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February 20, 2024

Brian DeLacey
Malden News Network
1 Earl St.
Malden, MA 02148
BY U.S. MAIL and EMAIL

Re: Open Meeting Law complaint
Public body: Malden City Council
Date of alleged violation: January 2, 2024 (or earlier)

Mr. DeLacey:

Your complaint dated January 22, 2024 alleged that the Malden City Council violated the Open Meeting Law, G.L. c. 30A, §§ 18-25 and 940 C.M.R. 29.00 et seq. in various ways, including by deliberating outside of a properly noticed meeting, in connection with the election of a council president at the City Council meeting on January 2, 2024 during the inaugural festivities on that date at the Malden High School. Pursuant to 940 C.M.R. 21.05(5), on behalf of the Malden City Council, this letter is a response to your complaint.

I. The City Council did not meet “in seclusion” on January 2, 2024 in violation of the open meeting law.

First, while it is true that during the ceremonial festivities in the Malden high school auditorium on January 2, 2024, the Malden City Council was directed to “retire” it meet to elect a council president, it is demonstrably false that they met in seclusion in violation of the open meeting law.¹

The law requires that if “public bodies shall file meeting notices sufficiently in advance of a public meeting to permit posting of the notice at least 48 hours in advance of the public meeting.” 940 C.M.R. 29.03(1)(a). Notice of the January 2, 2024 meeting was properly posted on the city’s website. The notice stated:

THE MALDEN CITY COUNCIL WILL HOLD A MEETING ON TUESDAY, JANUARY 2, 2024,
6:00 PM AT MALDEN HIGH SCHOOL, 77 SALEM ST., MALDEN, MA. IN ROOM #J278
DURING A RECESS IN THE INAUGURAL CEREMONY FOR THE PURPOSE OF SELECTING A
COUNCIL PRESIDENT FOR THE YEAR 2024. THIS MEETING IS OPEN TO THE PUBLIC.

¹ A video of the inauguration is available here: <https://www.youtube.com/watch?v=GYYiNFzFFZw>. The announcement that the City Council would retire to meet and elect a president is made at approximately 58m:45s into the event. The City Council returned to the stage at approximately 1:16:30.

The above notice was conspicuously posted on the city's website on December 27, 2023, more than 48 hours prior to the January 2, 2024 meeting.² The fact that during the inauguration it was announced that the City Council would "retire" does not imply that the meeting was not open to the public. The notice of the meeting clearly and unambiguously stated that the meeting was open to the public; it also provided the meeting room number. Thus, regardless of whether any member of the public attended, there can be no doubt that any member of the public that wish to attend was clearly notified that they could do so. Although you failed to attend, you, like any other member of the public, were welcome to attend the January 2, 2024 meeting.

Further, interviews with the city councilors by my office revealed that during the meeting, the room door was never closed; it was open and members of the public could be observed outside in the hallway by the council members. Anyone was free to enter the meeting room.

II. Communication by the Mayor with the city council members is not deliberation and does not violate the open meeting law.

Without any evidence or identifying any specific instance, the complaint alleges that "Mayor Gary Christenson and/or his staff, or a proxy thereof – communicated with members of the City Council concerning voting for the Council President." Regardless of the Mayor's importance to the city, there can be no dispute that the Mayor is not a member of the City Council. Communications by a non-member, even a mayor, with a member do not qualify as deliberation by a public body. Deliberations are defined only as communications "between or among a quorum of a public body on any public business within its jurisdiction." G.L. c. 30A, § 18.

That said, none of the council members received any message from the mayor or his staff expressing an opinion about who should be council president.

III. There is no evidence that the January 2, 2024 meeting was "a perfunctory ratification of secret decisions," or that the council members deliberated in violation of the open meeting law.

Your complaint that the election of Council President on January 2, 2024 was "a perfunctory ratification of a secret decision" in violation of the open meeting law is equally devoid of any specific factual support. You admit that the allegation is "based on information and belief," but you failed to provide any such information or basis for the belief beyond pure speculation.

Even if a decision by a public body is perfunctory, that alone is not a violation of the open meeting law. But you have no basis to complain, and there is no reason to think, that the election of Council President was perfunctory at all. Even if the decision to elect a Council President was something that each member had decided for himself or herself in private without deliberation, the open meeting law does not straitjacket the minds of members of public bodies and preclude them from thinking privately about

² Postings of meetings are available online at the city's website on the agenda center page: <https://www.cityofmaiden.org/AgendaCenter/City-Council-37/>

public decisions. The open meeting law is not a means of mind control over public officials. The allegation your complaint that the members' decision was "perfunctory" simply because there may not have been extensive debate in an open meeting is based on pure speculation.

As part of my investigation, I spoke with every city councilor present at the January 2, 2024 meeting.³ My investigation revealed that between the election in early November 2023 and the date of the meeting, there were no written communications to a quorum of the council members on the topic of the council presidency. Any communications between the members on the topic were mostly brief and sporadic verbal exchanges, and usually involved only two (at most three) members at a time. All of these communications amounted to nothing more than occasional, isolated inquiries or discussions, spread over several weeks, as to who would be a good candidate or who should deserve support for the position. None of these exchanges reached a quorum, or even close to a quorum, of 6 council members. These conversations, most of which were ad hoc and casual, were uncoordinated. There was no serial communication between members on this topic.

Initially, there was only one council member interested in the presidency. When it became apparent to him that he was unlikely to garner enough support, this member decided to withdraw his candidacy and support councilor Stephen Winslow, apparently the only other member interested in the position. Councilor Winslow was then unanimously elected president of the Malden City Council on January 2, 2024. None of the members treated the election of a president as a perfunctory decision.

The facts here are similar to *OML 2014-14 Melrose Board of Aldermen*, where it was a practice "that candidates running for President reached out to the Board's members to inform the members of that person's candidacy," and the Atty. Gen.'s office found that such a practice did "not appear to have been conducted systematically in an effort to circumvent the law."

There is no evidence that a quorum of the Malden City Council deliberated outside a properly noticed meeting, or otherwise sought to circumvent the open meeting law.

IV. Conclusion

In conclusion, my office reminds the City Council members of the importance of continuing to comply with the open meeting law. "Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over

³ Those councilors are: Ryan O'Malley, Amanda Linehan, Karen Colon-Hayes, Carey McDonald, Craig Spadafora, Paul Condon, Stephen Winslow, Chris Simonelli, Jadeane Sica, Peg Crowe, and Ari Taylor. These interviews were not recorded, and therefore no transcriptions exist. Further these communications are protected by the attorney-client privilege and are not subject to disclosure. As the Supreme Judicial Court stated in a related context, the "necessity of the privilege for governmental entities and officials flows directly from the realities of modern government" and because "the attorney-client privilege serves the same salutary purposes in the public as in the private realm, it is now well established that communications between government agencies and agency counsel are protected by the privilege as long as they are made confidentially and for the purpose of obtaining legal advice for the agency." *Suffolk Constr. Co. v. Div. Of Capital Asset Mgmt.*, 449 Mass. 444, 450-51 (2007).

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the telephone, or in any other form." *Dist. Atty. for the Northern District v. School Committee of Wayland*, 455 Mass. 561, 570-71 (2009).

This completes the investigation and response to your open meeting law complaint. The evidence leads to the conclusion that there was no violation of the open meeting law. There are no facts to reasonably support the allegations in your complaint, which appears to be little an attempt to repeat your triumph in OML 2020-103. You should be gratified, however, that the City Council has did not engage in any unlawful deliberations in connection with the election of the 2024 Council President.

Sincerely,


Zaheer A. Samee

Encl: Notice of City Council Meeting, Jan. 2, 2024
City Council Agenda for January 2, 2024 meeting

Cc: Massachusetts Attorney General, Division of Open Government (with copy of complaint)
Lisa Cagno, Clerk of Malden City Council