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July 28, 2022

OML 2022 – 141

Ryan P. Ruley
Chair, Oak Bluffs Select Board
Post Office Box 1327
Oak Bluffs, MA 02557

By email only: rruley@oakbluffsma.gov

RE: Open Meeting Law Complaint

Dear Chair Ruley:

This office received a complaint from Rich Saltzberg on May 9, 2022, alleging that the Oak Bluffs Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on February 11, 2022, and the Board responded by letter dated March 1, 2022. The complaint alleges that the Board approved insufficiently detailed meeting minutes for executive sessions held on November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, January 11, 2022, and January 25, 2022.

Following our review, we find that the Board violated the Open Meeting Law by approving insufficiently detailed minutes for its November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, and January 11, 2022, executive session meetings. In reaching this determination, we reviewed the complaint, the Board’s response to the complaint, and the complainant’s request for further review, including 8 exhibits. We also reviewed the regular and executive session notices and minutes for the dates at issue, as well as video recordings of the December 14, 2021, December 28, 2021, January 11, 2022, and January 25, 2022, open session meetings.¹

FACTS

¹ Video recordings of the December 14, 2021, December 28, 2021, January 11, 2022, and January 25, 2022, meetings are available at <https://www.oakbluffsma.gov/agendacenter>.

We find the facts as follows. In October 2021, the Oak Bluffs Police Department discovered a Bushmaster Model XM15-E2S M-4 patrol rifle was missing from its inventory. The Board accordingly held a series of executive sessions on November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, January 11, 2022, and January 25, 2022, to discuss and respond to the controversy. The Board approved and released the minutes for these executive sessions during its February 8, 2022, open meeting.

The Board's November 24, 2021, December 3, 2021, December 14, 2021, and December 28, 2021, executive sessions were convened "to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual." On November 24, 2021, the Board convened in executive session for 1 hour and 20 minutes. The substantive portion of the minutes states in its entirety:

"Attorney Collins outlined the reasons for the Executive Session. A firearm is missing from the Police Department. Sergeant Michael Marchand was put on Administrative Leave. Sergeant Marchand forwarded a written communication waiving his right to be present at this meeting.

A discussion was held regarding the facts of the incident including the fact that there is no specific punishment for an Officer losing a firearm. The discussion also included establishing a possible punishment.

A list of Charges will be prepared."

Similarly, the substantive portion of the Board's December 3, 2021, minutes, for an executive session that lasted about 1 hour and 6 minutes, states in its entirety: "The Select Board discussed possible punishments relative to the offense. The consensus was to consider a 'modified probation.'" The minutes of the December 14, 2021, executive session reflect that the Board discussed the ongoing negotiations between Attorney Collins and the police union's representative. In the 39-minute session, Attorney Collins reported that the two had agreed to "a mutual release, no litigation. [Marchand] will use his earned leave by February 2, 2022, and provide a letter of resignation, with a non-disparagement clause." The Board voted unanimously to accept the mutual separation agreement.

On December 16, 2021, the missing patrol rifle was found on a lower floor of the Police Department. In response, the Board met in executive session on December 28, 2021, for 53 minutes. Sergeant Marchand's personal attorney claimed the Sergeant was a "whistleblower" entitled to reinstatement and "emotional distress" pay. The minutes capture the subsequent discussion as follows: "The Select Board discussed the suggestion that the Sergeant was a 'whistleblower' and other questions surrounding the missing weapon." The Board then voted unanimously to hold a hearing "including all of the original findings plus the addition of the charge of lying."

On January 11, 2022, the Board convened in executive session for 43 minutes "to discuss strategy with respect to litigation." The Board reviewed the status and results of the investigation, which concluded that Sergeant Marchand was responsible for the missing weapon.

The minutes detail that the Board “discussed multiple options of discipline, if after a hearing the facts justified it, with a consensus that a demotion and a suspension was appropriate.” It then turned to the withdrawal of Sergeant Marchand’s retirement offer and again “discussed various options.” The minutes list the resulting “course of action” the Board authorized Attorney Collins to present to Sergeant Marchand’s attorney.

Lastly, the Board held a 48-minute executive session on January 25, 2022, to, among other things, “conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel.” During the session, Police Chief Erik Blake notified the Board he intended to resign. The minutes state, “The Board discussed the process of advertising the vacancy; the timeline involved with internal and external candidates as the Town approaches the busy time of year.” It then directed Chief Blake and the town administrator to draft a press release, provide an updated job description to human resources, and assess the viability of potential promotions.

DISCUSSION

I. The Board’s November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, and January 11, 2022, Executive Session Minutes Are Insufficiently Detailed

The Open Meeting Law requires that a public body “create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting, including the record of all votes.” G.L. c. 30A, § 22(a). Meeting minutes must include the location of the meeting, as well as the actual scheduled time of each meeting and not just the time that the chair opened the meeting. See OML 2019-29.²

When reviewing minutes for compliance with the Open Meeting Law, we look for substantial compliance with the accuracy requirement. See OML 2016-105; OML 2013-64. By substantial compliance, we mean that the minutes should contain enough detail and accuracy so that a member of the public who did not attend the meeting could read the minutes and have a clear understanding of what occurred. See OML 2019-163; OML 2012-106. While minutes must include a summary of the discussion on each topic, a transcript is not required, and the minutes need not include every remark or opinion presented. See OML 2018-8; OML 2012-29; OML 2011-55. Nonetheless, we recommend that public bodies follow best practices when possible. In particular, we encourage public bodies to include dissenting or minority opinions whenever feasible. Where significant debate on a matter occurs and it is clear that one or more members of the body and/or the public disagree with the decision ultimately taken by the public body, public bodies should note the opposing viewpoints in the meeting minutes. See OML 2019-163. While it is not necessary to record the comments of every speaker, and we acknowledge the difficulty of doing so where there are many speakers whose remarks may even overlap, if a particular

² All previous determinations issued by the Division can be found on the Attorney General’s website: <https://www.mass.gov/the-open-meeting-law>.

individual speaks at some length or is the only one to offer an argument for or against a proposal, that person and his or her comments should be identified in the minutes. See id; OML 2012-29.

Here, the Board's November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, and January 11, 2022, executive session minutes fall short of the accuracy requirement of the Open Meeting Law. The minutes generally identified topics that were discussed, without any actual summary of the discussion. For instance, the Board's November 24, 2021, minutes reference "a discussion" of possible punishments, and its January 11, 2022, minutes state that it "discussed multiple options of discipline," but neither recap what the Board discussed or considered. Likewise, the December 14, 2021, minutes simply declare the results of ongoing negotiations. Despite the length of the meeting, the minutes make no mention of any discussion between Board members. The Open Meeting Law requires that meeting minutes include more than a statement *that* a public body discussed a specified topic; the Law requires that the minutes summarize the discussion that was held. G.L. c. 30A, § 22(a); see also OML 2021-70; OML 2021-33; OML 2019-167; OML 2018-8. We therefore find that the Board violated the Open Meeting Law by approving insufficiently detailed minutes of its November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, and January 11, 2022, executive sessions.³

Moreover, the Open Meeting Law requires that the minutes of a public body's meeting include a list of all documents and exhibits used by the public body during the meeting. See G.L. c. 30A, § 22(a); OML 2012-91. The law does not define what it means for a document to be used at a meeting but, at a minimum, it is clear that where a document is physically present, verbally identified, and the contents are discussed by the members of a public body during an open meeting, it has been "used" for purposes of the Open Meeting Law. See OML 2019-163; OML 2014-12; OML 2012-42. As such, any documents that are physically present, verbally identified, and discussed during a meeting must be separately listed in the minutes. It is not enough that those documents are simply referenced in the body of the minutes or that the minutes include a digital link to the documents. See OML 2019-29; OML 2018-70. Here, we note that none of the minutes include a list of documents or exhibits used during the sessions. To the extent that any documents or exhibits were used, they must be listed in the corresponding meeting minutes.

II. The Board's January 25, 2022, Executive Session Minutes Are Sufficiently Detailed

The complaint further alleges that the minutes of the Board's January 25, 2022, executive session were insufficiently detailed. Specifically, the minutes indicate that "the Board discussed" the process and timeline for advertising the vacant Police Chief position without including further detail about those discussions. However, the minutes also include a list of actions the Board initiated, such as assessing potential promotions. Therefore, although the January 25, 2022, minutes include a simplistic statement that the Board "discussed" a topic, we find that the

³ The complaint further alleges that the executive session minutes are insufficiently detailed in that they do not include a start time. A public body must "create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place" of the meeting. G.L. c. 30A, § 22(a). Here, where the Board met in an open meeting before moving into executive session, the minutes indicate when the open session began but do not further specify when the Board entered executive session. We have not construed the Open Meeting Law as requiring meeting minutes to separately list the start time of an executive session. Therefore, the Board did not violate the Open Meeting Law by omitting this information from the minutes.

Board also included enough additional detail to adequately capture the substance of the discussions. See OML 2021-128. Accordingly, we find no violation of the Open Meeting Law with respect to the January 25, 2022, minutes.

III. We Decline to Find the Board's Violation to be Intentional

Finally, we must determine if the violation was, as the complainant alleges, intentional. See G.L. c. 30A, § 23(c). An intentional violation is an “act or omission by a public body or a member thereof, in knowing violation of [the Open Meeting Law].” 940 CMR 29.02. An intentional violation may be found where the public body acted with deliberate ignorance of the Law’s requirements or has previously been advised that certain conduct violates the Open Meeting Law. Id. Here, we find no evidence that the Board intentionally violated the Law or acted with deliberate ignorance of the Law's requirements. Furthermore, our office has never previously found the Board in violation of the Open Meeting Law. Therefore, we decline to find an intentional violation.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by approving insufficient minutes for executive sessions held on November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, and January 11, 2022. We order the Board’s immediate and future compliance with the Open Meeting Law and caution the Board that a determination by our office of a similar violation in the future may be considered evidence of intent to violate the Law. Additionally, we order the Board to amend, to the best of its ability, the executive session minutes for the meetings held on November 24, 2021, December 3, 2021, December 14, 2021, December 28, 2021, and January 11, 2022, and to release those minutes to the public, unless any portion thereof may lawfully be withheld in accordance with G.L. c. 30A, § 22(f). Within **45 days** of receipt of this letter, the Board shall certify to our office that it has complied with this order by amending the executive session minutes and releasing them to the public.

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,



Carrie Benedon
Assistant Attorney General
Division of Open Government

Assisted by: Caitlyn Galvin, Legal Intern, Division of Open Government

cc: Rich Saltzberg (via e-mail: [REDACTED])

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.