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June 4, 2013

OML 2013 – 75

David J. Rushford
City Clerk
City Hall, Room 206
455 Main St.
Worcester, MA 01608

RE: Open Meeting Law Complaint

Dear Mr. Rushford:

This office received two Open Meeting Law complaints from Nicole Apostola and Kevin Ksen, respectively, both dated September 20, 2012, alleging that the Worcester City Council (the "Council") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Ms. Apostola's complaint alleges that the Council discussed an item during its June 26, 2012 meeting that was reasonably anticipated by the Chair 48 hours before the meeting, but was not included in the Council's meeting notice. The complaint was filed with the Council on July 11, 2012. The Council responded by letter dated November 2, 2012. Mr. Ksen's complaint alleges that on the morning prior to the Council's June 26, 2012 meeting, the Mayor's office sent an email to the entire Council regarding a proposed panhandling resolution, asking the Councilors if they "wish to sign onto this for tonight." The complaint was filed with the Council on July 11, 2012. The Council responded by letter dated November 26, 2012.

Following our review, we find that a quorum of the Council did not deliberate on a proposed resolution, called an order, over email ahead of its June 26, 2012 meeting. Furthermore, we find that the Council did not violate the Open Meeting Law by voting on the order at its June 26, 2012 meeting, even though it was not listed in the meeting's notice. In reaching this determination, we reviewed the two July 11, 2012 complaints filed with the Council; the September 20, 2012 complaints filed with our office; an October 22, 2012 letter from the Worcester City Solicitor to the City Manager; and the Council's November 26, 2012 response to the complaint. Finally, we interviewed by telephone the Mayor's Chief Secretary, Michael Lanava, on January 3, 2013.



FACTS

The Council is a public body consisting of eleven Councilors. The Mayor is a member, and Chair, of the Council. The notice for the Council's June 26, 2012 meeting listed 14 anticipated topics for discussion, including "New Business Under Suspension of Rules." The notice did not include a topic regarding panhandling.

On the morning of June 26, 2012, Michael Lanava, the Mayor's Chief Secretary, sent an email to the members of the Council. Mr. Lanava is not a member of the Council. The subject of the email was "panhandling," and Mr. Lanava wrote: "[t]he Mayor has asked that I forward you the language below. Please indicate by email if you wish to sign onto this for tonight. Please let me know by 4PM if possible." The language included in the email read: "Request City Manager develop a comprehensive resolution to the significant public safety issues from standouts and panhandling on medians, exit ramps, intersections, and within public rights of way and present this to City Council for further action at the July 17 City Council Meeting." Seven Council members replied to Mr. Lanava regarding his email. None of the recipients "replied to all." Two more Council members signed on to the order on the floor during the June 26, 2012 Council meeting.

According to a letter from the City Solicitor, dated October 22, 2012, and drafted in response to the two complaints, the Mayor "advised me that he decided to place [the panhandling order] before the city council 'under suspension' of the rules on June 26 because he was aware that the city council would [be] meeting only monthly in July and August (the next meeting was three weeks away, July 17) and that he did not want to wait until then to initiate a request to the city manager for a report into what appeared to be a public safety issue." According to Mr. Lanava, the Mayor decided during the weekend prior to the June 26, 2012 meeting to submit an order to the Council requesting a report from the City Manager regarding panhandling, following a sudden, significant increase in the presence of people engaging in the activity within the City.

DISCUSSION

The Open Meeting Law 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 [material] or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed." G.L. c. 30A, § 18.

Mr. Ksen's complaint alleges that the Council deliberated over email when a member of the Mayor's staff sent an email on the Mayor's behalf to the entire membership of the Council. Generally, sending an email with proposed language for an order to be considered at an upcoming meeting is not deliberation because it constitutes distribution of "reports or documents that may be discussed at a meeting." G.L. c. 30A, § 18. Although this email additionally asked Council members to "[p]lease indicate by email if you wish to sign onto this for tonight," thereby

soliciting the opinions of the members as to whether or not they supported the order, we find there was no deliberation because there was no communication between or among a quorum of the Council. The email was sent by a person who was not a member of the Council, and the councilors responded to him individually. Had the Mayor sent the email himself, or used his secretary as a conduit for serial deliberation between members, the email would have been a violation of the Open Meeting Law. See OML 2013-27; OML 2012-84.¹ In the present instance, however, while the email was sent on the Mayor's behalf, we do not find sufficient evidence that he communicated with a quorum of the Council's members about the issue.

We caution that responses to the type of request sent by Mr. Lanava, if they were to reach a quorum of a body's members, would violate the Open Meeting Law. Mr. Lanava's email contained a request for the opinions of members, namely whether they wished to "sign onto" the order, in effect expressing their support for the measure. This type of poll over email is analogous to the impermissible practice of a member asking the other members for their votes over email. See OML 2011-35. Furthermore, while it did not occur here, this type of open-ended request could easily lead to an inadvertent or intentional reply to all recipients containing a public body members' opinion on the matter under review.

City Solicitor David Moore writes in his October 22, 2012 memorandum to the City Manager that "[c]o-sponsoring items is a centuries-old legislative practice. On its face there is no attempt to solicit opinions or provoke a series of emails discussing the merits of the order. There is only an attempt to offer councilors the opportunity to co-sponsor the introduction of an item to the legislative body." While we acknowledge that this practice has been in effect for many years, to the extent that such practice reaches a quorum of a body's members, it does not comply with the current Open Meeting Law. If the Council wishes to announce the sponsors of an order at the time it is introduced, an individual who is not part of the Council, rather than a Councilor, may make the request for sponsorship. For example, the City Clerk or a Council administrator could send an email, blind carbon copying the Council members, attaching a specific piece of legislation and requesting sponsorships. That same staff person could then compile the sponsorships, and announce the result during a meeting. The results should not be made public prior to the meeting, however, including in a publicly-posted meeting notice. While the change is admittedly minor, it would enable the Council to compile sponsorship information without members conducting an improper poll outside of a meeting (which is deliberation). See OML 2011-35. Alternatively, a Council member who introduces an order can request sponsors during a meeting, or at a prior meeting before the order is introduced.

We next address Ms. Apostola's complaint, which alleges that the Council discussed a topic during its June 26, 2012 meeting that was reasonably anticipated by the Chair 48 hours before the meeting, but was not included in the Council's meeting notice. The Open Meeting Law, G.L. c. 30A, § 20(b), states in relevant part 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

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

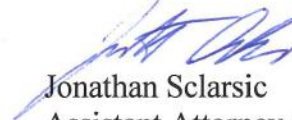
hours prior to such meeting, excluding Saturdays, Sundays and legal holidays... Notice shall be printed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” Any topic for discussion that is reasonably anticipated by the chair of the public body 48 hours in advance of a meeting must be listed in a meeting notice. G.L. c. 30A, § 20(b). Here, it appears that the Mayor did not anticipate introducing the panhandling order until the weekend prior to the June 26, 2012 meeting – fewer than 48 hours in advance, excluding Saturdays and Sundays. Therefore, we find that the Council did not violate the Open Meeting Law by considering a topic that was not listed on the meeting notice. However, our office encourages public bodies to update their meeting notices or postpone discussion of topics that arise fewer than 48 hours before a meeting, so that members of the public may be given advance notice of agenda items. See OML 2012-19; OML 2012-3.

CONCLUSION

We find that a quorum of the Council did not deliberate on a proposed order over email ahead of its June 26, 2012 meeting. Furthermore, we find that the Council did not violate the Open Meeting Law by voting on the order at its June 26, 2012 meeting, even though it was not listed in the meeting’s notice.

We appreciate the patience and cooperation of the parties during this investigation, and now consider this matter closed. Please contact me if you have any questions regarding this letter.

Sincerely,



Jonathan Sclarsic
Assistant Attorney General
Division of Open Government

cc: David Moore, City Solicitor
Worcester City Council
Nicole Apostola
Kevin Ksen

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.