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June 12, 2018

OML 2018 – 78

Aldo Cipriano, Esq.
277 Main Street
Victoria Building, Second Level
Marlborough, MA 01752

RE: Open Meeting Law Complaint

Dear Attorney Cipriano:

This office received a complaint from Attorney Donald O’Neil, on behalf of Attorney Gary Brackett, on March 14, 2018, alleging that the Southborough Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on or about December 1, 2017 and you responded to the complaint, on behalf of the Board, in a letter dated January 26, 2018. In his complaint, Attorney Brackett alleges that a Board member improperly copied a quorum of the Board on an August 11, 2016 email.

Following our review, we find that Board member John Rooney individually violated the Open Meeting Law by engaging in deliberation over email. In reaching a determination, we reviewed the original complaint, the Board’s response to the complaint, and the complaint filed with our office requesting further review. We also reviewed the email at issue.

FACTS

We find the facts as follows. The Board is a five-member public body, thus three members constitute a quorum. In early 2016, the Southborough Zoning Board of Appeals (“ZBA”) was in the process of reviewing an application for a permit submitted pursuant to G.L. c. 40B for a development known as the “Park Central project.” On August 11, 2016, the Board received a draft decision relative to this application. Upon receiving the draft decision, Board member John Rooney promptly sent an email to Board counsel, copying the remaining Board members. In the email, Mr. Rooney stated:

Please note, that I am speaking as an individual as the Board has not had an



opportunity to discuss this issue on an agenda given that it was received less than one hour ago...It is my understanding that both the Planning Board and the Conservation Commission are in the midst of reviewing this project and intend to offer comments. To prepare a draft decision, without the benefit of those comments, is a stark breakdown in the overall process. Therefore, I would request that you immediately counsel the ZBA to make sure they receive the input from those other entities before putting pen to paper in a written decision.

DISCUSSION

The Open Meeting Law was enacted “to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based.” Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). The law requires that 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. The law defines a “meeting” as, “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. A “deliberation” is defined 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 or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” Id. For the purposes of the Open Meeting Law, a “quorum” is a simple majority of the members of the public body. Id.

The complaint alleges that Mr. Rooney improperly communicated by email regarding a draft decision of another public body, the ZBA. Although the Board has no specific supervisory role over the ZBA permitting process, it does appoint members to the ZBA. Additionally, the ZBA had previously asked the Board to weigh in and vote on certain aspects of the proposed development at issue in the email. Notwithstanding Mr. Rooney’s statement that he was speaking as an individual, and not on behalf of the Board, as the Board had not yet had a chance to discuss the draft decision during a meeting, we conclude that an opinion about the ZBA’s decision-making process is a matter within the Board’s jurisdiction. See OML 2015-167; OML 2014-76.¹

Whether this particular email constitutes “deliberation,” however, is a close question. We acknowledge that it may be necessary for an individual public body member to promptly apprise the other members of certain discussions held with, or instructions given to, third parties such as employees or counsel. However, in light of the Supreme Judicial Court’s recent ruling, we find that, by copying the other Board members on an email containing his opinion about a matter of public business within the Board’s jurisdiction, Mr. Rooney engaged in deliberation outside of a meeting in violation of the Open Meeting Law. See Boelter v. Wayland Board of Selectmen, 479 Mass. 233, 243 (2018) (holding that the Board violated the Open Meeting Law by circulating “individual and composite evaluations [that]

¹ Open Meeting Law determinations may be found at the Attorney General’s website, www.mass.gov/ago/openmeeting.

expressed the opinions of the board members to a quorum in advance of the public meeting”); see also OML 2017-165 (expression of an opinion on matters within the body’s jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds).

We note that it may be appropriate in limited circumstances for a public body to convene an emergency meeting to discuss an unexpected topic that demands its immediate action, but that’s not what occurred here. See G.L. c. 30A, § 18 (“emergency” is defined as “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action”). Moreover, Mr. Rooney was free to ask counsel to contact the ZBA to delay its decision or he was free, as an individual and not on behalf of the Board, to do so himself. What he was not free to do under the Open Meeting Law was to share his opinion with the other Board members by email about the ZBA’s decision-making process.

CONCLUSION

For the reasons stated above, we find that Mr. Rooney individually violated the Open Meeting Law by engaging in deliberation over email. We order the Board’s immediate and future compliance with the law’s requirements, and we caution that similar future violations could be considered evidence of intent to violate the law. Additionally, we order the Board to publicly release the August 11, 2016 email within 30 days of its receipt of this determination, if it has not done so already.

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 our office at (617) 963-2540 if you have any questions regarding this letter.

Sincerely,



Hanne Rush
Assistant Attorney General
Division of Open Government

cc: Gary Brackett, Esq. (c/o Donald O’Neil, Esq.)
Southborough Board of Selectmen

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.