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October 25, 2019

OML 2019 – 133

Aldo Cipriano, Esq.
Southborough Town Counsel
277 Main Street, Victoria Building
Second Level, Atrium Suite
Marlborough, MA 01752

RE: Open Meeting Law Complaints

Dear Attorney Cipriano:

This office received four complaints from Attorney Ginny Kremer, on December 21, 2018, January 11, 2019, and two on March 1, 2019, alleging that the Southborough Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaints were originally filed with the Board on November 21, 2018, December 14, 2018, January 14, 2019, and January 25, 2019. The Board responded by letters dated December 10, 2018, January 2, 2019, February 13, 2019, and February 21, 2019.¹ In her complaints, Attorney Kremer alleges that the Board has repeatedly failed to approve both open and executive session meeting minutes in a timely manner.² The complaints also allege that the Board has failed to review executive session minutes at reasonable intervals since 2013.³

¹ The complaints also allege violations of G.L. c. 269A, §21A, a statute which is not within the jurisdiction of our Division to enforce the Open Meeting Law. The complaints also allege that the Board did not include a “public comment” item for its December 14, 2018, and January 2, 2019, meetings. Even if true, these allegations would not constitute a violation of the Open Meeting Law. See OML 2019-2; OML 2012-78. As such, we decline to review these allegations.

² The Open Meeting Law imposes a continuing obligation on public bodies to maintain minutes of all meetings and to review executive session minutes at reasonable intervals. See G.L. c. 30A, §§ 22 (a) and (g)(1); OML 2018-115; OML 2013-45. Therefore, we consider these complaints to be timely filed as the alleged violations continued each day that these obligations were not met.

³ The Open Meeting Law requires that complaints shall be filed within 30 days of the alleged violation, or if the alleged violation could not reasonably have been known at the time it occurred, then within 30 days of the date it should reasonably have been discovered. 940 CMR 29.05(3). The complaints allege that an April 3, 2017, meeting notice did not include an anticipated item. However, this allegation is untimely as it could have been discovered at the time the open session took place. The complaints also allege that the April 3, 2017 meeting minutes lack sufficient detail because they failed to record a Warrant Article 25 discussion. However, this allegation is also untimely because the alleged lack of detail could have been discovered when the minutes were approved on April 18, 2017. We decline to review these untimely allegations.

We appreciate the patience and cooperation of the parties during this investigation. Following our review, we find that the Board violated the Open Meeting Law for between four and five years by failing to approve meeting minutes in a timely manner and by failing to review its executive session minutes at reasonable intervals.

In reaching this determination, we reviewed the four complaints, the Board's responses, and Attorney Kremer's requests for further review, as well as other correspondence between the parties.⁴ We also reviewed your September 11, 2019, letter responding to questions concerning review of executive session minutes and corresponded by email with you on August 19 and 27, and September 9, 10 and 11, 2019. We spoke with Attorney Kremer in person on May 21, 2019, and by telephone on September 5, 2019; reviewed her letter dated September 5, 2019; and corresponded by email with her on September 6, 11 and 12, 2019. Finally, we reviewed a large body of the Board's meeting minutes.

FACTS

The complaints allege that dozens of sets of meeting minutes were approved late by the Board over a five-year period. This issue is fully discussed in Section I. However, for the sake of clarity, the results of our analyses of the alleged violations are summarized in the following chronological chart.

Meeting Date	Minutes Approval Date	Executive or Open Session	Timely or Untimely
4/8/13	1/2/19	Executive	Untimely
2/25/14	1/2/19	Executive	Untimely
1/25/17	12/18/18	Executive	Untimely
3/2/17	11/19/18	Open	Untimely
3/8/17	12/4/18 ⁵	Open	Unclear - "Previously approved, Resubmitted with edits"
4/10/17	11/7/18	Open	Untimely
4/18/17	11/19/18	Open	Untimely
4/25/17	11/7/18	Open	Untimely
6/22/17	10/2/18	Open	Untimely
6/22/17	1/2/19	Executive	Untimely ⁶
8/1/17	12/18/18	Executive	Untimely
10/17/17	11/19/18	Open	Untimely
12/5/17	1/2/19	Executive	Untimely
12/16/17	1/2/19	Executive	Untimely

⁴ We decline to review any allegations made for the first time in the requests for further review. Our Division does not conduct broad audits of public bodies and will address only allegations made in an Open Meeting Law complaint in order to give public bodies a chance to address those allegations. See OML Declination 4-22-15 (Natick Economic Development Committee); OML Declination 8-25-15 (Middlefield Board of Selectmen).

⁵ Minutes from other meetings were approved late at this December 4, 2018, meeting. However, since they were not noted in the complaints, we decline to review these other potential violations.

⁶ These minutes were "released" on 1/2/19; they do not appear to have been previously approved.

1/2/18	1/2/19	Executive	Untimely
1/18/18	1/2/19	Executive	Untimely
9/5/18	1/2/19	Executive	Untimely
9/12/18	1/2/19	Executive	Untimely
10/2/18	11/7/18	Open	Timely
10/15/18	12/18/18	Open	Untimely
10/19/18	11/7/18	Open	Timely
11/7/18	12/18/18	Open	Untimely
12/4/18	12/18/18	Open	Timely
12/11/18	12/18/18	Open	Timely
12/11/18	12/18/18	Executive	Timely
12/18/18	1/2/19	Open	Timely
12/18/18	1/2/19	Executive	Timely
12/27/18	1/2/19	Open	Timely

The complaints also allege that the Board failed to periodically review executive session minutes for release. This issue is discussed below in Section II. The Board responded that it reviewed some, but by no means all, of its outstanding executive session minutes at six different meetings from 2015 through 2018. As a result of Attorney Kremer's Open Meeting Law complaints and public records requests in late 2018, the Board's staff conducted an internal review to identify all outstanding executive session minutes. On January 2, 2019, the Board voted to release 68 sets of executive session minutes from meetings that took place from 2013 to 2018.

The following chart summarizes which executive session minutes were reviewed and released on which dates.

Date Reviewed and Released	Meeting Minutes
4/7/15	11/18/14, 12/16/14
7/14/15	1/20/15, 1/22/15, 4/7/15, 4/13/2015, 4/28/15, 5/19/15
11/15/16	8/2/16
4/2/18	12/6/16
6/21/18	7/7/17, 7/19/17
12/27/18	12/11/18
1/2/19	2/12/13, 2/26/13, 3/12/13, 4/8/13, 4/23/13, 5/7/13, 9/3/13, 6/4/13, 10/1/13, 1/16/14, 2/4/14, 2/25/14, 3/11/14, 3/25/14, 6/3/14, 7/15/14, 7/24/14, 8/12/14, 8/21/14, 9/2/14, 9/23/14, 10/7/14, 11/17/14, 11/18/14, 12/2/14, 12/16/14, 1/20/15, 1/22/15, 2/3/15, 4/7/15, 4/13/15, 4/28/15, 5/19/15, 8/11/15, 10/20/15, 11/3/15, 11/17/15, 12/1/15, 12/15/15, 2/2/16, 2/29/16, 4/5/16, 5/17/16, 6/28/16, 8/2/16, 8/23/16, 10/4/16, 12/6/16, 1/3/17, 1/25/17, 2/7/17, 2/21/17, 3/21/17, 4/3/17, 6/6/17, 6/22/17, 7/7/17, 7/19/17, 8/1/17, 12/5/17, 12/19/17, 1/2/18, 1/18/18, 4/9/18, 9/5/18, 9/12/18, 11/7/18, 12/18/18

DISCUSSION

I. The Board violated the Open Meeting Law by failing to approve both open and executive session minutes in a timely manner.

The Open Meeting Law requires that a public body “create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting, including the record of all votes.” G.L. c. 30A, § 22(a). The meeting minutes must be reviewed and approved in a timely manner. G.L. c. 30A, § 22(c). The Open Meeting Law itself does not define “timely manner.” However, the Attorney General’s Open Meeting Law regulations provide that “timely manner” means “within the next three public body meetings or within 30 days, whichever is later, unless the public body can show good cause for further delay.” 940 C.M.R. 29.11 (2). Whenever possible, we recommend that minutes of a meeting be approved at the next meeting. See OML 2019-39; OML 2014-15; OML 2012-91.

Here, the Board failed to approve minutes in a timely manner on numerous occasions. Minutes from executive sessions held on April 8, 2013, and February 25, 2014, were approved years late, on January 2, 2019. In addition, at least 11 sets of meeting minutes from 2017 were approved late, and another six were late in 2018.⁷ We note that the Board improved its timely approval of meeting minutes after receiving a November 16, 2018, determination from this office which found that the Board had violated the Open Meeting Law by failing to timely approve minutes. See OML 2018-147. Indeed, many of the late minutes were finally approved in December 2018 or January 2019 after the Board conducted an internal review of its outstanding minutes. A cursory review of the Board’s 2019 minutes suggests that this improved timeliness has continued.

For these reasons, we find that the Board violated the Open Meeting Law by routinely failing to approve minutes of both open and executive sessions in a timely manner. Our investigation also found many additional sets of meeting minutes that were not timely approved, beyond those alleged in the complaints, which demonstrates a very concerning and longstanding pattern of non-compliance with the Open Meeting Law. However, because the violations that we find here took place before the issuance of determination OML 2018-147, and the Board has taken steps to come into compliance with the law’s timeliness requirement since that time, we decline to find the violations to be intentional.

II. The Board violated the Open Meeting Law by failing to review its executive session minutes at reasonable intervals.

The Open Meeting Law requires that a public body “create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting,

⁷ The Attorney General’s revised Open Meeting Law regulations took effect October 6, 2017, and for the first time expressly defined the term “timely manner” to mean within the next 3 meetings or 30 days, whichever is later. Even under the prior standard, we would have found that the 2013, 2014, and 2017 meeting minutes at issue here were not timely approved, where they were approved well over a year after each meeting.

including the record of all votes.” G.L. c. 30A, § 22(a). Executive session minutes may be withheld from disclosure to the public “as long as publication may defeat the lawful purposes of the executive session, but no longer.” G.L. c. 30A, § 22(1). When the purpose for a valid executive session has been served, the minutes and any documents or exhibits used at the session must be disclosed, unless the attorney-client privilege or an exemption to the Public Records Law applies. *Id.* The burden of justifying continued nondisclosure of executive session minutes lies with the public body. Foudy v. Amherst-Pelham Regional School Committee, 402 Mass. 179, 184 (1988).

A public body or its chair or designee must, at reasonable intervals, review the minutes of executive sessions to determine if continued nondisclosure of those minutes is warranted. G.L. c. 30A, § 22(g)(1). Although “reasonable interval” is not defined by the law, our office has found a quarterly review or a review every six months to be appropriate. See OML 2019-45; OML 2017-104; OML 2015-166; OML 2013-180. At the meeting following each periodic review, the public body must announce which executive session minutes will be released and which will continue to be withheld at the next meeting following its review, and such announcement shall be included in the minutes. G.L. c. 30A, § 22(g)(1); OML 2019-3; OML 2015-94; OML 2013-56. A public body’s obligation to review executive session minutes for possible release is ongoing. If a public body reviews executive session minutes and determines that the purpose for the executive session remains such that the minutes should continue to be withheld from the public, it must continue to review those same executive session minutes at reasonable intervals until it determines that the reason for secrecy has expired.

Here, when asked when the Board reviewed executive session minutes from 2013 through 2018 to determine if continued nondisclosure was warranted, the Board could only identify reviews taking place at its meetings on April 7, 2015, July 14, 2015, November 14, 2015, April 2, 2018, June 21, 2018 and December 27, 2018. This leads us to conclude that the Board did not conduct any such reviews in 2013, 2014 or 2017. Although quarterly or six-month review is acceptable for purpose of the Open Meeting Law, waiting a year or more between reviews is not. We also find that the Board only reviewed a select number of its outstanding minutes at each of these meetings, not all of them, as it should have done. The Board was required to review all outstanding executive session minutes at reasonable intervals to determine whether the purpose for the executive session continued, and if it determined that the minutes must continue to be withheld, then it should have reviewed those minutes again at reasonable intervals.

For these reasons, we find that the Board violated the Open Meeting Law by failing to review its executive session minutes at reasonable intervals to determine whether continued nondisclosure was warranted or whether the minutes could be released to the public. Although we are concerned with the Board’s longstanding failure to satisfy its obligations under the Open Meeting Law, we acknowledge that the Board undertook a comprehensive review of all outstanding minutes as a result of the Open Meeting Law complaints, and we decline to find the violations to be intentional.

III. The Board has engaged in a longstanding and widespread pattern of Open Meeting Law violations and therefore all members will be required to attend in-person Open Meeting Law training.

The Legislature designed the Open Meeting Law “to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.” See Dist. Attorney for N. Dist. v. Sch. Comm. of Wayland, 455 Mass. 561, 563 (2009); Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72 (1978). The procedural requirements surrounding executive session, including the timely approval and periodic review of executive session minutes, are extremely important to the transparency aims of the Open Meeting Law, because the public has no other way to know what happened at these closed-door sessions. See OML 2012-43; OML 2012-91. We are gravely concerned that the Board neglected its obligations to timely approve and then review and release executive session minutes adequately for almost five years, especially considering the controversial topics which came before the Board during that time.⁸

We acknowledge that the Board has taken significant steps to approve minutes in a timely manner and review all outstanding executive session minutes since the issuance of OML 2018-147 at the end of last year. Town Counsel, in conjunction with the Town Clerk’s office, has also conducted a workshop for approximately thirty elected and/or appointed town officials, including four of the five Selectmen, on September 5, 2019.

However, the Board has a history of Open Meeting Law violations spanning a variety of different requirements of the law, and persisting despite changes to the Board’s membership. See OML 2015-40 (Board discussed the professional competence of the Town Administrator in executive session); OML 2015-167 (Board deliberated outside of a meeting); OML 2018-78 (Board member deliberated via email); OML 2018-147 (Board approved meeting minutes late). In addition, the breadth and depth of the years of failures related to meeting minutes found in this determination are egregious. For these reasons, we order all members of the Board to attend, in-person, the Open Meeting Law training that our office will present on November 20, 2019, at 5:30PM at the Southborough Senior Center.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by failing to approve meeting minutes in a timely manner and by failing to review its executive session minutes at reasonable intervals. We find that these violations were longstanding and widespread. **We order all members of the Board to attend an in-person Open Meeting Law training that our office will conduct in Southborough on November 20, 2019, at 5:30PM at the Southborough Senior Center.** Furthermore, we order the Board’s immediate and future

⁸ We note that comments by Town Counsel which characterize certain Open Meeting Law complaints as “frivolous” and minimize the importance of curing certain Open Meeting Law violations as “ministerial” are likely to encourage the Board to disregard the seriousness of its obligations under the Law. We have, on occasion, described certain Open Meeting Law violations as “*de minimis*,” such as when legal counsel rather than a public body chair made the required statement at a meeting of the purpose for an executive session, see OML 2019-81, or when a chair failed to announce to those in attendance at a meeting that the meeting was being recorded, when the person recording had himself announced to the room that he was recording, see OML 2013-128. By contrast, the issues raised here are significant and the violations we find go to the heart of the Open Meeting Law.

compliance with the Open Meeting Law, and we strongly caution that similar future violations may be considered evidence of an intent to violate the law.

We now consider the complaints 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 the Division at (617) 963-2540 if you have any questions.

Sincerely,



Sarah Chase

Assistant Attorney General

Division of Open Government

cc: Attorney Ginny Kremer
Southborough Board of Selectmen

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.