The Commonwealth of Massachusetts

OFFICE OF THE DISTRICT ATTORNEY
FOR THE NORFOLK DISTRICT

WILLIAM R. KEATING
DISTRICT ATTORNEY

45 SHAWMUT ROAD
CANTON, MA 02021
(781) 830-4800
FAX (781) 830-4801

November 25, 2009

Erdem A. Ural, Ph.D.
659 Pearl Street
Stoughton, MA 02072

Eric D. Milgroom, Chair
School Committee
232 Pearl Street
Stoughton, MA 02072

Re: OML Complaint 09-02

Dear Dr. Ural and Mr. Milgroom:

This letter constitutes this office's response to three letters from Erdem Ural, Ph.D. (dated March 31, 2009; May 9, 2009; and June 8, 2009) alleging that the Stoughton School Committee violated the Open Meeting Law by: (1) holding a sub-committee meeting on February 10, 2009 that was not posted, not voting on the sub-committee's agreement concerning the appropriate ratio of budget cuts before presenting a figure representing those cuts to the Finance Committee, and by meeting on March 31, 2009 to vote on the subcommittee's agreement without properly posting the meeting; (2) signing financial warrants outside a public meeting; (3) failing to keep accurate minutes; (4) discussing School Committee business outside a publicly posted meeting; and (5) denying access to meeting records. In considering these issues, we rely on: these three letters; a compact disc provided by Dr. Ural containing excerpts of meetings on March 24, 2009, March 31, 2009 and April 14, 2009; responses by the School Committee (dated April 9, 2009, June 12, 2009, and June 22, 2009); and an additional response by Dr. Ural dated July 22, 2009. We consider each issue in turn.

1) The Sub-Committee Agreement Regarding Budget Cuts

We find the following facts:

Under the Stoughton Town Charter, the proposed budget for the schools for the next fiscal year is submitted by December 31st. From that point until Town Meeting, the budget may increase or decrease depending on statutory provisions such as proposition 2 ½, federal and state aid, the ability to raise taxes, and the economy. During this period, it is the usual practice of the School Committee to meet with other Town officials so that the entire school and town budget may be seen in context and to analyze cuts that may be needed or funds that could be accessed.

The purpose of these meetings is to reach a consensus, if possible, prior to Town Meeting. The warrant presented at Town Meeting includes a school budget in the amount recommended by the Finance Committee; this amount usually reflects the work of this group. At Town Meeting, the School Committee, through the Superintendent, could request additional monies. Ultimately, the final vote on the budget by the School Committee occurs after Town Meeting.

On December 9, 2008, the School Committee submitted a proposed budget of $36,406,143 for fiscal year 2010. On January 27, 2009 the School Committee discussed the funding and debated having a joint meeting with the Selectmen, the Town Manager, and the Finance Committee. After further discussion it was decided that a smaller subgroup from each entity would be more efficient and that the Chair[1] would arrange a mutually agreed-upon date and time.

On February 10, 2009, a meeting took place with the following in attendance: School Committee members Thomas Colburn and Allan Mills, Interim Superintendent Anthony Sarno, Assistant Superintendent Marguerite Rizzi, School Financial Coordinator Kathleen Silva, Board of Selectmen members John Anzivino and Stephen Anastos, Town Manager Mark Stankiewicz, Town Accountant William Rowe, and Finance Committee Chair Holly Boykin. Dollar amounts for proposed budget reductions were not discussed, but rather the group discussed how to share the decrease in revenue. Since the revenue share of the budget was usually about a 67%/33% split between the schools and the town respectively, the same ratio was suggested for absorbing the decrease in revenue. As the group had no voting power, this agreement was described as a "hand-shake" agreement.

Subsequently, the Superintendent announced that this "sub-committee" had met.[2] At a March 24, 2009 meeting, the Superintendent offered a revised budget figure that represented a decrease of the school budget by $2,095,721; this figure endorsed the 67%/33% split discussed at the February 10th meeting. The proposed ratio of cuts was hotly challenged and Dr. Ural suggested a lesser cut. On March 30, 2009 the Superintendent appeared before the Stoughton Finance Committee and requested a budget that included a reduction of $2,095,721 from the amount originally budgeted. On March 31, 2009 the School Committee voted to approve the amount of $34,310,422 for the FY10 proposed budget, which reflected a cut of $2,095,721 from the original December 31st budget.

Under the Open Meeting Law, "[a]ll meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided in this section." G.L. c. 39, §23B. A meeting is defined in pertinent part as "any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered." G.L. c. 39, §23A. The Open Meeting Law applies to sub-committees, even where

[1] At the time of this action, the Chair of the School Committee was Allan W. Mills. It is our understanding that subsequent to the filing of the School Committee's responses, Eric D. Milgroom became Chair.

[2] It is unclear when this occurred. Dr. Ural's March 31, 2009 letter states that this occurred on February 24, 2009, but the documentation offered by the parties tends to suggest that the discussion took place on March 24, 2009.

the sub-committee has no voting power. See Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433, 435-36 (1984).

The February 10, 2009 meeting should have been posted as a sub-committee meeting of the School Committee. It is clear, via the June 12, 2009 response of the School Committee, that this group was intended to be a "sub-committee." And while this sub-committee had no voting power, a review of the recordings of the March 31, 2009 and April 14, 2009 meetings indicates that there was a belief that the sub-committee was authorized to come to some type of agreement regarding the next fiscal year. See Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. at 436 (Open Meeting Law applied to sub-committee that only made recommendations to parent body).

However, we note that after the February 10, 2009 meeting, the "hand-shake" agreement on sharing the decreased revenue was discussed at length at the March 24, 2009 open meeting of the School Committee, including Dr. Ural's questioning regarding the percentage split and his opinion regarding the split of revenues between the schools and the Town. This independent deliberation regarding the proposed ratio of budget cuts cures any violation of the Open Meeting Law that occurred through the February 10, 2009 meeting.[3] See Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. at 125 (independent deliberative action by the governmental body would cure any violation of Open Meeting Law by a non-public meeting).

Dr. Ural also alleges that the School Committee did not formally approve the sub-committee decision before the Superintendent presented a figure representing the reduced amount to the Finance Committee. The agreement to accept a certain percentage of the decreased revenue is a matter of public business within the jurisdiction of the School Committee, accordingly all deliberation and votes were required to be conducted in accordance with the Open Meeting Law. However, the discrete issue of whether the sub-committee's handshake-agreement required a vote of the full School Committee is not a matter that falls within the Open Meeting Law.

Dr. Ural also questions whether the March 31, 2009 School Committee meeting where the vote was taken was properly posted. He states that: he was informed at 6:50 p.m. on the evening of March 31, 2009 that there was to be an impromptu meeting of the School Committee; that he checked the Town bulletin board but found no public notice; and that he told the then-Chair he could not find evidence of proper posting but was told that the posting was sent and that Town Hall employees must have made a mistake. In response, the School Committee has provided a copy of the meeting posting.

Notice of an open meeting must be publicly posted for at least forty-eight hours, excluding Sundays and legal holidays, before the meeting. It is the burden of the governmental body, as opposed to any town employee, to ensure that the meeting has been properly posted and

[3] We caution, however, that an open meeting would not cure an Open Meeting Law violation where it was found that the open meeting did not include independent deliberative action. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 642-45 (2008). We also caution that it would be improper for a governmental body to purposefully meet outside of an open session with the intent to "cure" such action by a future open meeting. We do not find that either circumstance exists on these facts.

remains posted for the prescribed statutory period. G.L. c. 39, §23B ("Such filing and posting shall be the responsibility of the officer calling such meeting"). It is also the burden of the governmental body to show compliance with the Open Meeting Law. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 644 n.10 (2008). Here, Dr. Ural observed the town bulletin board before the meeting and did not see the posting. While at least one other member of the School Committee was informed, there has been no proffer that anyone else determined that the notice had in fact been properly posted. We find that the School Committee has not met its burden to show that the meeting was posted continuously for forty-eight hours before the meeting.[4]

Generally, in such a scenario, the remedy is to create and make public minutes of the meeting. We note that the recording of the March 31, 2009 meeting reflects that the School Committee treated the meeting as a posted open meeting and that the School Committee has already transcribed minutes of the March 31, 2009 meeting. Further, we note that the meeting was held at the beginning of the Finance Committee meeting and that various members of the Finance Committee and community were present. We find no further action is required other than the School Committee's statement that they will comply with the Open Meeting Law in the future.

Lastly, we note that in recordings and in letters, the parties contest the propriety of the March 31, 2009 vote after a letter was sent to this office. We find nothing improper with the Stoughton School Committee attempting to remedy a possible violation of the Open Meeting Law when such a possible violation was brought to its attention. Generally, courts do not take action against the offending board where the violation is remedied before the court hears the case. See e.g., Puglisi v. School Committee of Whitman, 11 Mass. App. Ct. 142, 146-47 (1981) (ordering compensation from date of invalid meeting to future time where governmental body holds valid meeting); Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306 (1990) (remedy of back pay allowed only from date of wrongfully held meeting to date of properly held meeting). And we have stated in the Norfolk District Attorney's handbook Understanding the Open Meeting Law (June 2002) that "[t]hese cases point to the wisdom of promptly correcting violations of the Open Meeting Law." Indeed, we encourage such remedial action if possible and done in good faith as such remedy serves the purpose of the Open Meeting Law to allow public viewing of a governmental body's deliberation and decisions.

2) Signing Warrants Outside of a Posted Meeting

Dr. Ural alleges that after the cancellation of public meetings in February and March, School Committee members went to the Superintendent's office individually to sign financial warrants. The School Committee states that signing warrants is a ministerial matter that need not take place in an open meeting as the warrants were merely the manifestation of the School budget, i.e. the actual invoices that follow after the monies allocated in the budget are disbursed.

[4] We note that the posting did not contain a legible date; however, in recognition of this issue, the School Committee offered to provide the original notice upon request. Regardless of whether the notice was properly posted at one point, there is insufficient evidence to show that it was posted continuously for forty-eight hours prior to the meeting; thus we do not find it necessary to request the original document. To the extent that Dr. Ural alleges that the meeting was not posted on the Town website, we note that the Open Meeting Law only requires posting "in the office of such clerk or on the principal official bulletin board of such city or town."

Generally, administrative matters, such as scheduling the date, time, and place of a meeting or soliciting agenda items, do not have to take place in open session. In Yaro v. Board of Appeals of Newburyport, 10 Mass. App. Ct. 587, 590-91 (1980), the Appeals Court found that the Open Meeting Law did not require a board to hold a public hearing for purposes of reducing to writing a decision reached at a prior meeting that was open to public, where accurate records were kept and the substance of the decision was known to the public. The question is whether signing warrants is analogous. We find that it is. Where the signing of warrants only memorializes budgetary decisions made at properly posted meetings, there is no violation of the Open Meeting Law.

Dr. Ural notes that in signing the warrants a board member might question certain expenditures, lack of expenditures, how expenses are tracking with the budget, or whether any adjustments need to be made. This may be true but is a different issue than the warrant signing process anticipated in G.L. c. 41, §56, which provides that "[s]uch approval shall be given only after an examination to determine that the charges are correct and that the goods, materials or services charged for were ordered and that such goods and materials were delivered and that the services were actually rendered to or for the town." This presupposes that warrants will be signed where the charges are correct. That questioning the propriety of certain expenditures must be done at an open meeting does not change the fact that approving the payment of appropriate expenses already made is a ministerial act.[5]

3) Failure to Keep Accurate Minutes

Dr. Ural alleges that the School Committee's minutes for the March 24, 2009 and March 31, 2009 meetings did not accurately reflect what transpired; and that in the April 14, 2009 meeting he attempted to amend the minutes but the School Committee refused to make the requested amendments.

Under the Open Meeting Law, "[a] governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions." G.L. c. 39, §23B. Minutes kept under the Open Meeting Law "shall report the names of all members of such boards and commissions present, the subjects acted upon, and shall record exactly the votes and other official actions taken by such boards and commissions; but unless otherwise required . . .such records need not include a verbatim record of discussions at such meetings." G.L. c. 66, §5A.

[5] We note the School Committee's response that the warrants would not be available to the public at an open meeting. We have said in Understanding the Open Meeting Law, "[d]iscussions at meetings must be intelligible to all present. For example, board members may not refer to written materials solely by page or paragraph number if the materials are not available to the public in attendance. If discussions can be understood only by reference to written materials, the written materials must be made available to the public. Copies could be provided, or a projector could be used to publish materials to the public." Accordingly, if warrants are discussed so that a member of the audience could not understand the conversation without access to the warrants, they must be provided at the meeting.

We have listened to the meeting excerpts provided by Dr. Ural on CD and compared them to the written minutes. We find that the minutes adequately summarize the discussions.[6] We note that in the recording of the April 14, 2009 meeting the Chair specially asked that the minutes reflect that Dr. Ural made a motion to amend the March 24, 2009 minutes, which was not seconded. We find no violation of the Open Meeting Law in this respect.[7]

4) Deliberation Outside of a Properly Posted Meeting

At the April 14, 2009 meeting Eric Milgroom, directed the following comment to Dr. Ural made regarding the budgetary vote taken at the March 31, 2009: "We took the vote only to shut you up. . . We also wasted a couple of thousand dollars on our lawyer who said placate him." In response, the School Committee states that counsel for the School Committee did not speak to any person on the School Committee nor did School Committee members speak to each other about the March 31, 2009 meeting; rather the Superintendent was the only person who communicated with counsel.

Private "serial" discussions of public business by members of a governmental body cannot be used to circumvent the letter or spirit of the Open Meeting Law. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648-49 (2008) (rejecting claim that Open Meeting Law did not apply to private meeting containing system of rotating participation because there was no quorum in meeting at any one point). There is no exemption under the Open Meeting Law for meetings with counsel. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985).

We accept the School Committee's assertion that only the Superintendent spoke to counsel. Even if the Superintendent spoke to counsel and then spoke to Mr. Milgroom, those communications would not result in a quorum of the committee engaging in serial communications. The use of the word "we" in Mr. Milgroom's comments at the March 31, 2009 meeting appears to be a colloquial reference to the School Committee, not an actual representation of a quorum either together or individually, speaking with counsel or discussing his advice. We do not find that these facts constitute an Open Meeting Law violation.

---

[6] While not entirely clear, we note that the March 31, 2009 meeting minutes appear to contain a vote regarding a holdback of funds that does not appear in the meeting minutes. We would ask that the School Committee examine its records.

[7] In his July 22, 2009 response, Dr. Ural alleges that because the School Committee did not respond to this allegation, this office must find in his favor. We note that in its June 12, 2009 response the School Committee claimed to be unable to access the meeting excerpts on the CD, which this office copied from the CD Dr. Ural provided with his May 9, 2009 letter. We also note that that Dr. Ural's May 9, 2009 letter did not include specific examples as to where the minutes are inaccurate. While, as discussed above in the first issue, the governmental body has the burden to show that the Open Meeting Law was not violated, this office must still determine whether the facts as alleged constitute an Open Meeting Law violation. As discussed above, after listening to the recordings of the meetings and examining the minutes, we find that the minutes adequately summarized the meetings.

5) Denial of Access to Meeting Records

Dr. Ural alleges that he was improperly denied videos of the April 28, 2009 and May 12, 2009 meetings and the draft minutes of the April 14, 2009, April 28, 2009 and May 12, 2009 draft meetings.

This office has previously suggested that a time period of two to six weeks is considered reasonable for the preparation and approval of minutes. Workload is not an adequate reason for further delay. Further, minutes must be released in whatever form they are in, including draft or stenographic.

We note however, that in its June 12, 2009 response, the School Committee included a partial draft of the April 14, 2009 minutes, as well as stenographic notes of that meeting. By letter on June 12, 2009, the keeper of the records, the Interim Superintendent, agreed that Dr. Ural could view the video recordings of the April 28, 2009 and May 12, 2009 meetings and stenographic notes. In his July 22, 2009, response, Dr. Ural noted that he received the requested minutes on June 22, 2009. We see no need to take any further action as to this issue and trust the parties will take heed of the above guidance in the future.[8]

CONCLUSION

We find that the Open Meeting Law was violated when a subcommittee of the Stoughton School Committee met on February 10, 2009 to discuss the appropriate ratio of budget cuts, but that this violation was cured by the independent deliberation in open session by the School Committee regarding the appropriate ratio of cuts. We find that the School Committee has not shown that the March 31, 2009, meeting was properly posted but has already partially remedied the situation by issuing minutes of that meeting. Accordingly, to resolve this matter we only require a written statement from the School Committee that they will comply with the Open Meeting Law.[9] Such statement should be sent to my attention within sixty days.

If you have any questions, I may be reached at extension 216.

Very Truly Yours,

Pamela Alford

Pamela Alford
Assistant District Attorney

---

[8] In his June 8, 2009 submission, Dr. Ural alleged that the Superintendent's providing his response to Dr. Ural's public record request to other School Committee members could be construed as a violation of the Open Meeting Law. Where the action concerns an administrative matter, i.e. the request for records, and there is no deliberation between members, either directly or through the superintendent, there is no violation of the Open Meeting Law.

[9] Dr. Ural's letters repeatedly ask that this office find two individuals to be in violation of the Open Meeting Law. As the Open Meeting governs governmental bodies, not individuals, this ruling only applies to the School Committee as a governmental body.