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OML 2012 - 6

Arthur Vigeant
City Council President
140 Main St.
Marlborough, MA 01752

RE: Open Meeting Law Complaint

Dear President Vigeant:

This office received a complaint filed by Kathleen Robey, dated June 27, 2011, alleging that the Marlborough City Council (the "Council") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint alleges that on "May 16, 2011, the City Council Finance sub-committee met during a duly posted meeting to continue their discussion of the school department's line item in the City's FY12 budget. The eleven member city council includes a 5 member [finance committee]; all eleven members were in attendance at the meeting and all sat in their council seats rather than the visitor's gallery." The complaint alleges that a quorum of the Council met and deliberated during the Finance Committee meeting, although no Council meeting was posted or convened. The complaint was originally filed with the Council on May 20, 2011, and the Council filed a response to the complaint on May 31, 2011.

We find that the Council violated the Open Meeting Law by failing to post notice and failing to convene a meeting of the full Council during the May 16, 2011 Finance Committee meeting. In reaching this determination, we reviewed the May 20, 2011 complaint, the Council's May 31, 2011 response to the complaint, and the June 27, 2011 complaint. We also reviewed the Council Rules, the notice for and minutes of the Finance Committee's May 16, 2011 meeting, and the documents used by the Finance Committee at that meeting. Finally, we reviewed a video recording of the Finance Committee's May 16, 2011 meeting.

FACTS

The Council consists of 11 elected members. The Council's Finance Committee consists of five of the 11 Council members. Items submitted to the full Council are referred during regular meetings to its respective subcommittees, and recommendations are subsequently referred back to the Council for decision. The Council's rules allow members of the Council to actively participate in meetings of Council subcommittees, even if they are not members of the subcommittee, as long as they are recognized by the chair of the subcommittee. Municipal managers and members of the public may also participate in subcommittee meetings, if recognized by the chair.

The Finance Committee met on May 16, 2011 to discuss the Mayor's fiscal year 2012 budget, and specifically the school department budget. A notice for this meeting, with the topic "Mayor's FY12 Budget" was posted on April 28, 2011. At the meeting, all 11 members of the Council participated in the budget discussion, though only the Finance Committee members were permitted to vote. Councilors sat in their regular seats, facing the audience, similar to the manner in which they conduct full Council meetings. The meeting was recorded by the local cable access station.

DISCUSSION

The Open Meeting Law requires that, except in limited circumstances, "all meetings of a public body shall be open to the public." G.L. c. 30A, § 20(a). Except in an emergency, "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). A subcommittee of a public body is itself a public body subject to the Open Meeting Law. G.L. c. 30A, § 18. The Open Meeting Law defines a "meeting" as "a deliberation by a public body with respect to any matter within the body's jurisdiction," however a meeting does not include the "attendance by a quorum of a public body at a meeting of another public body that has complied with the notice requirements of the open meeting law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion by the host body and do not deliberate." Id. "Deliberation" is defined, in relevant part, 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." G.L. c. 30A, § 18.

The Council violated the Open Meeting Law on May 16, 2011 by deliberating outside of a posted meeting. Although the Finance Committee posted notice for its meeting on that date, the full Council did not. Members of the Council, who are not members of the Finance Committee, may attend a subcommittee meeting without it being a meeting of the Council as long as they do not deliberate. See G.L. c. 30A, § 18. This means that Council members may attend the meeting and listen as members of the audience, and participate as members of the

audience at the discretion of the chair of the subcommittee.¹ However, at the May 16, 2011 meeting, the Council members sat in their regular seats in the Council chambers, and participated on the same terms as members of the subcommittee, except for voting. The Council's conduct therefore did not fall within the exception to the definition of "meeting," and notice should have been posted.

Our office recently resolved a similar complaint, OML 2011-16.² In that determination, we found that a quorum of a board of selectmen deliberated, and should therefore have posted notice for a meeting, when its members attended a public forum, sat together at the front of the room facing the audience and participated in discussion of matters within the board's jurisdiction. The same reasoning applies to attendance by a quorum of a public body at a meeting of that body's own subcommittee.

Both the Council and the complainant suggest that this interpretation may prevent public bodies from working effectively with committees. The complainant explains that her complaint "was meant to bring this issue to the forefront by showing how a seemingly well-meaning body, the City Council, would act in what appeared to be a transparent process, but was, rather, a violation of law that they did not intend to commit." In her June 27, 2011 letter, the complainant suggests that "[t]here must be a way for duly elected and appointed members of public bodies to sit as such at subcommittee meetings, even if they are not members of the sub-committee, and simply ask questions or just listen so they can be more fully informed of all the issues affecting them." We agree, and note that there is a way. If the Councilors wish to attend a subcommittee meeting and listen to the discussion, they may sit in the audience and do so and no meeting of the Council is required. If they wish to ask questions of the subcommittee, they may also do so without convening a meeting of the Council provided their participation is open and on the same terms as members of the public, and there is no discussion between a quorum of the Council on matters within its jurisdiction. If they do anticipate engaging in such deliberation, there is a mechanism for that as well. If a quorum of the Council wants to deliberate during a meeting of a

¹ The Attorney General has provided a Frequently Asked Question available at www.mass.gov/ago/openmeeting addressing this point:

If a subcommittee of a public body holds a meeting and members of the public body, who are not members of the subcommittee, wish to attend the meeting, must the public body post a meeting notice?

No, as long as the public body does not engage in a deliberation. Members of a public body may wish to attend a meeting of a subcommittee of that public body, even where those members are not part of the subcommittee. In those cases, they may sit in the audience and participate as members of the public. They may address the public body with the permission of the chair, and may state their opinion on matters under consideration by the subcommittee. They may not discuss matters as a quorum, or discuss topics which are not under consideration by the subcommittee. Doing so would constitute a deliberation, and a separate meeting notice for the public body would be required. The subcommittee convening the meeting must still post its regular meeting notice.

² Open Meeting Law determinations may be found at www.mas.gov/ago/openmeeting.

subcommittee, the Council can post a meeting and allow the subcommittee to hold a concurrent meeting to conduct its business.

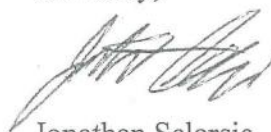
The Complainant protests that if Council members were to participate from the audience during meetings of subcommittees of which they are not members, "every subcommittee would have to allow public participation if they wished to obtain input and comment from members of the main body." The Complainant contends this is a problem because, "[w]ith rare exception, the Marlborough City Council and School Committee do not allow public participation at the sub-committee meetings." Whether to allow public participation, and to what extent, is a matter at the discretion of the chair. See G.L. c. 30A, § 20(f). The chair may choose to recognize some individuals, and not others, and allow them to address the public body. If a subcommittee does not want to allow public participation, but wants input from members of its parent public body, then the parent public body should post notice and hold a meeting concurrently with the subcommittee meeting.

CONCLUSION

We find that the Council violated the Open Meeting Law by failing to post notice for and convene a meeting during the May 16, 2011 Finance Committee meeting. We do not find that this was an intentional violation, and we acknowledge that the Council's deliberation was held during a posted meeting of another public body, which was open and accessible to the public, and aired live on local cable access television. We therefore provide this letter as guidance to the Council and its committees, and order no further remedial action.

We now consider this matter closed. If you have any questions regarding this determination, please do not hesitate to contact me at the number below.

Sincerely,



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

cc: Kathleen Robey