

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

June 7, 2017

OML 2017 – 90

New Marlborough Board of Selectmen
c/o Mari Enoch
Town Administrator
807 Mill River Southfield Road
Mill River, MA 01244

RE: **Open Meeting Law Complaint**

Dear Ms. Enoch:

This office received a complaint from Tom Stalker on April 3 alleging that the New Marlborough Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaint was originally filed with the Board on February 22, and Chair Nathaniel Yohalem responded, on behalf of the Board, by letter dated March 13. The complaint alleges that the notice for the Board’s January 24 meeting lacked sufficient detail because it did not contain any topics under the heading “Town Administrator Updates.”

Following our review, we find that the Board did not violate the Open Meeting Law. In reaching this determination, we reviewed the original complaint, the Board’s response to the complaint, and the complaint filed with our office requesting further review.² We also reviewed the notices of and open session minutes from the Board’s January 24 and March 20 meetings. Finally, we spoke with you by telephone on May 26.³

¹ All dates in this letter refer to the year 2017.

² In his April 3 complaint filed with this office, Mr. Stalker additionally alleges that the Board’s March 13 meeting notice lacked sufficient detail and suggests he could find insufficiencies in other notices. We decline to review the allegation regarding the March 13 meeting notice because it was not included within the February 22 complaint and the Board has not had an opportunity to respond to it. See G.L. c. 30A, § 23(b); 940 CMR 29.05(3). Moreover, we note that the Division of Open Government does not perform broad audits of public bodies. See OML 2013-180.

³ For purposes of clarity, we will refer to you in the third person hereafter.



FACTS

We find the facts as follows. On January 19, the Board posted notice with the Town Clerk for a meeting to be held on Tuesday, January 24 at 8:00 A.M. The notice listed six topics, including "Town Administrator Updates" which did not include any description of what the Board anticipated discussing during this portion of the meeting.

The January 24 meeting was held as planned. Before the meeting began, Highway Superintendent Chuck Loring entered Town Hall, spoke with Town Administrator Mari Enoch and requested to update the Board. During "Town Administrator Updates," Mr. Loring advised the Board that money originally planned for two culverts on Clayton Mill River Road could best be used at the intersection at Konkapot Road, and that the culvert completed last fall on Clayton Mill River Road went over budget. Ms. Enoch then advised the Board that bridge-scoping had been conducted by the Department of Transportation on Campbell Falls Road and Norfolk Road, that Town Counsel would prepare a warrant article relative to a donation of property by the New Marlborough Land Trust, and reminded the Board of a meeting on January 25 in Monterey to discuss broadband and a workshop on January 26 in Lenox to discuss marijuana legalization.

On March 16, the Board posted notice with the Town Clerk for a meeting to be held on Monday, March 20 at 6:00 P.M. The notice listed nine topics, two of which were "Discuss with Highway Superintendent Clayton Mill River Road Project" and "Discuss with Highway Superintendent Clayton Mill River Road Culvert."

The March 20 meeting was held as planned. During the discussions of Clayton Mill River Road, Mr. Stalker addressed the Board and voiced his concerns with the financial issues of the project and culvert. Mr. Loring advised the Board that the culvert may not need to be reconstructed as originally planned and that he will consult with the engineering firm.

DISCUSSION

A public body must post notice of every meeting at least 48 hours in advance, not including Saturdays, Sundays, and legal holidays. G.L. c. 30A, § 20(b). The notice must be printed in a legible, easily understandable format and must contain the date, time and place of the meeting, as well as a listing of topics that the chair reasonably anticipates will be discussed. Id. The list of topics shall have "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." 940 CMR 29.03(1)(b). We generally consider a topic to be sufficiently specific when a reasonable member of the public could read the topic and understand the anticipated nature of the public body's discussion. See OML 2015-35.⁴

⁴ Open Meeting Law determinations may be found at the Attorney General's website, www.mass.gov/ago/openmeeting.

The complaint alleges that the January 24 meeting notice concerning the topic of "Town Administrator Updates" lacked sufficient detail in that it did not provide specific topics that the Board would discuss. We understand that under this topic the Town Administrator provides status updates to the Board and that these updates are generally not pieces of business that Board members anticipate discussing. See OML 2011-23; OML 2011-44; see also G.L. c. 30A, § 20(b). During the January 24 meeting, the Ms. Enoch did just that by reminding the Board of two upcoming meetings and advising on the status of a warrant article and bridge scoping. We have been assured that when a particular topic requires discussion and/or a decision by the Board that topic will be specifically listed on the notice. In fact, the Board listed two topics pertaining to the Clayton Mill River Road project and culvert on its March 20 notice. We encourage the Chair to solicit a more detailed set of topics from the Town Administrator for the meeting notice when the Chair anticipates that the Town Administrator will provide a report. See OML 2011-23; OML 2013-111; see also OML 2012-19 ("best practice dictates that the Chair make reasonable efforts to ascertain what the Superintendent plans to discuss and include all matters that are reasonably anticipated in the meeting notice").

In addition, a public body may discuss a topic not listed on a meeting notice if the topic was not anticipated by the chair 48 hours in advance of the meeting. See OML 2017-2; OML 2013-87. Here, Mr. Loring approached Ms. Enoch shortly before the Board convened its meeting on January 24 and requested to update the Board. As such, the chair did not reasonably anticipate discussions pertaining to Clayton Mill River Road 48 hours prior to the meeting. While a public body may consider a topic at a meeting that was not listed in the notice if it was not reasonably anticipated at least 48 hours before the meeting, we strongly encourage public bodies to postpone discussion of topics that were not listed in the meeting notice until the topic may be included in a meeting notice, unless the circumstances demand immediate action by the public body. See OML 2011-23; OML 2013-197.

CONCLUSION

For the reasons stated above, we find that the Board did not violate 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 our office or the Board. Please feel free to contact our office at (617) 963-2540 if you have any questions regarding this letter.

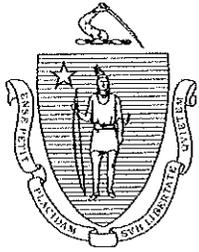
Sincerely,



Kerry Anne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: Thomas Stalker

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.



THE COMMONWEALTH OF MASSACHUSETTS
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MARTHA COAKLEY
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August 5, 2013

OML 2013 – 111

John Bladon
Chairman
Board of Selectmen
41 Cochituate Road
Wayland, MA 01778

RE: Open Meeting Law Complaint

Dear Mr. Bladon:

Our office received a complaint from Mr. George Harris, dated October 5, 2012, alleging a violation of the Open Meeting Law, G.L. c. 30A, §§18-25, by the Wayland Board of Selectmen (the "Board"). Specifically, the complaint alleges that at its August 1, 2012 meeting, the Board discussed and voted on a topic that was not listed in the meeting notice with sufficient specificity: whether the Town Administrator would be authorized to speak on behalf of the Board at the Audit Committee's first meeting on August 6, 2012.¹ The complaint was filed with the Board on or about August 22, 2012. The Board responded by letter from Town Administrator Frederic Turkington, dated September 10, 2012.

After reviewing the complaint and the Board's response, we have decided to resolve this complaint by **informal action**, in accordance with 940 CMR 29.07(2)(a). We find that the Board did not violate the Open Meeting Law.

As early as July 24, 2012, the notice for the first meeting of the Audit Committee indicated that Town Administrator Turkington would participate in that meeting, though he is not a member. While the Board Chair may have been aware that the Town Administrator would attend and participate in the Audit Committee meeting, he did not anticipate that the subject would be raised by the Town Administrator during his report to the Board on August 1, 2012. The Board listed "report of the town administrator" as a topic for discussion in the notice for its August 1, 2012 meeting. Because the Chair did not reasonably anticipate, more than 48 hours before the meeting, the specific topics that the Town Administrator would address during his report, we find the notice was sufficiently specific. The Open Meeting Law does not require that

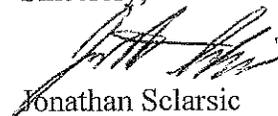
¹ The complaint includes a second allegation regarding notice of the discussion of the Board's consent calendar. Mr. Harris writes in his October 5, 2012 complaint that he considers that issue to be resolved. Therefore, we do not address it here.



the chair guess which topics might be raised by Board members or meeting participants, only that the public body list in the meeting notice those topics “reasonably anticipated by the chair.” See OML 2013-61;¹ G.L. c. 30A, § 20(b). However, we encourage the Chair to solicit a more detailed set of topics from the Town Administrator for the meeting notice when the Chair anticipates that the Town Administrator will provide a report. See OML 2011-23; see also OML 2012-19 (“best practice dictates that the Chair make reasonable efforts to ascertain what the Superintendent plans to discuss and include all matters that are reasonably anticipated in the meeting notice”).

With the issuance of this determination, we now consider this matter closed. This determination does not address any other complaints which may be pending with our office or the Board. If you have any questions regarding this letter, please contact our office at (617) 963-2540.

Sincerely,

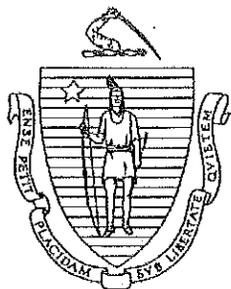


Jonathan Sclarsic
Assistant Attorney General
Division of Open Government

cc: George Harris
Mark Lanza, Wayland Town Counsel

This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by this order 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 this order.

¹ Open Meeting Law determinations may be found at the Attorney General’s website, www.mass.gov/ago/openmeeting.



MARTHA COAKLEY
ATTORNEY GENERAL

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June 8, 2011

OML 2011 – 23

Diana Provencher
Chair
Leicester Board of Selectmen
3 Washburn Sq.
Leicester, MA 01524

RE: Open Meeting Law Complaint

Dear Chair Provencher:

This office received a complaint from Mr. Michael Shivick, dated February 14, 2011, alleging that the Leicester Board of Selectmen (the "Board") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaint alleges that the Board's vote to approve a "trial-period consolidation" of two municipal positions was not a topic included in the Board's notice for its January 10, 2011 meeting, though the Board "extensively deliberated on and ratified" the topic. Additionally, the complaint alleges that Town Administrator Robert Reed, under the authority of the Board, "appears to have committed a negligent misrepresentation of material fact by having the Board of Selectmen's primary secretary call the Personnel Board Chairman, in order to deter him from offering any opinion, suggestion recommendation, or explanation regarding a personnel action under the Board's concurrent jurisdiction." The complaint was originally filed with the Board on or about January 19, 2011 and an amended complaint was filed with Board on January 23, 2011. The Board responded to the complaint in a letter dated February 1, 2011.

We find that the Leicester Board of Selectmen did not violate the Open Meeting Law. In reaching this determination, we reviewed the January 19, January 23, and February 14, 2011 complaints; the Board's February 1, 2011 response to the complaint; and a series of emails and documents provided by both the complainant and the Board. Additionally, we reviewed the notice and the minutes for the Board's January 10, 2011 meeting. Finally, we spoke with Town Administrator Robert Reed by phone on May 20, 2011 and you by phone on May 23, 2011.

FACTS

The notice for the Board of Selectmen's January 10, 2011 meeting listed topics including "Recommendation for appointment – Highway Mechanic, Personnel Board" and "Town Administrator's Report." Michael Shivick, the complainant and chair of the Leicester Personnel Board, anticipated attending the January 10, 2011 Board of Selectmen meeting because the Board would be considering an appointment to the Personnel Board. On January 10, 2011, sometime prior to the Board of Selectmen's meeting, Mr. Shivick received a call from the secretary of the Board of Selectmen stating that there would be no action taken on the Personnel Board appointment at the meeting, and thus his presence at the meeting would not be required. After several calls between Mr. Shivick and the Town offices confirming the evening's agenda, Mr. Shivick sent an email to the Board's secretary stating that he was ready, willing, and able to attend the evening's meeting should the Board to decide to consider the Personnel Board appointment. In an email to this office dated April 4, 2011, Robert Reed, the Leicester Town Administrator, wrote that it was his "sense that the Selectmen were not prepared to act on the appointment of Mr. Dennison [to the Personnel Board] that evening and simply had Mr. Shivick and Mr. Dennison called and asked not to come to the meeting to save them time and possible embarrassment." In speaking with this office, Mr. Reed acknowledged that he had not spoken directly with the Board chair who had sent the agenda, only that he had spoken with several other Board members.

At the January 10, 2011 meeting, during the Town Administrator's report, Selectman Richard Antanavica asked for an update on combining the clerk jobs in the Board of Health and Conservation Commission offices. Town Administrator Reed reported that an agreement had been made and that the parties were ready to act on a trial basis. Selectman Antanavica and Selectwoman Sandra Wilson spoke in favor of the proposal to combine the jobs. Selectwoman Wilson then moved to "combine the two administrative positions, the ConCom clerk and BOH clerk, into on one position." The motion passed unanimously.

The Board also considered an appointment to the Personnel Board at the January 10, 2011 meeting. During discussion of the appointment, you read aloud a recommendation from the Personnel Board to appoint applicant Matthew Dennison. The Board then engaged in a discussion regarding whether to make the appointment in light of recent Board discussions to disband the Personnel Board in favor of a personnel director. The Board rejected a motion to table the appointment, and then approved a motion to appoint Mr. Dennison to the Personnel Board. There is no mention in the minutes as to the reason for the absence of the chair of Personnel Board—the complainant—or Mr. Dennison, the applicant.

DISCUSSION

The complaint against the Board of Selectmen raises two allegations. The complaint alleges, that the "'trial-period consolidation' item was not posted on the Selectmen's agendas and yet was extensively deliberated on at the meeting of 1/20/11". Additionally, the complaint alleges that the "Town Administrator, by his apparent authority as Chief Executive Administrator of the Town of Leicester, under the authority of the Leicester Board of Selectmen...did commit an affirmative

misrepresentative of fact by having the Board of Selectmen's primary secretary call the Personnel Board Chairman, in order to deter the Board from offering any opinion, suggestion, recommendation, or explanation regarding a personnel action under the Board's concurrent jurisdiction." We find that neither allegation constitutes an Open Meeting Law violation.

1. The Board's Vote on Combining Two Municipal Positions Did Not Violate the Open Meeting Law

The Open Meeting Law provides that "[e]xcept in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays." G.L. c. 30A, § 20(b). The Law further requires that, "[n]otice shall be printed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting." Id.

The notice for the Board of Selectmen's January 10, 2011 meeting listed a topic as "Town Administrator's Report." At the meeting, Selectman Antanavica requested an update on combining the clerk jobs in the Board of Health and Conservation Commission offices. Town Administrator Robert Reed reported that an agreement had been made and that the parties were ready to act on a trial basis. After some discussion, the Board voted unanimously to "combine the two administrative positions, the ConCom clerk and the BOH clerk, into one position."

The meeting notice only included "Town Administrator's Report" and did not include the specific topic of combining the two municipal administrative positions. Town Administrator Reed wrote on behalf of the Board in its February 1, 2011 response to the complaint that the "chair was not aware that this item would be brought up during the Selectmen's meeting." The Open Meeting Law requires the chair of the public body to list in the meeting notice all topics the chair reasonably anticipates will be discussed at the meeting. G.L. c. 30A, § 20(b). The Law does not require the chair to guess as to which topics members of the Board may discuss during a meeting. Here, the topic arose during the Town Administrator's report, and was raised by a member of the Board other than the chair. While the Board did not violate the Open Meeting Law by addressing a topic unanticipated by the chair, we remind the Board that the Attorney General strongly encourages public bodies not to consider topics that were not listed in the meeting notice, but rather to postpone action on such items until the topic is posted in a meeting notice, unless the circumstances demand immediate action by the public body. We commend the Board's statement that, "[i]n the future[,] the Town Administrator's Report will be listed under New Business and any items which the Town Administrator expects might lead to deliberation and/or a vote by the Selectmen will be listed separately on the agenda." We encourage the Board to follow this protocol.

The complaint additionally alleges that actions taken by the Town Administrator or Board of Selectmen to combine the municipal positions may have violated Town bylaws, specifically the personnel bylaws. The Attorney General's Division of Open Government only has jurisdiction to enforce and interpret the Open Meeting Law, G.L. c. 30A, §§ 18-25. Therefore any potential violations of the Town bylaws must be resolved at the municipal level or by other authorities.

2. The Board's Vote to Make an Appointment to the Personnel Board Did Not Violate the Open Meeting Law

The complaint's second allegation accuses the Town Administrator of "an affirmative misrepresentation of fact by having the Board of Selectmen's primary secretary call the Personnel Board Chairman, in order to deter the Board from offering any opinion, suggestion, recommendation, or explanation regarding a personnel action under the Board's concurrent jurisdiction." This office makes no finding as to this accusation, as it does not allege a violation of the Open Meeting Law. The meeting notice for the Board's January 10, 2011 meeting listed the topic of "Recommendation for appointment – Highway Mechanic, Personnel Board." Because the notice listed as a topic an appointment to the Personnel Board, it was proper for the Board to consider the appointment at its meeting, although the notice should have listed the specific individual or individuals under consideration by the Board. The Town Administrator stated that he did not speak with you as the Board chair and person responsible for setting the agenda prior to contacting Mr. Shivick. You confirmed this in our conversation on May 23, 2011. Therefore it appears that he was not acting on behalf of the Chair. That the Town Administrator may or may not have misled the complainant to prevent him from attending an open meeting of the Board of Selectmen is a matter for resolution at the municipal level, and not appropriate for this Office to resolve. The Board, however, acted appropriately in posting a meeting notice and listing the topic for consideration.

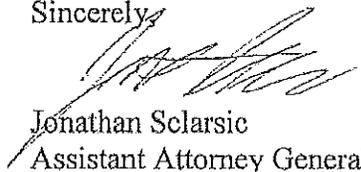
We caution, however, that Board members who believe that topics listed in a meeting notice will no longer be discussed at the meeting should communicate their expectations to the Chair. The Chair can then enable any appropriate official action to be taken prior to the meeting, rather than Board members directly or indirectly communicating their views to affected parties or members of the public who may become confused or misled about whether to rely on the published notice of anticipated topics prepared by the Chair.

CONCLUSION

We find that the Board of Selectmen did not violate the Open Meeting Law. We encourage the Board to work with the Town Administrator and other municipal officials to include anticipated topics for discussion or vote in the Board's meeting notices. We also encourage the Board to postpone voting on any items considered at a meeting that were not included in the meeting notice.

We now consider this matter closed. If you have any questions regarding this determination, or believe any of the facts presented to be inaccurate, please do not hesitate to contact me at the number below.

Sincerely,



Jonathan Sclarsic
Assistant Attorney General
Division of Open Government
Ph: 617-963-2045

cc: Michael Shivick
Robert Reed, Town Administrator