive session.” G.L. c. 30A, § 21(b)(3), (4). As noted above, the Law requires that additional statements be made by the chair before entering executive session for specific purposes, such as Purpose 3 which requires the chair to declare that “an open meeting may have a detrimental effect on the bargaining or litigating position of the public body.” G.L. c. 30A, § 21(a)(3).

⁷ Open Meeting Law determinations may be found at the Attorney General’s website, www.mass.gov/ago/openmeeting.

The complaint alleges that President Kazinskas' announcement before entering executive session was insufficient, in part because she did not state that holding the discussion in open session may have a detrimental effect on the Council's litigating position. Although the Open Meeting Law requires that, before entering executive session under Purpose 3, the chair declare that holding the discussion in "an open meeting may have a detrimental effect on the bargaining or litigating position of the public body," G.L. c. 30A, § 21(a)(3), the Law does not mandate that the chair recite the exact language of the statute. See OML 2020-108. Here, when reviewed in its entirety, we find President Kazinskas' announcement sufficient to comply with the Law where she read aloud the Purpose 3 statutory language, identified the specific litigation matter to be discussed, and then stated "as required by Chapter 30A of the General Laws, I declare that discussing these matters in open session would not be appropriate as the discussion involves an item in active litigation against the City."

II. The Council Met to Review the September 1 Open Meeting Law Complaint Prior to Responding to the Complaint; However, the Council Improperly Deliberated When a Proposed Response Was Circulated to the Full Council Via Email.

Unless an extension of time has been granted by this office, within 14 business days of receipt of a complaint, the public body must meet to review the complaint's allegations; take remedial action, if appropriate; send to the complainant a response and a description of any remedial action taken; 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). The public body may review a complaint during a meeting and refer the complaint to an individual to respond, or an individual may draft a response to the complaint in advance of a meeting for the public body to approve during a meeting, but the public body may not remove itself entirely from the process. See OML 2020-164; OML 2017-197. The Open Meeting Law does not require a public body to engage in a substantive discussion of the merits of the complaint. See OML 2020-38; OML 2018-134; OML 2017-148 ("That the Board may have chosen to refer the complaint rather than discuss its substance is the Board's prerogative.").

As discussed in the previous section, meetings of a public body must be open to members of the public unless an executive session is convened. G.L. c. 30A, §§ 20(a), 21. Additionally, meetings of a public body must be properly noticed. G.L. c. 30A, §§ 20(b). 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; provided, however, that 'deliberation' shall not include the distribution of other procedural meeting [sic] or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed." Id. Email attachments are considered along with the body of an email when determining whether a public body member has expressed an opinion. See OML 2019-75; OML 2014-152; Boelter v. Bd. of Selectmen of Wayland, 479 Mass. 233, 239-43 (2018). A one-way communication from one public body member to a quorum on business within a body's jurisdiction is deliberation, even if no other members respond. See OML 2020-136; OML 2019-

144. For purposes of the Open Meeting Law, a “quorum” is a simple majority of the members of a public body. G.L. c. 30A, § 18.

To begin, we find that the Council met to review the September 1 Open Meeting Law complaint prior to formally responding to the complaint. The Council met on September 20, voted to approve President Kazinskas’ proposed response, and on September 29 formally sent the response to the Complainant, copying our office. That the Council did not discuss the complaint in depth did not violate the Open Meeting Law. See OML 2020-38; OML 2018-134; OML 2017-148.

Next, although we find that the Council did not violate the Open Meeting Law with respect to the procedures for responding to an Open Meeting Law complaint, we find that the Council improperly deliberated regarding its response to the September 1 complaint when the proposed response was circulated to the full Council via email as part of the meeting packet for the Council’s September 20 meeting. The proposed response was drafted by President Kazinskas and therefore necessarily contained her opinions, as such the distribution of the proposed response did not fall within the exception to the definition of “deliberation” for the distribution of reports or documents that may be discussed at a meeting. G.L. c. 30A, § 18. Although it is clear that certain administrative tasks are excluded from the definition of “deliberation,” that exception includes a strong caveat: such administrative communications are permissible “provided that no opinion of a member is expressed.” G.L. c. 30A, § 18; OML 2013-5.⁸

⁸ The Supreme Judicial Court suggested in dicta that a public body may avoid violating the Open Meeting Law if, when circulating documents that contain public body members’ opinions outside of an open meeting, the public body contemporaneously provides the documents to the public by, for example, posting the documents on a website. Boelter, 479 Mass. 233, 243-44 (2018). Those facts were not before the Court, and furthermore, the unambiguous language of the statute clearly prohibits distribution among a quorum of a public body of reports or document that may be discussed at a meeting if those reports or documents express the opinions of a public body member. See G.L. c. 30A, § 18 (“‘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.”) (emphasis added).

CONCLUSION

For the reasons stated above, we find that the Council violated the Open Meeting Law by improperly deliberating via email. We find that the Council did not otherwise violate the Open Meeting Law as alleged. We order the Council's immediate and future compliance with the Open Meeting Law, and caution that a future similar violation may be considered evidence of an intentional violation of the Law. Because the proposed response was previously released to the public on September 16 when the September 20 meeting packet was posted online, we order no further remedial action.

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 the Council or with our office. Please feel free to contact our office at (617) 963-2540 if you have any questions regarding this letter.

Sincerely,



Elizabeth Carnes Flynn
Assistant Attorney General
Division of Open Government

cc: Scott Graves (via email: sgraveslawoffice37@gmail.com)
John M. Flick, Esq., City of Gardner Law Department (via email: jflick@flicklawgroup.com)

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.