



THE COMMONWEALTH OF MASSACHUSETTS
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August 1, 2022

OML 2022 – 146

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 a complaint from Scott Graves alleging that the Gardner City Council (the “Council”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was filed with the Council on or about January 28, 2022, and you responded on behalf of the Council by letter dated February 7, 2022. The complaint alleges that 1) Council President Elizabeth Kazinskas¹ deliberated via email on December 30, 2021; and 2) the Council failed to create and approve minutes for its executive session held on August 2, 2021.^{2,3}

We appreciate the parties’ patience while we reviewed this matter. Following our review, we find that the Council violated the Open Meeting Law as alleged. In reaching this determination, we reviewed the Open Meeting Law complaint; the Council’s response; and the request for further review. We also reviewed a video recording of the Council’s January 3, 2022, meeting and the meeting packet for that same meeting.⁴ Finally, we communicated with the Council President.

¹ For the sake of clarity, we refer to you in the third person.

² The propriety of the August 2, 2021, executive session is the subject of another Open Meeting Law complaint filed by the Complainant and is addressed in a separate determination.

³ We decline to review additional allegations that were not raised in the original complaint filed with the Council. See OML Declination 4-22-15; OML Decimation 8-25-2015; OML 2022-129, n. 2.

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

FACTS

We find the facts to be as follows. The Council is an eleven-member public body; therefore, six members constitute a quorum. On August 2, 2021, the Council convened in executive session under G.L. c. 30A, § 21(a)(3) to discuss a litigation matter. The Council approved the minutes for the August 2, 2021, executive session on April 19, 2022. The April 19, 2022, meeting was the Council's seventeenth meeting following the August 2, 2021, meeting.

On December 30, President Kazinskas sent the City Clerk an email entitled "Agenda Item – Committee Appointments" and asked that the Clerk forward the email to the full Council. That same day, the Clerk forwarded President Kazinskas's email to the full Council. The email stated as follows:

Dear Councillors,

I hope you are well and have enjoyed the holidays. I am writing to you regarding an item that I have proposed on the agenda for this Monday's City Council meeting. I received a letter from Mayor Nicholson regarding the approximately 300 appointments that will expire over the next two years. My proposal is to add the Committee on Appointments to oversee appointments, as the fifth Standing Committee of the City Council. As you know, the Finance Committee currently oversees appointments, along with a number of other areas. In anticipation of the large number of upcoming appointments over the next term, I thought it would be wise for the next City Council to consider adding another Standing Committee to oversee appointments. Mayor Nicholson's letter, along with this email, will be included in the City Council meeting packet information regarding this proposed item.

The notice for the Council's January 3, 2022, meeting include the topic "A Measure Amending the Rules of the City Council to Establish a Standing Committee on Appointments." During the January 3, 2022, meeting, President Kazinskas announced the topic and then recognized Councilor Nathan Boudreau who moved to adopt the amendment to the Council Rules and create a standing committee on appointments. The motion was seconded, and President Kazinskas called for discussion. Councilor Judy Mack spoke commending the Mayor and President Kazinskas for recommending the establishment of a committee to oversee appointments and stating that she supported forming such a committee. Councilor Craig Cormier then spoke regarding the makeup of the new appointments committee. Thereafter, the Council voted in favor of creating an appointments committee.

DISCUSSION

I. The Council Failed to Timely Approve Minutes for Its August 2 Executive Session Meeting.

The Open Meeting Law requires public bodies to create and approve meeting minutes, whether for open or executive session, in a timely manner. G.L. c. 30A, § 22(c). “Timely manner” means “within the next three public body meetings or within 30 days, whichever is later, unless the public body can show good cause for further delay.” 940 CMR 29.11; see OML 2018-48. Whenever possible, we recommend that minutes of a meeting be approved at the next meeting. See OML 2018-67; OML 2017-133. Approval of executive session minutes is a separate and unrelated obligation from the requirement that executive session minutes be periodically reviewed to determine whether they should be released to the public. See OML 2019-115. This initial approval of executive session minutes is to approve the minutes as an accurate record of what occurred at a particular executive session and does not mean that the minutes are approved for release to the public.

The complaint alleges that the Council failed to create minutes for its executive session held on August 2, 2021. The Council responded to the complaint explaining that the minutes had not yet been released to the public. In response to questions from our office, the Council has explained that it approved the minutes for the August 2, 2021, executive session in the first instance on April 19, 2022, and that the minutes have not yet been approved for release to the public. Because the Council did not approve the minutes of its August 2, 2021, meeting until April 19, 2022, its seventeenth meeting and 260 days after the August 2 meeting, we find that the Council violated the Open Meeting Law by failing to timely approve meeting minutes.

II. The Council President Improperly Deliberated Via Email on December 30, 2021, and This Violation Was Not Cured.

The Open Meeting Law requires that meetings of a public body be properly noticed and that they be 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; 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. 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. A public body may not use a non-member, such as the secretary, to facilitate a deliberation or communication on matters that the public body would otherwise be required to save for discussion at an open meeting. See OML 2020-144; OML 2017-69; OML 2016-48; see also Dist. Atty for the Northern Dist. v. Sch. Comm. of Wayland, 451 Mass. 561, 570-571 (2009) (“Governmental bodies may not circumvent the requirements of the open meeting law by

conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form.”).

We find, and the Council does not dispute, that President Kazinskas violated the Open meeting Law by causing her December 30, 2021, email to be sent to the full Council and thus deliberating outside of a properly noticed meeting. Although the Council does not directly dispute that a violation occurred, it asserts that any violation was cured because President Kazinskas’ email was included in the meeting packet for the Council’s January 3, 2022, meeting—which is publicly posted online—and because the Council discussed the subject of the December 30, 2021, email during the January 3, 2022, meeting.

Violations of the Open Meeting Law may be cured by independent, deliberative action that is not merely a ceremonial acceptance and perfunctory ratification of action taken in violation of the Law. See Pearson v. Bd. of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125 (2000); OML 2020-7; OML 2016-49. Generally, that means conducting deliberations anew at a subsequent meeting that is accessible to the public and for which proper notice is provided. For example, we found that a board of health cured a similar violation to the one found here when the Chair read the two memoranda that constituted improper deliberation aloud at an open meeting after having included this topic on a properly posted notice. OML 2021-130.

Here, we find that the actions taken by the Council are insufficient to cure the violation where the December 30, 2021, email was simply included in the meeting packet for the Council’s January 3, 2022, meeting and was not otherwise acknowledged or discussed during an open meeting. We take this opportunity to clarify for the Council that simply including deliberative emails in a meeting packet does not negate the fact that such emails violate the Open Meeting Law. The substance of the December 30, 2021, email is precisely the kind of communication that the Open Meeting Law requires be conducted in an open meeting for which proper notice has been given.

CONCLUSION

For the reasons stated above, we find that the Council violated the Open Meeting Law by failing to timely approve executive session minutes. Additionally, we find that the Council President violated the Open Meeting Law by deliberating via email on December 30, 2021. 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. Additionally, we order each member of the Council to attend a comprehensive Open Meeting Law training, either by participating in one of the Division of Open Government's monthly webinar trainings or by attending a training presented by the Council's legal counsel. Each member of the Council shall certify to our office that they have done so within ninety (90) days of receipt of this letter.

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 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.