

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



**Kathryn M. Fallon
City Solicitor**

**John J. McNaught, Jr.
Assistant City Solicitor**

**Mark E. Rumley
Special Counsel**

**Law Department
Tel: 781.397.7108
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**Workers' Compensation
Tel: 781.397.7136
Fax: 781.397.7105**

June 24, 2021

**Mr. Brian DeLacey
1 Earl Street
Malden, MA 02148**

Via email transmission

RE: Open Meeting Law Complaint received 6/15/21

Dear Mr. DeLacey:

This office represents the Malden City Council regarding the 6/15/2021 Open Meeting Law complaint filed by you against the City Council. The City Council voted during its 6/23/21 meeting to permit this office to answer the allegations of your complaint.

In summary, the communication about which you allege the City Council violated the Open Meeting Law was a memo prepared by the undersigned as counsel for the City Council, regarding Paper #284-21, an agenda item docketed for discussion during the 6/8/21 City Council meeting. The memo was emailed to the City Council by the undersigned on 6/8/21, in advance of the meeting. The memo was read into the record during the meeting when the City Council reached Paper #284-21 for discussion.

Transmission of the review by the undersigned to the City Council was not a communication between or among the members of the City Council, and did not constitute a deliberation within the meaning of, and under a plain reading of the Open Meeting Law. Distribution of reports or documents that may be discussed at a meeting to assist public body members when preparing for upcoming meetings generally will not constitute deliberation, as long as when the reports or documents are transmitted, no member of the public body expresses opinion on any matter within that public body's jurisdiction. See "*Office of the Attorney General's Open Meeting Law Guide and Educational Materials/January 2018.*"

Attached is a copy of the Report and Recommendation prepared by this office after review and investigation of the allegations of your Complaint, which was read into the record during the 6/23/21 City Council meeting.

Very truly yours,

/s/Kathryn M. Fallon

**cc: Office of the Attorney General-via email transmission-openmeeting@state.ma.us
Council President Neil Anderson
City Clerk Greg Lucey**

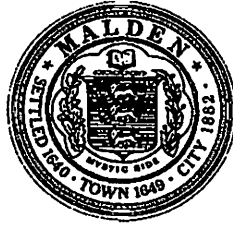
City of Malden
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215 Pleasant Street, Suite 420
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*City Council
Meeting 6/22/21
John J. McNaughton
Agree*

Kathryn M. Fallon
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REPORT REGARDING JUNE 15, 2021 OPEN MEETING LAW COMPLAINT

I. INTRODUCTION

On 6/15/21, 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 6/15/21, is attached hereto as Exhibit A, and 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 "File #284-21". Council Paper 284-21 was a Paper sponsored by Councillors Linehan, DeMaria and Winslow for the Council's 6/8/21 meeting. Complainant claims that the City Solicitor's communication to the City Council responding to Paper 284-21 is a violation of the open meeting law. The Complainant attempts to bolster this claim by way of analogy with "File # 237-21, claiming a "fact pattern...similar to File #237-21." Paper 237-21, sponsored by Councillor O'Malley, sought a vote of the Council to order the City Solicitor to render an opinion on mitigation funds, including billboard mitigation funds, and compliance with state law and Department of Revenue Regulations".¹

¹ Neither Paper relates to the other. Paper #284-21 and Paper #237-21 are similar only in the nature that they were sponsored by certain members of the Council seeking to have the Council vote to order the City Solicitor to expound upon the topics stated; the City Council placed those reviews "on file" after the City Clerk read them into the record during the meetings. Complainant's attempt to demonstrate an open meeting law violation based on Paper #237-21 is not timely, relevant, informative or dispositive, and lacks legal merit, similar to his claims about Paper #284-21. In addition, Complainant's "request for relief" lacks any discernible connection to the allegations contained in the narrative of the Complaint.

2. Summary of facts.

1. On 6/3/21, Councillors DeMaria, Linehan and Winslow sponsored Paper # 284-21, which appeared on the agenda for the meeting of the City Council to be held on 6/8/21 as follows:

“Order: That the City Solicitor provide a legal review and opinion to the City Council of the current ordinances related to the collection of highly sensitive CORI reports. This request is related to Malden Ordinance 6.08.100 and with respect to the Mass. General Laws; specifically procedures for sharing these documents via hard copy and electronically.”

2. On 6/8/21, the City Solicitor prepared a legal review as solicited in Paper #284-21 and transmitted the same via email to the City Council in advance of the City Council’s meeting.

3. The City Solicitor’s legal review was read into the record during the 6/8/21 City Council meeting by the City Clerk, following which the City Council moved to place the City Solicitor’s legal review on file.

3. Legal Analysis of claims.

The OML requires meetings of a public body to be properly noticed and open to the public, unless an executive session is convened. MGL c. 30A, §20. Notice of the City Council’s 6/8/21 meeting was posted on 6/4/21. A “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, or the transmission of the same in advance of the City Council meeting, for purposes of the City Council’s discussion during that meeting, 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 review, provided in advance of the meeting, for purposes of the Council's discussion at its meeting, 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.²

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

June 22, 2021

² 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).

EXHIBIT A



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:

- o 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.
- o To file the complaint:
 - o 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.
 - o For all other public bodies, you must submit a copy of the complaint to the chair of the public body.
 - o Complaints may be filed by mail, by email, or by hand. Please retain a copy for your records.
- o 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:

- o The chair must disseminate the complaint to the members of the public body.
- o The public body must meet to review the complaint within 14 business days (usually 20-22 calendar days).
- o 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.
- o 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:

- o 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.
- o 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.
- o 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: This appears to be a violation of the body as a whole

Date of alleged violation: 6/8/21

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 accompanying four-page description, which is titled "Open Meeting Law Complaint regarding File #284-21 and Related Matters, June 15, 2021"

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.

I request the following actions by the Malden City Council, in response to this complaint:

Attest to a cessation of the described ongoing pattern and practice of non-public communications between counsel and a quorum of Malden's public body of governance, outside of properly posted open meetings or valid executive sessions.

At the same time, this complaint seeks the public body (City Council) to provide a full public release of all email communication between counsel and a quorum of any Malden public body, dated from 11/5/2019 to the present, at the time it submits its required report on this complaint to the Attorney General.

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: 6/15/21

For Use By Public Body Date Received by Public Body:	For Use By AGO Date Received by AGO:
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Open Meeting Law Complaint regarding File #284-21 and Related Matters, June 15, 2021

This complaint concerns the handling of File #284-21 in the City of Malden. The public body agenda item relates to a long-standing procedural practice: "Order to render opinion on 'current ordinances related to collection of highly sensitive CORI reports ... related to Malden Ordinance 6.08.100..."

This agenda item was created for the City Council on 6/3/21 and made public on or about 6/4/21, to be discussed at a public meeting of the City Council on 6/8/21. Prior to the meeting, an electronic communication between counsel and a quorum of the City Council occurred, causing a violation.

The fact pattern is similar to File #237-21, which listed a 5/11/21 discussion of the City Council in a public meeting. The agenda also sought an opinion from the City Solicitor, in that matter regarding compliance with state law and Department of Revenue regulations.

Neither topic constituted an emergency arising out of any unanticipated matter, resulted after considerable prior public discussion, and deliberation was in the general public interest.

~~Minutes made public sometime after the 5/11/21 meeting provided details only known to me on 6/14/21.~~

These minutes clearly show that if File #237-21 is a violation then so is File #284-21. Minutes of the earlier meeting spell this out simply: "City Solicitor Fallon gave an opinion in writing to the council prior to the meeting." Thus, it appears the City Council's handling of #284-21 and #237-21 violates well known principles of Open Meeting Law, namely:

> The well known requirement 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." (OML 2019-140, dated 11/5/2019, involving Malden's City Council.)

It is clear from the meeting record that communication between counsel and a quorum of Malden's City Council took place outside of properly posted open meetings or valid executive sessions. It is well documented that the City Solicitor's office acts as counsel and agent for the City Council, and routinely claims "This office represents the City of Malden" including on matters related to Open Meeting Law.

> Guidance that "A public body may not use a non-member, such as a staff member, to communicate on matters that the Board would not otherwise be able to discuss outside an open meeting." (OML 2013-186) Additionally, a public body may not use a non-member, such as a staff member, "to communicate on matters that the Board would otherwise save for discussion at an open meeting." (See OML 2018-43)

Here, the City Solicitor is such a staff member, and communicated on matters in advance of a public body meeting on at least two occasions. This included communications with a quorum of the public body on matters the public body could not discuss outside of a properly posted meeting or executive session. Additionally, it is a matter of the public record that the public body had docketed, announced and saved these topics for public meeting discussion at the time of these apparent violations.

> "Public bodies must list topics for discussion with "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." 940 CMR 29.03(l)(b)." (OML 2016-13)

In these cases, the agenda items sought deliberation concerning the need for an Opinion on a certain matter. The agenda did not schedule a lengthy, prepared and planned formulated presentation by the City Solicitor. These are two different kinds of agenda actions.

> "A public body may discuss and take action on a topic that was not listed in a meeting notice if it was not anticipated by the chair at least 48 hours before the meeting." (Quoted from OML 2015-4, with reference to OML 2012-3)

Here, the agenda was established and published at least 48 hours before the meetings. An appearance but the City Solicitor was not listed but could easily have been called for or anticipated. Indeed, a different agenda item would have been presented and required if the public body sought to have the City Solicitor present and testify at the meeting, as happened.

> As the City Council knows from prior Open Meeting Law Determinations, "The purpose of the Open Meeting Law is "to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." (OML 2019-140)

The City Solicitor's intervention outside of the public body meeting, in communication with a quorum of the Public Body, altered the deliberation of two docketed agenda items. As a direct result, scheduled topics were not not discussed as expected in a scheduled open meeting. Thus secrecy remained sealed in any conversations related to this matter as a result of action taken outside of the scheduled public deliberations.

Specifically, members of the public body did not discuss or deliberate on the background circumstances or need for a legal opinion as described by the agenda. Consequently, that background remains unknown to the public, but is well known to the public body.

Finally, it appears the resulting violation was intentional and should have been known as such. This conclusion flows from a plain reading of the Attorney General's prior ruling with the City of Malden:

> The Attorney General had previously advised a similarly constituted membership of Malden's City Council that this type of conduct violated Open Meeting Law (OML 2019-140, 11/5/19). That earlier Determination by the Attorney General called for "the Council's immediate and future compliance with the Open Meeting Law" with a caution "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 ". (OML 2019-140)

I request the following actions by the Malden City Council, in response to this complaint:

- 1) Attest to a cessation of the described ongoing pattern and practice of non-public communications between counsel and a quorum of Malden's public body of governance, outside of properly posted open meetings or valid executive sessions.
- 2) At the same time, this complaint seeks the public body (City Council) to provide a full public release of all email communication between counsel and a quorum of any Malden public body, dated from 11/5/2019 to the present, at the time it submits its required report on this complaint to the Attorney General.

Thank you for your consideration. Brian DeLacey Submitted June 15, 2021

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



Kathryn M. Fallon
City Solicitor

John J. McNaught, Jr.
Assistant City Solicitor

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TO: Honorable Members of the Malden City Council
FROM: Kathryn Fallon, City Solicitor
RE: Order to render opinion on 'current ordinances related to collection
of highly sensitive CORI reports....related to Malden Ordinance 6.08.100...'
DATE: 6/8/21

As you are aware, I am asked to render an opinion on the above referenced matter, which presents itself on the Council docket this evening as an entry seeking to Order me to provide "a legal review and opinion to the City council of the current ordinances related to the collection of highly sensitive CORI reports. This request is related to Malden Ordinance 6.08.100 and with respect to Mass General Laws; specifically procedures of sharing of these documents via hard copy and electronically."

Generally, ordinances enacted in accordance with the law are presumptively valid, unless inconsistent with the Constitution or laws of the Commonwealth of Massachusetts. Take Five Vending, Ltd. v. Town of Provincetown, 415 Mass. 741, 744 (1993), citing 41 Marshfield Family Skateland, Inc. v. Marshfield, 389 Mass. 436, 440(1983). Malden Ordinance 6.08.100 was enacted several years ago, amended in 2019 (Paper #289 of 2019), and upon information and belief, the ordinance has never been challenged as unlawful. In addition, the City Clerk manages the application process for the City Council, including undertaking collection and sharing of records, therefore questions regarding procedures of sharing documents must be directed to the City Clerk. The City Clerk is presumed to be conducting these activities consistent with the City Clerk's own policies and procedures.

As you know, the City Council is the Licensing Authority responsible for issuance of Class I, II and III Dealer's Licenses within the City pursuant to MGL c. 140, §59. An applicant seeking such a license is a "Licensing Applicant" pursuant to Massachusetts CORI regulations. 803 CMR 2.02 defines a Licensing Applicant as: "An otherwise qualified individual who is being screened for criminal history by a governmental licensing agency. Licensing applicant, as referenced in 803 CMR 2.00, includes new and renewal license applicants, as well as current licensees. Licensing for purposes of 803 CMR 2.00 also includes licenses, permits or certificates issued by government agencies."

The City Council in this context as a licensing authority has required Standard Access to CORI information in accordance with 803 CMR 2.05(4)(a), however, is not the requestor because CORI reports are provided directly to the City Clerk by the applicants themselves as part of their application.

CITY OF MALDEN

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File #: 237-21 **Version:** 1 **Name:**
Type: Order **Status:** Filed
File created: 5/6/2021 **In control:** [City Council](#)
On agenda: 5/11/2021 **Final action:** 5/11/2021

Title: Order: That the City Solicitor provide an opinion on the City of Malden's compliance with state laws and Department of Revenue regulations related to general revenue entering and exiting the "Billboard Mitigation Operating" account # 2838-134-5725. This opinion should properly reference the relevant laws, rules, and regulations related to municipal finance in Massachusetts.

Sponsors: [Ryan O'Malley](#)

[History \(1\)](#)
[Text](#)

[1 record](#)
[Group](#)
[Export](#)

Date	Ver.	Action By	Action	Result	Action Details	Meeting Details	Video
5/11/2021	1	City Council	placed on file	Pass	Action details	Meeting details	Not available

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File #: 284-21 **Version:** 1 **Name:**
Type: Order **Status:** Filed
File created: 6/3/2021 **In control:** [City Council](#)
On agenda: 6/8/2021 **Final action:** 6/8/2021

Title: Order: That the City Solicitor provide a legal review and opinion to the City Council of the current ordinances related to the collection of highly sensitive CORI reports. This request is related to Malden Ordinance 6.08.100 and with respect to the Mass General Laws; specifically procedures of sharing of these documents via hard copy and electronically.

Sponsors: [Deborah DeMaria](#), [Amanda Linehan](#), [Stephen Winslow](#)

[History \(1\)](#)
[Text](#)

[1 record](#)
[Group](#)
[Export](#)

Date	Ver.	Action By	Action	Result	Action Details	Meeting Details	Video
6/8/2021	1	City Council		Not available	Meeting details	Not available	