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October 27, 2015

OML 2015 – 164

Janelle M. Austin, Esq.
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110

RE: Open Meeting Law Complaint

Dear Attorney Austin:

This office received a complaint from Steve Sheehan, dated June 17, 2015, alleging that the Rockport Board of Selectmen (the "Board") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaint alleges that the Board failed to make executive session meeting minutes available to Mr. Sheehan in response to his requests. The complaint was originally filed with the Board on April 23, 2015. The Board responded by letter dated May 7, 2015.

We appreciate the patience and cooperation of the parties while we reviewed this matter. Following our review, we find that the Board violated the Open Meeting Law as alleged. In reaching this determination, we reviewed the complaint filed with the Board, the Board's response, and the complaint filed with our office. We also spoke with Mr. Sheehan by telephone on July 6, 2015, and with the Board's counsel, Attorney Janelle Austin, by telephone on July 8, 2015.¹ Finally, we reviewed an August 11, 2015 email sent by Mr. Sheehan to the Rockport Assistant Town Administrator, and a letter from Mr. Sheehan to our office, dated August 13, 2015.

FACTS

We find the facts as follows. On February 17, 2015, Mr. Sheehan wrote to the Rockport Assistant Town Administrator requesting that the Board forward to him "any/all available BOS Executive Session minutes in PDF format." On March 17, 2015, Mr. Sheehan sent the Assistant Town Administrator another email, stating that he "would like to begin reading the historical BOS meeting minutes – both the regular BOS meeting minutes and the Executive Sessions

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



minutes...I would like to begin with the earliest historical BOS meeting minutes on record, and continue chronologically up through 1980.” Mr. Sheehan again wrote to the Assistant Town Administrator on March 19, 24, and 25, 2015 regarding his request.

On March 25, 2015, the Assistant Town Administrator responded to Mr. Sheehan, explaining that the Board possessed executive session minutes “from 1985-Present but not all have been released. We have confirmed that 1985-1994 have been released but will need to be redacted prior to public review. Our review continues for years subsequent to 1994 and are most likely on a meeting by meeting basis.” The Assistant Town Administrator wrote further that, “We have [Board executive session minutes] from 1985-Present in PDF format but as stated above, not all have been released and they will require redactions...the Executive Session minutes that were voted for release require redaction prior to public review. The rate for segregation time is \$29.31 per hour.”

On March 27, 2015, Mr. Sheehan again requested the Board’s meeting minutes, writing that, “[s]ince you previously mentioned that all Executive Session minutes (post-1985) are in PDF format, I would appreciate receiving all July 1, 2010 to present Executive Session minutes via email without any further delay.” In response, the Assistant Town Administrator wrote Mr. Sheehan on March 27, 2015, explaining that the Town may charge Mr. Sheehan the costs associated with reviewing and redacting responsive records. The Assistant Town Administrator further wrote that, “where the Town must evaluate the content of the requested executive session meeting minutes in order to redact those portions of the minutes that are not subject to public disclosure, it may charge a prorated fee... for search time and segregation time expenses, as defined by 950 CMR 32.03.”

On April 23, 2015, having not received any executive session minutes from the Board, Mr. Sheehan filed the present Open Meeting Law complaint.

DISCUSSION

1. The Board Failed to Review the Requested Executive Session Minutes within 30 Days.²

The Board violated the Open Meeting Law by failing to conduct a complete and timely review of its executive session minutes as required by G.L. c. 30A, § 22(g)(2). The Open Meeting Law requires that when a public body receives a request for executive session meeting minutes, it shall review those minutes 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(f). Thus, the law contemplates a two stage review of executive session minutes, with both stages occurring within 30 days of a request. See G.L. c. 30A, § 22(f), (g)(2). First, the public body must determine whether the executive session purpose continues to warrant confidentiality. G.L. c. 30A, § 22(f). Then, if the purpose has expired, the public body must determine whether the attorney-client privilege or one or more of the exemptions under the public records law apply

² We note that a public body must respond to a request for executive session minutes within 10 days. G.L. c. 30A, § 22(g)(2). While the Board responded to Mr. Sheehan’s March 17 request within 10 days, it does not appear to have responded to his February 17 request to review executive session minutes. We remind the Board of this requirement.

to withhold the minutes, or a portion thereof, from disclosure. Id. At the conclusion of this review, the public body must respond to the requester and either make the minutes available or provide an explanation of what is being withheld and why. Id. It is clear that, in the present instance, the Board failed to do either.

Thirty six days after receiving his request for executive session minutes, the Board notified the requester that the executive session purpose had expired for minutes of meetings held between 1985 and 1994. The Board did not state whether the executive session purpose continued to justify non-disclosure of any minutes of meetings held prior to that date, however. Further, the Board did not state whether the executive session purpose continued to justify non-disclosure of any minutes of meetings held after that date, stating instead that those minutes would be reviewed “on a meeting by meeting basis.” It gave no time frame for a review of the minutes of meetings held prior to 1985. It is clear, therefore, that the Board violated the Open Meeting Law by failing to review its executive session minutes within 30 days of a request to determine whether the executive session purpose had expired.³ See G.L. c. 30A, § 22(g)(2).

But the Board’s response was flawed in other respects as well. Because the Board had determined at the time of its response that the executive session purpose had expired for the meetings held between 1985 and 1994, it should have either made those minutes available to the requestor, in whole or with redactions, or provided an explanation of why they were being withheld. G.L. c. 30A, § 22(f), (g)(2). Instead, the Board responded with an hourly rate for reviewing those minutes pursuant to the Public Records Law. This was improper. Minutes must be reviewed for *all purposes* within 30 days of a request. See id. In order to release “the non-exempt minutes, or any portion thereof” within 30 days, as is required by law, a public body must have first reviewed whether any of the permissible exemptions to disclosure apply. See id. While we acknowledge the burden that may be associated with this requirement where, as here, the request is for an exceptionally large number of minutes, we nevertheless conclude that the public’s interest in promptly obtaining either minutes of public body meetings or an explanation for why they are being withheld justifies this interpretation of the law. Further, we note that the Open Meeting Law requires that a public body, or its chair or designee, review the minutes of its executive sessions at reasonable intervals to determine if the Open Meeting Law warrants continued non-disclosure. G.L. c. 30A, § 22(g)(1). Faithful adherence to this requirement should eliminate the need to review massive numbers of minutes within a short time period, if a request such as the one at issue in this complaint is received. Additionally, we encourage those seeking a large number of executive session meeting minutes to work with public bodies to determine a reasonable schedule for the review and production of such minutes. Here, though, Mr. Sheehan was willing to adhere to a reasonable schedule for production yet received no minutes at all from the Board in the more than six months following his initial requests. This violated the law.

³ We understand from counsel that, since this complaint was filed, the Board has determined that the executive session purpose expired with respect to all executive session meetings held prior to 2015. It does not appear that this information was ever conveyed to Mr. Sheehan, however.

2. The Board May Not Assess of Fee for its Review of Executive Session Minutes in Response to Mr. Sheehan's Request.

The Open Meeting Law states that a public body "shall not assess a fee for the time spent in its review." G.L. c. 30A, § 22(g)(2). The Board states that the rate provided to Mr. Sheehan did not pertain to its review of whether or not the executive session meeting minutes should be released as set forth in G.L. c. 30A, § 22(g)(2), but was provided in relation to the redaction process, as permitted by 950 CMR 32.06(1)(c) and 950 CMR 32.03. These regulations, promulgated by the Supervisor of Records, govern the process by which a government entity may respond to a request under the Public Records Law. While these regulations apply generally to records, responses to requests for meeting minutes are governed by a more specific law. See G.L. c. 30A, § 22. It is clear that fees for reviewing executive session meeting minutes are prohibited by G.L. c. 30A, § 22(g)(2). Further, as stated above, the required review of executive session minutes pursuant to G.L. c. 30A, § 22(g)(2) includes both a review of whether the executive session purpose continues to warrant non-disclosure and, where it does not, whether an exemption to the Public Records Law or the attorney-client privileged applies. Accordingly, it is not permissible to assess a fee for search and segregation of executive session meeting minutes following a request.⁴

We acknowledge that a considerable amount of time and effort may be associated with this sort of review, however meeting minutes are created for the benefit of the public, as a record of a meeting. The Open Meeting Law's prohibition on fees for reviewing executive session minutes is an acknowledgement that minutes should be treated differently than other public records, and that barriers to accessing them should be low. Accordingly, we find that the Board violated the Open Meeting Law by assessing a fee for its review of the requested executive session minutes.

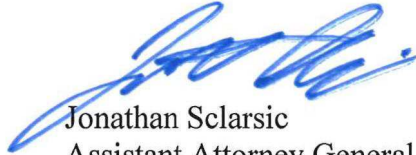
CONCLUSION

We find that the Board violated the Open Meeting Law by failing to timely review and make available minutes of its executive sessions following a request, and by assessing a fee for conducting a review of executive session minutes following a request. We order the Board's immediate and future compliance with the Open Meeting Law, and caution the Board that a similar future violation may be considered evidence of an intentional violation of the law. Additionally, we order the Board to provide an accounting of all executive session minutes responsive to Mr. Sheehan's requests, detailing for each set of minutes whether the executive session purpose continues to apply; and for those sets of minutes where the executive session purpose no longer applies, whether: 1) a specific exemption under the Public Records Law applies; 2) the attorney/client privilege applies; or 3) the minutes are available for public review. The Board must comply with this order within thirty (30) days of receipt of this letter. The Board may not charge Mr. Sheehan for its review.

⁴ A public body may still charge for providing copies of documents or minutes, in accordance with the Supervisor of Records' regulations. G. L. c. 66, § 10(a); 950 CMR 32.06(1)(a).

We now consider this matter closed. Please be advised that this letter does not resolve any other complaints that may be pending with this office or with the Board. Please feel free to contact our office at 617-963-2540 if you have any questions regarding this letter.

Sincerely,



Jonathan Sclarsic
Assistant Attorney General
Division of Open Government

cc: Rockport Board of Selectmen
Steve Sheehan

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.