

MARTHA COAKLEY
ATTORNEY GENERAL

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

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

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OML 2011 - 30

James Lampke
115 North Street
Hingham, MA 02043

Dear Attorney Lampke,

Our office has reviewed a complaint filed by Michael Schneider, dated November 24, 2010, alleging violations of the Open Meeting Law, G.L. c. 30A, §§ 18-25, by the Wareham Fire District Prudential Committee (the "Committee"). The complaint specifically alleges that "[o]n August 5, 2010, the Wareham [Fire] District Prudential Committee entered in executive session under purpose 3" and that the Committee "did not enter into executive session for a permissible purpose." The complaint was originally filed with the Committee on August 11, 2010. The Committee responded by letter on September 10, 2010.

We reviewed the August 11, 2010 and November 24, 2010 complaints, and the Committee's September 10, 2010 response. We also reviewed the meeting notice and the open and executive session minutes for the August 5, 2010 Committee meeting. Additionally, we reviewed a February 10, 2011 letter from the Committee's counsel in response to a January 18, 2011 interrogatory from this office.

Following our review, we find that the Committee violated the Open Meeting Law during its August 5, 2010 meeting by discussing topics during that executive session that, while appropriate under other statutory purposes for executive session, were not proper under the purpose actually cited by the Committee.

FACTS

Because we reviewed executive session minutes that remain confidential, and because our interrogatories sought information that has not yet been released to the public, we are unable to provide a full recitation of the facts. The publicly available facts are as follows. The Committee met on August 5, 2010, and considered ten topics. Topic

number nine was listed on the meeting notice as “Executive Session to discuss strategy with respect [sic] investigation of possible litigation.” The minutes of the open session reflect the following:

Voted: To enter into executive session, not to return to open. Purpose to discuss strategy re: possible litigation. Members polled individually, each said yes.

[Michael] Schneider indicated he felt we were in violation of the Open Meeting law in citing reason. We utilize directions supplied to town by Kopelman and [Paige].

According to the executive session minutes, the Committee entered executive session at 7:52 p.m. and adjourned at 8:23 p.m.

DISCUSSION

The Open Meeting Law requires that all meetings of a public body be conducted in an open session, with some exceptions. G.L. c. 30A, §§ 20-21. Public bodies may enter a closed, executive session for one of ten purposes enumerated in the Open Meeting Law. Id. One purpose for executive session is, “[t]o discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.” Id. at § 21(a)(3).

Here, the Committee listed in its notice for its August 5, 2010 meeting an executive session to “discuss strategy with respect [to] investigation of possible litigation.” During the actual meeting, according to the minutes, the Committee entered executive session “to discuss strategy re: possible litigation.” This appears to be a reference to executive session Purpose Three, “to discuss strategy with respect to...litigation.”

The complainant asserts that Purpose Three was not appropriate for the discussion that took place during the August 5, 2010 executive session because, among other things, the Committee announced an intention to discuss only an investigation and “possible” litigation. See Complaint at 2. The complainant is correct that proposed litigation is not an appropriate topic of discussion under Purpose Three unless that litigation is clearly or imminently threatened. See Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 352 (1983). Here, the executive session minutes and response of the Committee make clear that at least a portion of the executive session discussion focused on whether the Committee should initiate legal action against a particular individual. Thus, legal action was sufficiently “imminent” to make the discussion appropriate under executive session purpose three.

We note, however, that in reciting Purpose Three, the Chair failed to declare that an open meeting would have a detrimental effect on the litigating position of the public body, as required by the Open Meeting Law. Id. See G.L. c. 30A, § 21(a)(3). This is

not a mere technical violation. The requirement is meant to engender confidence that the secrecy inherent in executive session is truly necessary. It must, therefore, be followed.

But that is not the end of the matter. The Committee's executive session was not limited to the decision whether to initiate legal action. Rather, the Committee's discussion covered a range of other topics — all related to the individual being investigated—that did not fall within Purpose Three. The Committee could have discussed these matters in executive session under several other executive session purposes. For example, if a public body seeks to discuss the discipline of an individual, the body may enter executive session under Purpose One. See G.L. c. 30A, § 21(a)(1). (“to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual”). However, in invoking Purpose One, the public body must also comply with the notice and other requirements that are particular to that purpose. A public body may also enter into executive session under Purpose Five if it seeks to conduct a criminal investigation or seeks to file criminal charges Id. at § 21(a)(5) (“[t]o investigate charges of criminal misconduct or to consider the filing of criminal complaints”). Finally, if a public body seeks to discuss a report or other document considered confidential by law, the public body may enter executive session under Purpose Seven Id. at § 21(a)(7) (“[t]o comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements”).

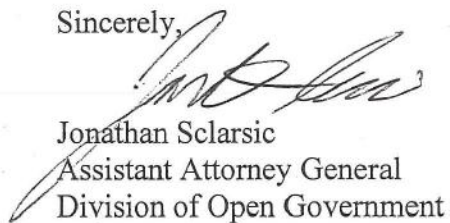
While all these purposes are proper, a public body may not enter into executive session without making clear which one it is invoking. The stated purpose is the public's only way of knowing what is being discussed in executive session, at least until the executive session minutes are published. And it is the only means the public has to judge the propriety of the executive session. Once again, failing to cite to the proper executive session purpose is not a mere technical violation of the law. It is simply a violation, and it occurred here.

CONCLUSION

We find that the Committee discussed topics during the August 5, 2010 executive session that, while appropriate under other portions of the law, were not proper under the purpose actually cited for the executive session. We order immediate and future compliance with the Open Meeting Law, and remind the Committee of its responsibility to follow the required procedures for entering executive session. We caution the Committee that a determination by our office of similar violations in the future may be considered evidence of intent to violate the Open Meeting Law. In addition, we expect that as soon as the legal purpose for the August 5, 2010 executive session has expired, the Committee will promptly release to the public the executive session minutes and any other documents used by the public body that are not exempt under the Public Records Law or any other general law.

We now consider this complaint resolved and this matter closed. Please contact me if you have any questions or believe any of the facts presented to be inaccurate.

Sincerely,



Jonathan Sclarsic
Assistant Attorney General
Division of Open Government

cc: Michael Schneider

cc: Wareham Fire District Prudential Committee