



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

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

March 22, 2021

OML 2021 – 35

VIA EMAIL ONLY

Michael J. Sullivan
Administrator for the Town of South Hadley
msullivan@southhadleyma.gov

RE: Open Meeting Law Complaint

Dear Mr. Sullivan:

This office received a complaint from Bruce Forcier, a member of the South Hadley Selectboard (the “Board”), on September 24, 2020,¹ alleging that the Board violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on or about June 26, and you responded on behalf of the Board by email on October 1.² The complaint alleges that a quorum of the Board deliberated outside of a properly posted meeting to draft and issue a statement expressing the Board’s stance against racism.

Following our review, we find that the Board violated the Open Meeting Law by deliberating outside of a properly noticed meeting. At the outset, we note that we do not review, and offer no opinion on, the substance of the Board’s communications, but rather review only whether the Board communicated in a manner that violated the Open Meeting Law. In reaching this determination, we reviewed the Open Meeting Law complaint, the Board’s response, the request for further review, emails provided to our office by the Board, and the minutes and a

¹ All dates in this determination are in 2020, unless otherwise stated.

² Although the Board met to discuss the complaint on June 30, it did not vote to respond or to delegate authority to respond to the complaint. Indeed, the Board did not formally respond to the complaint until after our office reached out requesting a response. We remind the Board of its obligation to comply with all provisions of the Open Meeting Law, including the obligation to respond to Open Meeting Law complaints within 14 business days, and to send to the Attorney General a copy of such response. G.L. c. 30A, § 23(b); 940 CMR 29.05(5). We also remind Mr. Forcier that Open Meeting Law complaints must be filed with our office within 90 days of the date of the alleged violation. 940 CMR 29.05(7).

video recording of the Board's June 30 meeting.³ We also communicated via email with the Complainant.

FACTS

We find the facts as follows. The Board is a five-member public body; therefore, three members constitute a quorum. On June 22, Board member Andrea Miles sent an email to the Board's list-serve and the Town Administrator⁴ asking the Board to consider issuing a statement against racism. The effect of emailing the Board's list-serve was that Ms. Miles's communication was distributed to each Board member's email address individually. In the email, Ms. Miles expressed her belief that "[a]s the board of public welfare" it was the Board's duty to "present a public and unified front" regarding the Board's stance on racism, and that the Board needed to address this important issue as soon as possible.

In the early morning of June 23, Ms. Miles and Jeff Cyr, the Chair, exchanged three emails in which Mr. Cyr expressed his agreement that the Board should take a stand against racism. They agreed that Ms. Miles would draft a statement for the Board to consider issuing. Later on June 23, Ms. Miles sent an email to Mr. Cyr, Vice Chair Sarah Etelman, and the Town Administrator attaching a draft statement expressing the Board's stance against racism. That same day, Ms. Etelman responded to Ms. Miles' email, copying Mr. Cyr and the Town Administrator. Ms. Etelman thanked Ms. Miles for raising the issue, suggested changes to the draft statement, and provided some thoughts about when the Board should release the statement. Ms. Miles responded to Ms. Etelman's email, copying Mr. Cyr and the Town Administrator, stating that she would make edits to the draft statement based on Ms. Etelman's suggestions and would circulate an updated version of the statement. Additionally, in response to Ms. Miles' June 22 email to the Board, member Chris Geraghty emailed Ms. Miles on June 23 thanking her for starting the conversation and expressing his agreement that the Board should make a statement.

At some point on June 23, Mr. Cyr forwarded the statement to Mr. Geraghty and to Mr. Forcier asking for their feedback and approval of the statement. Ms. Miles also emailed Mr. Forcier that same day, forwarding the statement and asking if he had any questions or suggestions regarding the statement. The following day, on June 24, the Town Administrator emailed Mr. Forcier on behalf of Mr. Cyr inquiring whether Mr. Forcier would endorse the statement, which the Town Administrator attached to the email. Later that day, the Board released the statement with the names of all Board members included except Mr. Forcier's. Mr. Forcier filed this Open Meeting Law complaint on June 26, alleging that the Board had deliberated outside of an open meeting in issuing the statement.

DISCUSSION

The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." Ghiglione v. School Board of Southbridge, 376 Mass. 70, 72 (1978). The Law states, in relevant part, that "[e]xcept in an emergency, . . . a public body shall post notice of every meeting at least 48 hours prior to such

³ A recording of the Board's June 30 meeting can be found at <https://vimeo.com/434237166>.

⁴ For the sake of clarity, we refer to you in the third person throughout.

meeting, excluding Saturdays, Sundays and legal holidays.” G.L. c. 30A, § 20(b). Except when convened in executive session, “all meetings of a public body shall be open to the public.” G.L. c. 30A, § 20(a).

A “meeting” is defined, in relevant part, as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. The Law defines “deliberation” broadly as any “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.” *Id.* A “quorum” is a simple majority of the members of a public body. *Id.* A one-way communication from one public body member to a quorum on matters within the body’s jurisdiction constitutes deliberation for purposes of the Open Meeting Law, even if no other public body member responds. *See* OML 2016-104; OML 2015-33; OML 2012-73.⁵ The Open Meeting Law does not carve out an exception to the definition of “deliberation” for discussions that do not result in a decision or vote. *See* OML 2020-93. A public body may not engage in serial communication whereby a quorum communicates in a non-contemporaneous manner outside of a meeting on a subject within the public body’s jurisdiction. *See* OML 2015-3; OML 2012-84; OML 2011-27; *McCrea v. Flaherty*, 71 Mass. App. Ct. 637 (2008) (holding that private serial communications violate the spirit of the Open Meeting Law and may not be used to circumvent the intent of the law).

Here, we find that the decision whether to issue a formal statement from the Board expressing its stance against racism, as well as determining the content of any such statement, was public business within the Board’s jurisdiction. *See* OML 2021-12. Therefore, Ms. Miles’ June 22 email to the entire Board suggesting that it issue a statement on racism and expressing her belief that it should do so as soon as possible constituted deliberation outside of a posted meeting, in violation of the Open Meeting Law. Likewise, the emails concerning drafting, finalizing, approving, and releasing the statement also constituted deliberation outside of a posted meeting. *See* OML 2020-160. Additionally, when Mr. Cyr, Ms. Miles, and the Town Administrator each forwarded the statement, which necessarily included the thoughts and opinions of the members who drafted it, to other members of the Board, this also constituted deliberation outside of a posted meeting. *See* OML 2019-75 (finding that an email sent to a quorum of a public body which included an attachment containing the opinions of one member of the public body constituted deliberation outside of a posted meeting); OML 2018-150 (a public body “may not use a staff member, such as the Business Manager, to facilitate a deliberation outside of a meeting.”). Finally, the process of polling Board members outside of a properly posted meeting, as was done here when members were contacted regarding whether they would endorse the statement, constitutes a violation of the Open Meeting Law. *See* OML 2020-160; OML 2016-52; OML 2013-75; OML 2013-76; *see also* G.L. c. 30A, § 22(b).

In its response, the Board asserts that, “[t]o the extent that the Board may have inadvertently deliberated outside a publicly posted meeting, immediate corrective action remediated any potential violations of the Open Meeting Law when the Board publicly discussed the contents of the press release on racism at its meeting on June 30, 2020.” During the June 30 meeting, the Board discussed the instant Open Meeting Law complaint, which related to the

⁵ Open Meeting Law determinations may be found at the Attorney General’s website, www.mass.gov/ago/openmeeting.

statement. The Board also discussed at some length whether it could discuss the statement where it was not separately listed on the meeting notice, but rather was included on the notice in the description of the Open Meeting Law complaint. In the end, the Board did not substantively discuss the statement, but did ultimately vote to accept the statement as written.

Violations of the Open Meeting Law may be cured by independent, deliberative action that is not merely a ceremonial acceptance and perfunctory ratification of action taken in violation of the law. See Pearson v. Bd. of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125 (2000); OML 2020-7; OML 2016-49. Generally, that means conducting deliberations anew at a subsequent meeting that is accessible to the public and for which proper notice is provided. Here, where the Board did not engage in independent, deliberative action, but rather simply voted to accept the statement as written, we find that the Board's actions did not cure the prior deficiencies, and we find that the Board violated the Open Meeting Law. See OML 2020-67.

Where, as here, impermissible deliberation has taken place via email, our usual remedy is to order the release of the email communications to the public. See OML 2019-75; OML 2019-140. We understand from the Board's response that the emails have been made available to the public by being placed on file with the Town Clerk. We order no additional remedial action.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by deliberating outside of a properly posted meeting. We order the Board's immediate and future compliance with the Open Meeting Law and caution that future similar violations may be considered evidence of an intent to violate the law. Because the Board has made the emails at issue available to the public, we order no further remedial action.

We now consider the complaint addressed by this determination to be resolved. This determination does not address any other complaints which 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.

Sincerely,



Elizabeth Carnes Flynn
Assistant Attorney General
Division of Open Government

cc: Jeff Cyr, Chair of the South Hadley Selectboard (via e-mail: jcyr@southhadleyma.gov)
South Hadley Selectboard (via e-mail: selectboard@southhadleyma.gov)
Bruce Forcier (via e-mail: kmaro68@aol.com)

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.