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OML 2018 – 125

Michael J. Maccaro, Esq.
Murphy, Hesse, Toomey & Lehane, LLP
300 Crown Colony Drive, Suite 410
Quincy, MA 02169

RE: Open Meeting Law Complaints

Dear Attorney Maccaro:

This office received two complaints from George King on October 27 and December 20, alleging that the Nashoba Regional School Committee (the “Committee”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaints were originally filed with the Committee on September 1 and October 30, and you responded, on behalf of the Committee, by letters dated September 19 and November 15.² The first complaint alleges that the Committee’s executive session minutes from its August 10, 2016, November 30, 2016, and December 7, 2016, meetings are not sufficiently detailed; and that the Committee failed to timely release executive session minutes from its January 18 and February 6 meetings. The second complaint alleges that the Committee entered into executive session for an improper purpose during its January 18 and February 6 meetings; and that the Committee’s executive session minutes from its January 18 meeting to do not contain a list of documents used by the Committee during that meeting.

We appreciate the patience of the parties while we reviewed this matter. We decline to review the first complaint because we find it to be untimely, as discussed below. Following our review of the second complaint, we find that the Committee did not violate the Open Meeting Law by convening in executive session on January 18 and February 6. In reaching this determination, we reviewed the original complaints, the Committee’s responses to the complaints with attached exhibits, and the complaints filed with our office requesting further review. We also reviewed the executive session minutes from the Committee’s August 10, 2016, meeting; the open and executive session minutes from the Committee’s November 30, 2016, December 7, 2016, January 18, and February 6 meetings; and the open session minutes from the

¹ Unless otherwise indicated, all dates in this letter refer to the year 2017.

² Attorney Kerry Regan Jenness of Murphy, Hesse, Toomey & Lehane responded to the September 1 complaint. However, it is our understanding that Attorney Maccaro is handling both complaints now.



Committee's January 4 meeting. Finally, we spoke with the complainant by telephone on May 22, 2018, and with you by telephone on August 17, 2018.

FACTS

We find the facts as follows. The Nashoba Regional School District ("District") includes the towns of Bolton, Lancaster, and Stow. In 2005, George King, the complainant, became the assistant superintendent for the District. In 2009, he added the interim principal duties at Hale Middle School in Stow. In April 2016, Mr. King became the full-time principal at Hale Middle School, while still retaining his assistant superintendent duties. During the summer of 2016, the Committee suspended the position of assistant superintendent, in an effort to reduce administrative costs. On or around August 5, 2016, Mr. King filed a Demand for Arbitration requesting that he be reinstated to the dual role of Assistant Superintendent and Hale Middle School Principal.

On August 10, 2016, the Committee met in executive session "to discuss strategy with respect to litigation (George P. King v. Nashoba Regional School District – Arbitration)." The Committee met for approximately one hour and thirty minutes and has publicly released the minutes of this executive session. Chair Lorraine Romasco shared with the Committee Mr. King's request to be reinstated as both Assistant Superintendent and Hale Middle School Principal, and advised the Committee that "the purpose of the meeting was to inform the School Committee of Mr. King's Demand for Arbitration and discuss litigation strategy with the Superintendent."

On November 30, 2016, the Committee again met in executive session "to discuss strategy with respect to litigation (George P. King v. Nashoba Regional School District – Arbitration)." The Committee met for approximately three hours and has publicly released the minutes of this executive session. Attorneys Nan O'Neill and Kerry Jenness of Murphy, Hesse, Toomey and Lehane updated the Committee on Mr. King's Arbitration Demand and advised that Mr. King wished to terminate his employment contract. The Committee discussed whether it wished to negotiate such termination and unanimously voted to direct Attorneys O'Neill and Jenness to respond to Mr. King's proposal and enter into negotiations "for termination of contract and employment and towards a settlement agreement." The minutes include specific terms of settlement that the Committee was willing to offer Mr. King.

On December 7, 2016, the Committee met in executive session "to discuss strategy with respect to imminently threatened litigation." The Committee met for approximately three hours and forty minutes and has publicly released the minutes of this executive session. The Committee reviewed Mr. King's allegations over the past year and discussed the financial impact on the school district. The Committee then approved specific terms of settlement it would offer Mr. King.

Mr. King signed a separation agreement on December 10, 2016, and the Committee signed it on December 13, 2016. Mr. King's last day of work with the District was December 14, 2016, at which time he was placed on paid administrative leave until his official resignation

date of June 30. As part of the agreement, Mr. King agreed not to speak on behalf of the District and to forward any questions regarding the District to the Superintendent.

During a January 4 meeting, the Committee was presented for the first time with the results of a forensic audit that was conducted for the District. The Committee learned that certain loans and leases may have been entered into illegally and expressed “grave concerns” with the District’s past accounting practices.

On January 18, the Committee met in executive session “to discuss strategy with respect to potential litigation.” The Committee met for approximately one hour and has publicly released the minutes of this executive session. The Committee discussed a letter it had received from Mr. King concerning the validity of a forensic audit, and conferred with legal counsel regarding its options to address questionable past accounting practices. The Committee also reviewed the executive session minutes from its August 10, 2016, November 30, 2016, and December 7, 2016 meetings. When the Committee reconvened in open session, it unanimously approved the release of those executive session minutes.

On February 6, the Committee met in executive session “to discuss litigation strategy . . . [Arbitration George P. King v. Nashoba Regional School District].” The Committee met for forty-five minutes and has publicly released the minutes of this executive session. Legal counsel reminded the Committee of the rules pertaining to executive session with respect to posting notice, creating minutes, and remedies available to the Attorney General’s office should the Committee be found in violation of the Open Meeting Law. The Committee then discussed a cease and desist letter that the Superintendent had sent to Mr. King regarding comments Mr. King made about the District on his blog.

On May 22, Mr. King requested numerous documents, including “all school committee and personnel subcommittee executive session minutes from December 1, 2015 to the present day” from the Records Access Officer of the District. Responsive executive session minutes were provided to Mr. King on August 2, including the minutes from Committee meetings held on August 10, 2016, November 30, 2016, and December 7, 2016. However, the Committee did not release executive session minutes from its January 18 and February 5 meetings, because it claimed that the purpose for the executive session had not yet expired. By letter dated September 6, in response to Mr. King’s public records request, the Committee stated that it would review the January 18 and February 6 executive session minutes at its next meeting on September 27, and that if the Committee determined that the purpose for the executive session had expired, the “minutes will be sent to [Mr. King] promptly.” In its September 19 response letter to the first Open Meeting Law complaint, the Committee again indicated that if it finds, during its September 27 meeting, that the purpose for the January 18 and February 6 executive sessions has expired, “the minutes will be sent to Mr. King.”

The Committee met on September 27 and voted to release the executive session minutes from its January 18 and February 6 meetings. These minutes were provided to Mr. King on October 2.

DISCUSSION

I. We Find the First Complaint to be Untimely but the Second Complaint to be Timely Filed.

The first complaint alleges that the minutes from the Committee's August 10, 2016, November 30, 2016, and December 7, 2016, executive session meetings failed to include an accurate summary of the discussions that occurred. During an open session meeting on January 18, the Committee voted to release the August, November and December executive session minutes. Complaints alleging violations of the Open Meeting Law must be filed with the public body within 30 days of the alleged violation. G.L. c. 30A, § 23(b). If the alleged violation could not reasonably have been known at the time it occurred, then the complaint must be filed within 30 days of the date it should reasonably have been discovered. 940 CMR 29.05(3). When an alleged violation occurs during an open meeting, the alleged violation is reasonably discoverable at the time it occurs. See OML 2014-85; OML 2012-52.³ Because the minutes were approved for release during an open session meeting, any complaint concerning the sufficiency of the minutes should have been filed with the Committee within 30 days, or by February 17. G.L. c. 30A, § 23(b). Here, the complaint was filed with the Board on September 1, almost seven months later. Thus, we find that the complaint is untimely and we decline to review it. See OML Declination 8-5-15 (Cape Light Compact); OML Declination 3-11-15 (Fairhaven Board of Selectmen).

However, we remind the Committee that 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). When reviewing minutes for compliance with the Open Meeting Law, we look for substantial compliance with the accuracy requirement. See 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 2012-106.

The first complaint also alleges that the Committee failed to provide executive session minutes from the Committee's January 18 and February 6 meetings within the time frame required by the Open Meeting Law. Because any complaints alleging a failure to provide minutes in a timely manner must be filed within 40 days of the original request, we find that this allegation is also untimely where the complaint was filed four months after the request. See OML Declination 9-1-16 (Maynard Board of Selectmen) (a failure to provide open session minutes becomes discoverable 10 days from the date of request); OML Declination 3-18-13 (Ashfield Board of Selectmen). Nevertheless, we remind the Committee that the minutes of any executive session may be withheld from disclosure in their entirety as long as publication may defeat the lawful purposes of the executive session, but no longer. G.L. c. 30A, § 22(f). Upon

³ Open Meeting Law declinations and determinations may be found at the Attorney General's website, www.mass.gov/ago/openmeeting.

request by any person to inspect or copy the minutes of an executive session or any portion thereof, the body must respond to the request within 10 days following receipt and release any such minutes where publication would not defeat the lawful purposes of the executive session; provided, however, that if the body has not performed a review, the public body must perform the review and release the non-exempt minutes, or any portion thereof, not later than the body's next meeting or 30 days, whichever first occurs. G.L. c. 30A, § 22(g)(2).

With respect to the second complaint, the Committee argues that it is untimely because the executive session minutes were released on September 28 but the complaint was not filed until October 30 – 33 days later. Here, the Committee voted to release the January 18 and February 6 executive session minutes during its September 27 executive session. Those minutes were then publicly available the next day but were not provided to Mr. King until October 2. Unlike the first complaint where the request was made seven months after the August, November and December minutes were released during an open session, the January and February minutes were not released until four months after the request was made, with specific assertions by the Committee that the minutes would be provided to Mr. King upon release. Because the minutes were not yet approved for release at the time of the request, and because the Committee twice advised Mr. King in writing that it would provide the minutes to him upon release but did not do so until several days later, we find this complaint, which was filed 28 days after receiving the minutes, to be timely filed.

II. The Committee Entered Executive Session for a Proper Purpose on January 18 and February 6.

The second complaint challenges the propriety of the Committee's January 18 and February 6 executive session discussions. The Open Meeting Law requires that all meetings of a public body be conducted in an open session, with some exceptions. G.L. c. 30A, §§ 20(a), 21(a). Public bodies may enter a closed, executive session for any of ten enumerated purposes, provided that the chair of the public body first announces in open session the purpose for the executive session, "stating all subjects that may be revealed without compromising the purpose for which the executive session was called." G.L. c. 30A, §§ 21(a), 21(b)(3); see also District Attorney for the N. Dist. v. Sch. Comm. of Wayland, 455 Mass. 561, 567 (2009) ("[a] precise statement of the reason for convening in executive session is necessary ... because that is the only notification given the public that a [public body] would conduct business in private, and the only way the public would know if the reason for doing so was proper or improper").

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"). When convening in executive session pursuant to Purpose 3, a public body should identify the litigation matter to be discussed, if doing so will not compromise the lawful purpose for secrecy. See OML 2016-12; OML 2013-97. Although we generally defer to a public body's assessment of whether the inclusion of such information would compromise the purpose for the executive session, a public body must be able to demonstrate a reasonable basis for such a claim if challenged. See OML 2015-14.

Mr. King argues that the Committee convened in executive session for an improper purpose on January 18 where it only discussed a letter it had received from him regarding the forensic audit. The Committee contends that the executive session was proper under Purpose 3 because the discussion concerned whether to initiate legal action. According to Committee legal counsel, the Committee was very concerned with the results of the forensic audit and the potential legality of certain leases and loans that Mr. King had entered into on behalf of the school district. During the January 18 executive session, the Committee discussed with its legal counsel strategy with respect to initiating litigation against Mr. King for inappropriate accounting. The Committee further contends that announcing the specific topic of litigation prior to convening in executive session would have comprised the purpose for the executive session. We find that it was appropriate for the Committee to convene in executive session under Purpose 3 to discuss litigation strategy, and that publicly identifying the specific litigation it planned to discuss would have compromised the confidentiality of the executive session discussion. See OML 2018-5; OML 2014-141; OML 2011-47.

We also find that the Committee's discussion of the cease and desist letter sent to Mr. King relative to his use of social media discussed during the February 6 meeting to be proper under Purpose 3. At the time of the February 6 meeting, the Committee was concerned with Mr. King's use of the phrase "Hale Principal" on his twitter account and "Nashoba" with respect to his email address and blog. The Committee discussed with its legal counsel whether Mr. King was in violation of the Separation Agreement and whether to initiate proceedings against him for breach of contract. We find that this discussion in executive session on February 6 pertained to a decision whether to pursue litigation, and the Committee did not violate the Open Meeting Law by meeting in executive session under Purpose 3.⁴ See OML 2017-178; OML 2013-23.

Finally, the complaint alleges that the January 18 executive session minutes do not include a list of documents used by the Committee during the meeting. The Open Meeting Law requires that the minutes of a public body's meetings include a list of all documents and exhibits used by the public body during the meeting. G.L. c. 30A, § 22(a); OML 2012-91. Documents and exhibits used at the meeting are part of the official record of the session. See G.L. c. 30A, § 22(d). Although the executive session minutes reference a letter it received from Mr. King, the Committee states that the letter was not distributed at the meeting. Since no documents or exhibits were used by the Committee during the executive session, it did not violate the Open Meeting Law by failing to include a list of documents in the minutes.

CONCLUSION

We find that the Committee did not violate the Open Meeting Law by meeting in executive session on January 18 and February 6 to discuss strategy with respect to pursuing litigation. We now consider the complaints addressed by this determination to be resolved. This

⁴ We note that Committee legal counsel also discussed "the rules pertaining to executive session" during its February 6 executive session. We remind the Committee that a public body's discussions with legal counsel do not automatically fall under Purpose 3 for holding an executive session. See OML 2015-14. However, it is not clear from the minutes how extensive this discussion was, or whether legal counsel was simply reminding the Committee of the law's requirements for executive sessions in relation to that particular executive session that we find was properly convened, and therefore we decline to find a violation here.

determination does not address any other complaints that may be pending with our office or the Committee. Please feel free to contact our office at (617) 963-2540 if you have any questions regarding this letter.

Sincerely,



Kerry Anne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: George King
Nashoba Regional School Committee

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.