347-21

City of Malden
Office of the City Solicitor
215 Pleasant Street, Suite 420
Malden, MA 02148

Kathryn M. Fallon
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REPORT REGARDING JUNE 21, 2021 OPEN MEETING LAW COMPLAINT

I. INTRODUCTION

On 6/21/21, Brian DeLacey, "Complainant", emailed a complaint under the Open Meeting Law, MGL c. 30A, §§ 18-25, "OML", to Council President Neal Anderson and City Clerk Greg Lucey, alleging the Malden City Council violated the OML on 6/8/21. The Complaint, received on 6/21/21, has already been distributed by the City Clerk to the members of the City Council. An investigation ensued and this Report follows on behalf of the Council.

II. SUMMARY OF COMPLAINT ALLEGATIONS AND ANALYSIS

1. Summary of claims.

The Complainant asserts the complaint regarding the City Solicitor's communication to the City Council in January of 2021. The Complainant alleges the privileged communication evidences violation of the Open Meeting Law by the City Council. The Complainant claims the Council violated the law by a deliberation of a quorum of Councillors in regard to the City Solicitor's communication. The Complainant bases his allegations on a series of public records requests taking issue with redaction of the responded to request. The Complainant asserts that serial communications by the City Solicitor are open meeting law violations.

2. Summary of facts.

1. On 1/4/21 the City Solicitor send privileged communication to the Council.

2. No deliberation of a quorum of the Council ensued.

3. Legal Analysis of claims.

The OML requires meetings of a pubic body to be properly noticed and open to the public, unless an executive session is convened. MGL c. 30A, §20. Public body" is defined as "a multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose..." A "Meeting" is defined as "a deliberation by a public body with respect to any matter within the body's jurisdiction..." MGL c. 30A, §18.

The OML 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 a meeting agenda, scheduling information or distribution of other procedural meeting or* ***the distribution of reports or documents that may be discussed at a meeting, provided than no opinion of a member is expressed***." MGL c. 30A, §18 (emphasis supplied). The OML applies to meetings of a public body at which members deliberate on matters within the public body's jurisdiction.

The question as to whether City Solicitor's opinion/review/analysis/advice to the City Council is a violation of the law, can be answered in the negative; it is by statutory definition not in violation of the OML. The OML is clear and concise, and a plain reading leads to the conclusion that the City Solicitor's legal advice to the Council does not constitute a deliberation within the meaning of the OML. No discussion or deliberation occurred, between or among a quorum of the City Council, outside of the City Council's public meeting.[1]

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[1] Contrast with OML2019-140 (Malden City Council), in which the Attorney General found "the expression of an opinion **by one public body member** on matters within the body's jurisdiction **to a quorum of a public body is considered a deliberation, even if no other public body member responds.**";
also, contrast with OML2011-27 (Otis Select Board), in which the Attorney General reiterated that communication with counsel by a quorum of a Board may occur only during a properly posted open meeting or during an executive session..."violation found due to **evidence of further discussion among a quorum of the Board and attempt to consider policy options before a public meeting was held in violation of OML**: "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." citing District Attorney for the Northern District v. School Committee of Wayland, 451, Mass, 561, 570-571 (2009).

III. RECOMMENDATION

It is the recommendation of the Legal Department that the Council vote to permit the Legal Department to respond to the Complaint in a manner consistent with this report, advising the Complainant that his claims are without legal merit and are not grounded in law or fact.

Respectfully submitted,
Malden Legal Department

/s/Kathryn M. Fallon, Esq.
City Solicitor
/s/John J. McNaught, Jr.
Assistant City Solicitor
/s/Mark Rumley
Special Counsel
City of Malden Legal Department
215 Pleasant Street, Suite 420
Malden, MA 02148
781-397-7106

June 29, 2021

Greg Lucey

From: Brian DeLacey <bdelacey@gmail.com>
Sent: Monday, June 21, 2021 3:52 PM
To: Neal Anderson; Greg Lucey
Subject: 6/21/21 - "Open Meeting Law Complaint - Counsel and Serial Communications"
Attachments: AG-OML-Complaint2021-06-21.pdf; Description-OML-Complaint-June-21-2021.pdf

Dear Council President Anderson and Clerk Lucey,

Please accept the attached documents representing my signed submission of an open meeting law complaint. One attachment is the required form. The second attachment is a description of the facts leading to the complaint/s. This filing may be described as:

"Open Meeting Law Complaint - Counsel and Serial Communications"

Thank you for your consideration.

Sincerely,
Brian DeLacey

The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

OPEN MEETING LAW COMPLAINT FORM

Instructions for completing the Open Meeting Law Complaint Form

The Attorney General's Division of Open Government interprets and enforces the Open Meeting Law, Chapter 30A of the Massachusetts General Laws, Sections 18-25. Below is the procedure for filing and responding to an Open Meeting Law complaint.

Instructions for filing a complaint:

- Fill out the attached two-page form completely. Sign and date the second page. File the complaint with the public body within 30 days of the alleged violation. If the violation was not reasonably discoverable at the time it occurred, you must file the complaint within 30 days of the date the violation was reasonably discoverable. A violation that occurs during an open session of a meeting is reasonably discoverable on the date of the meeting.
- To file the complaint:
  - For a local or municipal public body, you must submit a copy of the complaint to the chair of the public body AND to the municipal clerk.
  - For all other public bodies, you must submit a copy of the complaint to the chair of the public body.
  - Complaints may be filed by mail, by email, or by hand. Please retain a copy for your records.
- If the public body does not respond within 14 business days and does not request an extension to respond, contact the Division for further assistance.

Instructions for a public body that receives a complaint:

- The chair must disseminate the complaint to the members of the public body.
- The public body must meet to review the complaint within 14 business days (usually 20-22 calendar days).
- After review, but within 14 business days, the public body must respond to the complaint in writing and must send the complainant a response and a description of any action the public body has taken to address the allegations in the complaint. At the same time, the body must send the Attorney General a copy of the complaint and a copy of the response. The public body may delegate this responsibility to an individual member of the public body, its counsel, or a staff member, but only after the public body has met to review the complaint.
- If a public body requires more time to review the complaint and respond, it may request an extension of time for good cause by contacting the Division of Open Government.

Once the public body has responded to the complaint:

- If you are not satisfied with the public body's response to your complaint, you may file a copy of the complaint with the Division by mail, by email, or by hand, but only once you have waited for 30 days after filing the complaint with the public body. Mail may be sent to: The Division of Open Government, Office of the Attorney General, One Ashburton Place - 20th Floor, Boston, MA 02108. Emails may be sent to: openmeeting@state.ma.us.
- When you file your complaint with the Division, please include the complaint form and all documentation relevant to the alleged violation. You may wish to attach a cover letter explaining why the public body's response does not adequately address your complaint.
- The Division will not review complaints filed with us more than 90 days after the violation, unless we granted an extension to the public body or you can demonstrate good cause for the delay.

If you have questions concerning the Open Meeting Law complaint process, we encourage you to contact the Division of Open Government by phone at (617) 963-2540 or by email at openmeeting@state.ma.us.

OPEN MEETING LAW COMPLAINT FORM

Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Please note that all fields are required unless otherwise noted.

Your Contact Information:

First Name: Brian Last Name: DeLacey

Address: 1 Earl St

City: Malden State: MA Zip Code: 02148

Phone Number: 617-863-0497 Ext. _____

Email: bdelacey@gmail.com

Organization or Media Affiliation (if any): Malden News Network

Are you filing the complaint in your capacity as an individual, representative of an organization, or media?
(For statistical purposes only)

☒ Individual ☐ Organization ☐ Media

Public Body that is the subject of this complaint:

☒ City/Town ☐ County ☐ Regional/District ☐ State

Name of Public Body (including city/town, county or region, if applicable): Malden City Council

Specific person(s), if any, you allege committed the violation: Malden City Council

Date of alleged violation: 1/4/21

Description of alleged violation:

Describe the alleged violation that this complaint is about. If you believe the alleged violation was intentional, please say so and include the reasons supporting your belief.

Note: This text field has a maximum of 3000 characters.

Please see the attached description, "Open Meeting Law Complaint - Counsel and Serial Communications"

What action do you want the public body to take in response to your complaint?

Note: This text field has a maximum of 500 characters.

These are described in the attached "Open Meeting Law Complaint - Counsel and Serial Communications"

Review, sign, and submit your complaint

I. Disclosure of Your Complaint.

Public Record. Under most circumstances, your complaint, and any documents submitted with your complaint, is considered a public record and will be available to any member of the public upon request.

Publication to Website. As part of the Open Data Initiative, the AGO will publish to its website certain information regarding your complaint, including your name and the name of the public body. The AGO will not publish your contact information.

II. Consulting With a Private Attorney.

The AGO cannot give you legal advice and is not able to be your private attorney, but represents the public interest. If you have any questions concerning your individual legal rights or responsibilities you should contact a private attorney.

III. Submit Your Complaint to the Public Body.

The complaint must be filed first with the public body. If you have any questions, please contact the Division of Open Government by calling (617) 963-2540 or by email to openmeeting@state.ma.us.

By signing below, I acknowledge that I have read and understood the provisions above and certify that the information I have provided is true and correct to the best of my knowledge.

Signed: Brian DeLacey (electronic signature) **Date:** 6/21/21

For Use By Public Body
Date Received by Public Body:

For Use By AGO
Date Received by AGO:

From:	Kathryn Fallon
To:	nanderson@cityofmalden.org; David Camell; pcondon@cityofmalden.org; pcrowe@cityofmalden.org; ddemaria@cityofmalden.org; Amanda Linehan; Barbara Murphy; Ryan O"Malley; Jadeane Sica; Craig Spadafora; Steve Winslow
Cc:	Diane M. Anthony; Kathryn M. Fallon; John McNaught Jr.; Kenneth Rossetti
Subject:	Privileged and Confidential-Attorney/Client Communication-Not a Public Record-Not for Disclosure-Not for Public Dissemination-
Date:	Monday, January 04, 2021 10:54:46 AM

Privileged and Confidential-Attorney/Client Communication-Not a Public Record-Not for Disclosure-Not for Public Dissemination

Good morning Councillors,

Happy New Year! I hope you all enjoyed peaceful holidays. This email is privileged and confidential and should not be forwarded. Please do not reply all, this email contains legal advice, and if you have any further questions or concerns, please reach out directly to me, John or Ken.

[redacted]

[redacted]

PLEASE DO NOT REPLY ALL IN RESPONSE TO THIS COMMUNICATION. IF YOU HAVE ANY FURTHER QUESTIONS, COMMENTS OR CONCERNS, PLEASE CONNECT WITH ME, JOHN OR KEN DIRECTLY.

Thank you,

Kate

"Open Meeting Law Complaint - Counsel and Serial Communications"

On or about June 17, 2021, recently released public records revealed one or more potential and previously unreported Open Meeting Law (OML) violations involving the City Council.

These violations could have been identified at least three months earlier but for the fact the city withheld relevant records from public requests dating back to early March 2021. Those requests include #2021-099 (redaction provided within the last week or so) and #2021-0106 (no response provided.) As a result, this complaint is filed with the public body within 30 days of the date on which the alleged violation/s could reasonably have been discovered.

The reported elements relate to the following facts which may serve as the basis for two violations:

1> On 1/4/21, City Solicitor Fallon sent email, from the address of kathryn@attorneyfallon.com, to a quorum of the City Council along with the Legal Department staff and kfallon@cityofmalden.org.

A heavily redacted Solicitor's email, revealed only in the last week, is evidence of this violation.

2> Councilor Barbara Murphy sent email to City Solicitor Kathryn Fallon on or about 12/30/20 and again on 1/2/21. The Councilor's email may be directly related to the Solicitor's email being sent to a quorum of the Council.

The three emails in question have been withheld from the public, despite multiple determined requests. The withholding has been undisclosed, withheld or redacted with unproven attorney/client claims.

Based on information and belief, these emails relate to significant and important matters in the public interest. It appears the Solicitor's email should have been shared only in an open meeting or properly noticed and documented executive session. As a result, these three emails now form the foundation of complaint for one or more open meeting law violations.

A simple review of the heavily redacted 1/4/21 email, and the corresponding privilege log only available within the last week, clearly indicates the Solicitor's email was sent to a quorum of the City Council. This violates a plain language reading of Open Meeting Law, as previously communicated and explicated directly and officially to the Malden City Council from the Attorney General's Office.

A well known OML principle is that "**communication between counsel and a quorum of a public body** may occur only during a properly posted open meeting or during a valid executive session." The Solicitor's 1/4/21 email verifiably violates this rule. (This violates a requirement of a previous Determination on file with the Solicitor; OML 2019-140, MALDEN CITY COUNCIL. That ordered the "Council's immediate and future compliance with the Open Meeting Law and caution the Council that a determination by our office of a similar violation in the future may be considered evidence of intent to violate the Open Meeting Law".)

A review of the timing of Councilor Murphy's withheld email/s suggests an additional OML violation may have arisen. Based on knowledge of other events and circumstances from that time, when it is known Councilor Murphy received records corresponding to matters related to Conflict of Interest, the effect if not intent of Murphy's emails may be a **serial communication** with a quorum of City Council, through the Solicitor. It is impossible to know since the City has withheld release of Murphy's emails.

It's clear precedent prohibits such serial communication activity: as OML 2021-12 - DANVERS BOARD OF SELECTMEN - observed,

"A public body may not engage in a serial communication whereby a quorum communicates in a non-contemporaneous manner outside of a meeting, on a particular subject matter within the public body's jurisdiction. See McCrea v. Flaherty, 71 Mass. App. Ct. 637 (2008); OML 2011-33."

If Murphy's email was a form of deliberation and in any way related to Fallon's email to a quorum of the Council, it appears to be a serial communication and thus a clear violation of OML. The City Council is aware of the meaning of deliberation, as it was spelled out in detailed communication from the Office of the Attorney General to the City of Malden on 11/5/2019, within OML 2019-140.

Many determinations have prohibited various fact patterns of serial communications. However, the general rule is simple: "A public body may not use a non-member, such as a staff member, to facilitate a deliberation or communicate on matters that the Board would otherwise be required to save for discussion at an open meeting." See OML 2016-31; OML 2014-51; OML 2013-186." (See OML 2020-144 - LONGMEADOW BOARD OF HEALTH, See District Attorney for the Northern District v. School Committee of Wayland, 451 Mass. 561, 570571 (2009)) .

A fuller review of the relevant emails - created by Solicitor Fallon and Councilor Murphy yet withheld from the public - necessitates full disclosure of the emails or an in camera review.

Based on what we know, it appears the alleged and ongoing actions by the City Council violate a general OML rule: "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." (See OML 2014-63, FOXBOROUGH BOARD OF SELECTMEN)

I request the following actions be taken by the City Council in response to this complaint:

> Acknowledge violations arising out of the actions described here.

> Commit to a cessation of the ongoing pattern and practice of non-public communication between counsel and a quorum of a public body outside of properly posted open meetings or valid executive sessions.

> When the City Council files their required response to this complaint with the Attorney General, the City should also release all email communication (from any email address, whether held in a private name or as an official City of Malden account) between counsel and a quorum of any Malden public body dated from 11/5/2019 (the date 2019-140 was issued) thru the present day. This release of communications should include the 1/4/21 email which has been withheld from the public.

> Councillor Murphy's emails of 12/30/20 and 1/2/21, and any forwarding or sharing of those emails, should be released to the public if they relate in any way to the content of Solicitor Fallon's 1/4/21 email and are determined to constitute or relate to a violation of Open Meeting Law.

The Complainant recognizes 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); 940 CMR 29.05(4). If the

alleged violation could not have reasonably been known at the time it occurred, as was the case here, then the complaint must be filed with the public body within 30 days of the date on which the alleged violation could reasonably have been discovered. 940 CMR 29.05(4). Because the underlying emails that document the alleged violation have been both secretly held, and explicitly withheld from the public, this complaint is filed within 30 days of the date on which the alleged violation could reasonably have been discovered (on or about June 17, 2021.)

Greg Lucey

From: Brian DeLacey <bdelacey@gmail.com>
Sent: Monday, June 21, 2021 3:52 PM
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