



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

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OML 2021 – 10

**VIA EMAIL ONLY**

J. Raymond Miyares, Esq.  
Miyares Harrington  
[REDACTED]

Ivria Glass Fried, Esq.  
Miyares Harrington  
[REDACTED]

**RE: Open Meeting Law Complaint**

Dear Attorneys Miyares and Fried:

This office received two complaints from Kendra Cooper on July 20 and August 26, 2020,<sup>1</sup> alleging that the Reading Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaints were originally filed with the Board on June 18 and July 27, and the Board responded by letters dated July 8 and August 12. The complaints allege that 1) during the Board’s February 11 meeting, members of the Board communicated electronically with each other and with members of the public; 2) the minutes of the February 11 meeting are insufficient where they do not reference the alleged electronic communications; 3) during its May 13 meeting, the Board improperly approved the minutes of the February 11 meeting; 4) the Board failed to timely approve meeting minutes; 5) during its May 13 meeting, the Board discussed adopting a method for creating meeting minutes that would violate the Open Meeting Law; and 6) the Board’s July 22 retreat was not accessible to the public.<sup>2</sup>

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<sup>1</sup> All dates in this determination are in 2020, unless otherwise stated.

<sup>2</sup> The Complainant raised additional concerns in subsequent communications with our office. We decline to review these allegations as they were not raised in an original complaint filed with the Board. See OML 2019-76; OML 2012-92. Additionally, with respect to the Complainant’s assertion that the July 27 complaint alleges that the Board’s unapproved meeting minutes were insufficient in substance, we note that we do not find that allegation to

Following our review, we find that the Board violated the Open Meeting Law by 1) failing to timely approve the minutes of its April 14 and May 13 meetings; and 2) denying public access to its July 22 meeting where it required individuals to register in advance. We do not find that the Board violated the Law in the other ways alleged. In reaching this determination, we reviewed the Open Meeting Law complaints, the Board's responses, the requests for further review, video recordings of relevant Board meetings,<sup>3</sup> the notice of the July 22 meeting, and subsequent communications from the Complainant.

The two complaints resolved by this determination raise a number of allegations. As explained below, we decline to review several of those allegations for various reasons. We begin by discussing the allegations we decline to review and the reasons therefor. We then address the remaining allegations.

### **Allegations Not Formally Reviewed in This Determination**

First, the June 18 complaint alleges that two Board members improperly communicated with each other and with members of the public through electronic means during the Board's February 11 meeting. As evidence in support of this allegation, the Complainant points to specific actions taken by Board members Vanessa Alvarado and Andrew Friedmann. These actions took place in open session and can be observed in the video recording of the February 11 meeting.

To be considered timely, a written Open Meeting Law complaint setting forth the circumstances which constitute the alleged violation must, among other things, be filed with the public body within 30 days of the date of the alleged violation. G.L. c. 30A, § 23(b). When an alleged violation occurs in open session, the alleged violation can reasonably be discovered at the time it occurs. See OML 2014-85; OML 2012-52; OML Declination 2-1-17 (West Bridgewater Board of Water Commissioners).<sup>4</sup> Where the allegation that Board members improperly communicated during the February 11 meeting was discoverable more than 30 days before the June 18 complaint was filed, we find this allegation untimely and decline to review it.

Although we decline to review the above allegation, we note that communications involving less than a quorum of public body members do not constitute deliberation under the Open Meeting Law. See G.L. c. 30A, § 18. Likewise, the Open Meeting Law only applies to members of a public body; therefore, any communications that may have occurred during the

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have been clearly raised in the complaint. Furthermore, had such an allegation been clearly raised, we would decline to review it as the minutes were in draft form at the time the July 27 complaint was filed with the Board. See OML 2014-62 ("A public body may revise draft minutes at any point prior to their approval to correct inaccuracies or add detail"); OML 2019-11. Although we do not make a formal finding as to the sufficiency of the meeting minutes at issue in the July 27 complaint, we note that the minutes of the Board's April 14 and May 13 meetings lack detail with respect to some topics.

<sup>3</sup> Video recordings of the Board's meetings may be found at <https://www.youtube.com/playlist?list=PLkibnMpZKYxtQFmCkaHeszeXuWuTk98h9>.

<sup>4</sup> Open Meeting Law determinations may be found at the Attorney General's website, [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting).

February 11 meeting between a single Board member and a member of the public also would not constitute deliberation under the Open Meeting Law Id.; OML 2019-52.

Second, both the June 18 and July 27 complaints allege that the Board improperly approved the minutes of the February 11 meeting during its May 13 meeting when it “preapproved” the minutes subject to amendments. Because approval of the minutes for the February 11 meeting took place in open session on May 13, any alleged violation relating to the process of approving those minutes was discoverable on May 13. Because June 18 and July 27 are more than 30 days after the May 13 meeting, we find this allegation to be untimely as well. Although we decline to review this allegation, we note that a public body may approve meeting minutes subject to amendments. See OML 2016-155; OML 2020-55.<sup>5</sup>

Third, the July 27 complaint alleges that at its May 13 meeting, the Board discussed “changing the manner in which Minutes are created to a summary, sanitized format of roughly 2 pages.” We decline to review this allegation because it was not timely filed with the Board and because it does not allege a violation of the Open Meeting Law, G.L. c. 30A, §§ 18-25. See OML Declination 1-25-16 (Nahant Housing Authority Board of Commissioners). The Open Meeting Law does not govern the substance of a public body’s discussions, and the complaint does not identify any particular meeting minutes that were insufficiently detailed following the adoption of such a policy. Therefore, we decline to review this allegation.

Although the Board’s discussion in and of itself would not violate the Law, we take this opportunity to remind the Board of its obligation to “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). When reviewing minutes for compliance with the Open Meeting Law, we look for substantial compliance with the accuracy requirement. See OML 2017-104; OML 2013-64. By substantial compliance, we mean that the minutes should contain enough detail and accuracy so that a member of the public who did not attend the meeting could read the minutes and have a clear understanding of what occurred. See OML 2019-145; OML 2012-106. Although a transcript of the discussions is not required, and the minutes need not include every remark or opinion presented, minutes must include a substantive summary of the discussion on each topic.<sup>6</sup> A statement that a discussion on a particular topic took place, without summarizing the discussion, is insufficient. See OML 2020-149 (finding minutes that noted a discussion was held, or a topic was addressed, without specifying what was said on each topic did not comply with the requirements of the Law); OML 2020-55; OML 2012-29 (recommending best practices for creating minutes, such as including dissenting or

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<sup>5</sup> In the July 27 complaint, the Complainant asserts that the June 18 complaint alleges that the minutes of the February 11 meeting were not timely approved. We do not find that the June 18 complaint clearly raised this allegation, but rather concerned the process by which the minutes were approved. In any event, even if the allegation had been clearly raised, it would have been untimely as the minutes were approved on May 13. Although we do not formally address this allegation, we note that the minutes of the February 11 meeting were not approved within the later of the next three meetings or 30 days. See 940 CMR 29.11(2).

<sup>6</sup> In its August 12 response the Board explains that it consulted with counsel and reviewed the Open Meeting Law with respect to the requirement to create and approve accurate meeting minutes. We commend the Board for taking these steps to ensure its compliance with the Open Meeting Law.

minority opinions whenever possible, and, if a particular individual speaks at some length or is the only one to offer an argument for or against a proposal, including a summary of that person's comments).

Fourth, the July 27 complaint alleges, among other things, that "[s]ince January 2020, the Reading Select Board has failed multiple times to approve and release minutes of their meetings in a timely manner, though the Board has met regularly." The Board met 28 times between January 1 and July 27. Aside from the minutes of the Board's April 14 and May 13 meetings, the complaint does not identify any particular set of minutes that were not approved in a timely manner. Complainants must allege violations with a degree of specificity, as our office will not conduct broad audits of public bodies based on generalized allegations. See OML 2020-156; OML Declination 3-20-12 (Wilmington Board of Assessors). Because the complaint does not identify any specific set of minutes, other than those of the April 14 and May 13 meetings, as being untimely approved, we decline to review the general allegation that the "Board has failed multiple times to approve" minutes.

### **Allegations Formally Reviewed in This Determination**

The complaints allege three additional violations of the Open Meeting Law: 1) that the minutes of the Board's April 14 and May 13 meetings were not timely approved; 2) that the minutes of the February 11 meeting are insufficient where they do not include alleged electronic communications of Board members; and 3) that the Board's July 22 retreat was not accessible to the public because the public was required to register in advance of the meeting and because the meeting was not recorded by Reading Community Television ("RCTV"). In its August 12 response, the Board acknowledged that it violated the Law by failing to timely approve the minutes of its April 14 and May 13 meetings and by requiring the public to register in advance of the July 22 meeting.

### **FACTS**

The Board is a five-member public body; therefore, three members constitute a quorum. On July 20, the Board posted notice for a retreat to be held on July 22 at 7:00 P.M. Relevant here, the notice states as follows,

This meeting will be held remotely on Zoom.

Members of the public that would like to observe the retreat must register as an attendee in advance before 6PM on Wednesday, 7/22/2020. . . . Registrations attempted after 6PM may not be accepted into the meeting due to staffing constraints.

. . .

Register in advance for this webinar (required): . . .

On July 22, the Board convened its retreat with access provided to the public via Zoom. Unlike the Board's regular meetings, the retreat was not recorded by RCT. Historically, the Board has not recorded or broadcast its annual retreats.

At its May 13 meeting, the Board approved the minutes of its February 11 meeting, subject to amendments. The final version of the minutes of the February 11 meeting do not list any electronic communications among members of the Board or between Board members and members of the public.

On August 11, the Board approved the minutes of its April 14 and May 13 meetings, along with nine additional sets of meeting minutes. The August 11 meeting was the sixteenth and eleventh meeting following the April 14 and May 13 meetings, respectively.

## DISCUSSION

### I. The Board Violated the Law by Failing to Timely Approve Meeting Minutes.

The Open Meeting Law requires that “[m]inutes of all open sessions shall be created and approved in a timely manner.” G.L. c. 30A, § 22(c). The 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 CMR 29.11 (2). The Board acknowledges, and we find, that the Board violated the Law where it did not approve the minutes of the April 14 and May 13 meetings until well past the 30 day or three meeting timeframe allowed for under the regulations.

### II. The Minutes of The Board’s February 11 Meeting Are Not Insufficient as Alleged in the June 18 Complaint.

Although not clearly alleged, we construe the June 18 complaint as asserting that the minutes of the February 11 meeting are insufficient where they do not include the alleged communications between or among Board members Alvarado and Friedmann and members of the public. As explained above, where a communication occurs between fewer than a quorum of the members of a public body, and does not reach a quorum via serial communication, that communication does not constitute deliberation under the Open Meeting Law. See G.L. c. 30A, § 18. As such, the public body is not required to record the communication in its meeting minutes.

To the extent the complaint alleges that any emails, text messages, or other electronic communications that were exchanged constitute documents used at the meeting and therefore should have been listed in the meeting minutes, we disagree. The Open Meeting Law requires that meeting minutes include a list “of documents and other exhibits used at the meeting.” G.L. c. 30A, § 22(a). The Law does not define what it means for a document to be “used” at a meeting; however, we have found that a document is “used” at a meeting when it is, at a minimum, physically present, verbally identified, and its contents are discussed by members of the public body. See OML 2014-146; OML 2019-57; OML 2012-42. After review of the video recording of the Board’s February 11 meeting, we find that, to the extent a Board member may have received and viewed emails, text messages, or other documents on an electronic device during the

meeting, those items were not “used” at the meeting for purposes of the Open Meeting Law, as they were not verbally identified nor their contents discussed. Therefore, we find the Board did not violate the Open Meeting Law in this way. See OML 2020-166; OML 2018- 116; OML 2012-59.

III. The Board Violated the Law Where It Required the Public to Register in Advance for Its July 22 Meeting, But Did Not Violate the Law by Providing Access Through Zoom Only.

On March 12, Governor Baker issued an executive order temporarily suspending certain provisions of the Open Meeting Law during the state of emergency created by the outbreak of the 2019 novel Coronavirus. See Order Suspending Certain Provisions of the Open Meeting Law, G. L. c. 30A, § 20 (Mar. 12, 2020) (the “Executive Order”). Relevant here, the Executive Order temporarily suspends the requirement that meetings be held in locations that are physically accessible to the public provided the public body provides adequate, alternative means of public access. The Executive Order states that

[a]dequate, alternative means of public access shall mean measures that provide transparency and permit timely and effective public access to the deliberations of the public body. Such means may include, without limitation, providing public access through telephone, internet, or satellite enabled audio or video conferencing or any technology that enables the public to clearly follow the proceedings of the public body while those activities are occurring.

Executive Order at § 1. Additionally, our office has published guidance explaining that “[a]dequate, alternative means of access’ could include Zoom, a high-capacity telephone conference line, Facebook Live, YouTube Live, and broadcasting on live TV, including local cable access television.” See Attorney General’s Updated Guidance on Holding Meetings During the COVID-19 State of Emergency.<sup>7</sup>

We find the Board did not violate the Law where it chose to allow public access to its July 22 meeting in real time via Zoom, and did not otherwise broadcast or record the meeting. See OML 2020-111. The Board is not required to provide more than one means of adequate, alternative access.

However, the Board acknowledges, and we find, that the July 22 meeting was not accessible to the public where the public was required to register in advance of the July 22 meeting in order to view the meeting and was informed that “[r]egistrations attempted after 6PM may not be accepted into the meeting due to staffing constraints.” See OML 2020-67. At the core of the Open Meeting Law is the requirement that meetings of public bodies be open and accessible to the public. G.L. c. 30A, §20(a) (except when meeting in executive session, “all meetings of a public body shall be open to the public.”). In order for a meeting to be truly open

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<sup>7</sup> The Attorney General’s Updated Guidance on Holding Meetings During the COVID-19 State of Emergency, updated June 2, 2020, is available here: <https://www.mass.gov/service-details/updated-guidance-on-holding-meetings-during-the-covid-19-state-of-emergency>.

to the public, the meeting venue must be accessible to the public for the duration of the meeting. See OML 2014-118; OML 2017-172; OML 2018-51.

By requiring members of the public to register no later than one hour in advance of the July 22 meeting, and by informing the public that those who attempted to register after 6:00 P.M. might not be allowed access to the meeting, the Board not only gave the impression that the meeting was not generally open to the public, but it effectively closed and locked the door to the meeting one hour prior to its start. Therefore, we find that the Board's July 22 meeting was not accessible to the public, in violation of the Open Meeting Law.<sup>8</sup>

During the Board's August 11 meeting, in an effort to remedy this violation, the Chair noted that the draft minutes of the July 22 meeting had been released to the public. The Chair also provided an overview of the topics discussed during the July 22 meeting, including that the Board had discussed and edited two documents during that meeting. The Chair noted that the edited versions of those two documents were included in the packet for the August 11 meeting, and that in his opinion the edited documents accurately reflected the changes discussed during the July 22 meeting. Although we find the Board violated the Law, in light of the steps already taken, we order no further remedial action.<sup>9</sup>

### CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by failing to approve the minutes of its April 14 and May 13 meetings in a timely manner and by requiring the public to register in advance in order to access its July 22 meeting. We do not find that the Board violated the Law in the other ways alleged. We order the Board's immediate and future compliance with the Open Meeting Law and note that future similar 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 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.

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<sup>8</sup> Public bodies concerned about the integrity of their virtual meetings may require members of the public to call or email to request login information for a virtual meeting. However, the notice must include the telephone number and/or email address the public should contact to request the login information, and the telephone number and/or email address must be monitored such that a member of the public can receive the necessary login information in a timely manner and at all times up to and throughout the meeting. See OML 2020-67.

<sup>9</sup> 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.

Sincerely,



Elizabeth Carnes Flynn  
Assistant Attorney General  
Division of Open Government

cc: Mark Dockser, Chair of the Reading Select Board (via email:  
[REDACTED]  
Kendra Cooper (via e-mail: [REDACTED])

**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.**