



THE COMMONWEALTH OF MASSACHUSETTS
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July 15, 2022

OML 2022 – 135

VIA EMAIL ONLY

John McNaught, Jr., Esq.
City of Malden Legal Department
jmcnaught@CITYOFMALDEN.ORG

RE: Open Meeting Law Complaint

Dear Attorney McNaught:

This office received a complaint from City Councilor Ryan O'Malley on September 26, 2021,¹ alleging that the Malden City Council (the "Council") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Council on July 29, and you responded on behalf of the Council by letter dated August 17. The complaint alleges that the Council discussed a topic at its June 29 meeting without that topic having been included on the notice for the meeting.

Following our review, we find that the Council violated the Open Meeting Law by discussing a topic that was not included on the notice for its June 29 meeting. Additionally, we find this violation to be intentional. In reaching this determination, we reviewed the Open Meeting Law complaint, the Council's response, the request for further review, the notice for and video recording of the Council's June 29 meeting,² the notice for the June 29 meeting of the Council's Finance Committee, and a video recording of the Council's September 7 meeting.³ Additionally, we communicated with Counsel⁴ by email and phone.

¹ All dates are in 2021 unless otherwise stated.

² A video recording of the June 29 meeting may be found at <https://videoplayer.telvue.com/player/0161qrd2cTIyQzYJ0oHNRYLt8lmyVn7U/media/658108?autostart=false&showtabssearch=true>.

³ A video recording of the Council's September 7 meeting may be found at <https://www.youtube.com/watch?v=aoYcu3gij4c>.

⁴ For the sake of clarity, we refer to you in the third person.

FACTS

Prior to June 29, the Council's Finance Committee had been negotiating with the Malden Retirement Board regarding a proposed increase to the cost-of-living adjustment ("COLA") base for Malden City retirees. On June 24 the Finance Committee posted notice for a meeting to be held on June 29 at 5:45 p.m. The Finance Committee's meeting notice included three topics, one of which was "235-21 Order: That the City Council approve an increase in the COLA base from \$14,000 to \$18,000 for contributory and non-contributory retirees of the Malden Retirement System." The Council posted notice for a meeting to be held on June 29 at 7:00 p.m.⁵ The Council's notice did not include a topic related to increasing the COLA base for retirees.

On June 28, the Retirement Board held a meeting at which it agreed to lower its original proposed increase to the COLA base from \$18,000 to \$16,000. During the Finance Committee's June 29 meeting, it voted to approve an increase to the COLA base, as proposed by the Retirement Board, from \$14,000 to \$16,000. In order for the COLA base increase to go into effect for the upcoming fiscal year, the full Council needed to vote to approve the increase no later than the following day, June 30.

During the Council's June 29 meeting immediately following the Finance Committee's meeting, Councilor Barbara Murphy, chair of the Finance Committee, moved to suspend the Council's docket rules to allow the full Council to consider and vote on the increase to the COLA base. Following an affirmative vote to suspend docket rules, Councilor Murphy provided background information regarding the COLA base, the Retirement Board's proposals to increase the COLA base, and the Finance Committee's vote earlier that evening to approve an increase from \$14,000 to \$16,000. Councilor Murphy explained that the full Council needed to vote to increase the COLA base no later than June 30 in order for the increase to go into effect for the upcoming fiscal year. After Councilor Murphy's presentation, Councilor Deborah DeMaria moved to recuse herself. The motion passed and Councilor DeMaria left.

Thereafter, a lengthy discussion ensued during which most councilors, including the Complainant, discussed not only the substantive topic of increasing the COLA base, but also whether engaging in such a discussion violated the Open Meeting Law and whether the Council could suspend its docket rules to discuss the topic. Specifically, after asking a substantive question about raising the COLA base, the Complainant noted that because this topic had not been included on the notice for the meeting he could not vote on this matter as he believed doing so may violate the Open Meeting Law. Thereafter, Councilor Jadeane Sica spoke regarding increasing the COLA base, stated that the Council should not worry about the Open Meeting Law, and asked City Solicitor Kathryn Fallon for her opinion regarding whether the Council was violating the Open Meeting Law by discussing the topic.

⁵ The webpage to which the Council's notice was posted indicates that the notice was amended on June 28 but does not include the date and time the original notice was posted. The notice itself does not indicate the date and time the original notice was posted or the date and time the amended notice was posted. We remind the Council that when a notice is amended within 48 hours of a meeting, the date and time that both the original and the amended notices were posted must be conspicuously recorded on or with the meeting notice. 940 CMR 29.03(1)(d).

In response to Councilor Sica's question, Solicitor Fallon explained that if the topic was anticipated, it should have been included on the Council's notice. Solicitor Fallon then recommended that, where the issue of a potential Open Meeting Law violation had been raised, the Council post notice for the topic to be discussed at another meeting. Thereafter, several members discussed the need to vote on the increase by June 30, the next day; their desire to move forward and vote on the COLA base increase regardless of the Open Meeting Law; and their belief that they could suspend their docket rules.

At one point the Council's Clerk, having reviewed Robert's Rules of Order, stated that he believed the Council could suspend its rules to take up this matter. In response, Solicitor Fallon clarified that although the Council may suspend its own rules, it may not suspend the Open Meeting Law. Thereafter, Councilor Sica asked Solicitor Fallon if the Council was already in violation of the Open Meeting Law by having discussed the COLA base increase that evening. Councilor Sica then noted that the Council was likely to receive an Open Meeting Law complaint regardless of what it did next and suggested that the Council should therefore vote on the increase to the COLA base that evening. The Council briefly discussed holding an emergency meeting the next day, and then Councilor Craig Spadafora moved to approve the COLA base increase. The motion was seconded. Councilor Spadafora then stated "if this is going to be an Open Meeting Law violation, we get one a week. I'd rather make sure people get a little bit more money in their paycheck for the coming years than worry about an Open Meeting Law violation." Thereafter, the Council voted to approve the COLA base increase, with all present councilors voting in favor, except for the Complainant, who voted against the increase on the basis that the vote was improper.

DISCUSSION

The Open Meeting Law requires public bodies to post notice no later than 48 hours in advance of any meeting, excluding Saturdays, Sundays and legal holidays, and to include on the meeting notice "a listing of topics that the chair reasonably anticipates will be discussed at the meeting." G.L. c. 30A, § 20(b). Where the chair delegates to another person responsibility for creating the meeting notice, we look to what that person reasonably anticipated would be discussed 48 hours prior the meeting. See OML 2020-80; OML 2015-190.⁶ A public body may discuss a truly unanticipated topic at a meeting even if the topic was not included on the meeting notice, although the Attorney General strongly recommends that public bodies postpone discussion and action on unanticipated topics that are controversial or may be of particular interest to the public if the topic can wait until a subsequent meeting. See OML 2020-172; OML 2019-131; OML 2018-119.

The Council's response to the Open Meeting Law complaint focuses on whether, in general, it violates the Open Meeting Law for the Council to suspend its docket rules, which, according to the Council, allows it "to act upon a matter that should have been sent to committee but needed immediate attention." We do not review this broader question of whether the Council's practice of suspending its own docket rules, in general, violates the Open Meeting Law. Rather, we review the allegation raised in the complaint before us, which is that the

⁶ Open Meeting Law determinations may be found at the Attorney General's website, www.mass.gov/ago/openmeeting.

Council violated the Open Meeting Law when it discussed a topic that was not included on the notice for the June 29 meeting. We find, and the Council does not dispute, that discussion of increasing the COLA base during the June 29 meeting violated the Open Meeting Law where that topic was reasonably anticipated but not included on the notice for the June 29 meeting.

The Council explains in its response that as remedial action it would include the topic of increasing the COLA base, along with the other topics the Council believes were discussed in violation of the Open Meeting Law, on the notice for its September 7 meeting. Violations of the Open Meeting Law may be cured by independent, deliberative action that is not merely a ceremonial acceptance and perfunctory ratification of action taken in violation of the Law. See Pearson v. Bd. of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125 (2000); OML 2020-7; OML 2016-49. Generally, that means conducting deliberations anew at a subsequent meeting that is accessible to the public and for which proper notice is provided. Here, the Council did not engage in independent deliberative action with respect to increasing the COLA base, but rather simply voted to ratify its earlier vote with respect to increasing the COLA base. Although we acknowledge that the Council took some corrective action, the action taken was insufficient to cure the violation.

Next, we must determine whether this violation was, as the Complainant urges, intentional. See G.L. c. 30A, § 23(c). An intentional violation is an “act or omission by a public body or a member thereof, in knowing violation of [the Open Meeting Law].” 940 CMR 29.02. An intentional violation may be found where the public body acted with deliberate ignorance of the law’s requirement or has previously been advised that certain conduct violates the Open Meeting Law. Id. The Council asserts that the violation was not intentional.

A review of the video recording of the June 29 meeting shows that Council members were confused about the interplay between the Council’s own procedural rules and the Open Meeting Law. However, the video recording also shows that Council members considered at some length, and sought legal guidance, regarding whether discussion of increasing the COLA base violated the Open Meeting Law where that topic had not been included on the meeting notice. The Council ultimately decided that regardless of whether it was in violation of the Open Meeting Law, it would continue with the discussion and would vote on whether to increase the COLA base. Based on the video evidence, we find that the Council intentionally violated the Open Meeting Law.⁷ We therefore order each member of the Council to attend a comprehensive Open Meeting Law training, either by participating in one of the Division of Open Government’s monthly webinar trainings or by attending a training presented by the Council’s legal counsel. Additionally, we refer this matter for a hearing pursuant to 940 CMR 29.07(3) and recommend that the Council be assessed a fine of \$1,000 pursuant to G.L. c. 30A, § 23(c) (“Upon the finding of a violation, the attorney general may issue an order to . . . impose a civil penalty upon the public body of not more than \$1,000 for each intentional violation”). We invite the Council to contact this office to discuss the hearing process.

⁷ We note that the Complainant objected to voting on the COLA base increase because he believed doing so would violate the Open Meeting Law; therefore, we find that the Complainant did not intentionally violate the Open Meeting Law. However, we clarify for the Complainant that even discussing the COLA base increase and voting against the increase violated the Open Meeting Law. Furthermore, we note that Councilor Deborah DeMaria had recused herself from the discussion, was not present, and did not violate the Open Meeting Law.

CONCLUSION

For the reasons stated above, we find that the Council violated the Open Meeting Law when it discussed an anticipated topic during its June 29 meeting without that topic having been included on the meeting notice. Additionally, we find the violation was intentional. We therefore refer this matter for a hearing pursuant to 940 CMR 29.07(3), and recommend the following orders be imposed:

- 1) A civil penalty of \$1,000;
- 2) Attendance by each member of the Council at a comprehensive Open Meeting Law training; and
- 3) Immediate and future compliance with the Open Meeting Law.

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 the Council or with our office. Please feel free to contact our office at (617) 963-2540 if you have any questions regarding this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Elizabeth Carnes Flynn', with a stylized, cursive script.

Elizabeth Carnes Flynn
Assistant Attorney General
Division of Open Government

cc: Craig Spadafora, President, Malden City Council (via email:
cspadafora@cityofmalden.org)
Ryan O'Malley (via e-mail: romalley@cityofmalden.org)

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.