

MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
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ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
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December 16, 2013

Richard Brown
Freetown Town Administrator
3 North Main Street
PO Box 438
Assonet, MA 02702

RE: Open Meeting Law Complaints

Dear Mr. Brown:

Please find enclosed a determination letter resolving two Open Meeting Law complaints against the Freetown Board of Selectmen, which were filed with our office by Selectman Paul Sadeck on May 29, 2013.

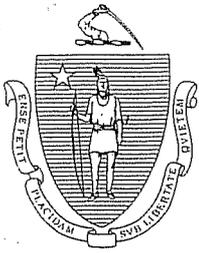
Please do not hesitate to call me at (617) 963-2820.

Sincerely,

A handwritten signature in black ink, appearing to read "Hanne Rush".

Hanne Rush
Assistant Attorney General
Division of Open Government

cc: Paul Sadeck
Freetown Board of Selectmen ✓



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OML 2013 – 186

Richard Brown
Freetown Town Administrator
3 North Main Street
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RE: Open Meeting Law Complaints

Dear Mr. Brown:

This office received two complaints from Selectman Paul Sadeck, dated March 7, 2013, alleging that the Freetown Board of Selectmen (the "Board") and then-Chair Jean Fox violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaints were originally filed with the Board on or about February 25, 2013, and you responded on behalf of the Board to the original complaints by letter dated March 6, 2013. In his complaints, Mr. Sadeck alleges that, on February 7, 2013, Chair Fox deliberated outside of a properly posted meeting by telephone, email, and through a third party.

We reviewed the February 25, 2013 complaints; the Board's March 6, 2013 response; and the March 7, 2013 complaints requesting further review. We also reviewed the email at issue. Finally, we spoke individually by telephone with Mr. Sadeck, Ms. Fox, and Board member Lisa Pacheco.

Following our review, we find that the Board violated the Open Meeting Law by engaging in deliberation outside of a properly posted meeting, by telephone and through a third party. Additionally, we find that Ms. Fox individually violated the Open Meeting Law by sending an electronic communication discussing public business within the Board's jurisdiction to a quorum of the Board.

FACTS

We find the facts to be as follows. The Board is a three member public body, thus two members constitute a quorum. On January 26, 2013, Ms. Fox sent an email to Mr. Sadeck and Ms. Pacheco regarding Lakeville Community Access Media ("LakeCAM"), a non-profit organization that provides cable access services to local communities, including Freetown. Ms. Fox stated in the message that according to Bob Marshall of LakeCAM, LakeCAM was considering removing the two television channels designated for Freetown in light of the fact that



Freetown had recently contracted with the Town of Middleborough for cable access services. Ms. Fox stated, "In my opinion, we should double check the contract and have another conversation with LakeCAM. I will not be at Monday's meeting, but I hope you will have an opportunity to discuss this and determine whether or not we should re-visit a Lakeville partnership." Then on Sunday, February 3, 2013, the chair of the Lakeville Cable TV Advisory Committee (the "Committee") advised Ms. Fox that LakeCAM planned to go before the Committee at its meeting on Thursday, February 7, 2013, to request the cancellation of the Freetown channels. Early in the day on February 7, 2013, Ms. Fox called Mr. Sadeck and Ms. Pacheco to convey the conversation she had with the Committee Chair, though Ms. Pacheco has stated she does not recall any such conversation.

Ms. Fox then sent a follow-up email to Mr. Sadeck and Ms. Pacheco to memorialize the details of her conversations regarding the Board's contract with Middleborough and the potential use of LakeCAM's services in the future, stating, "I wanted to talk about my meeting with Bob Marshall of LakeCAM to get the Board's thoughts. I will provide brief details of my discussion with Bob Marshall regarding some possibilities for Freetown, so you can have some background before we deliberate." Ms. Fox then provided an extensive outline of the contract with Middleborough and LakeCAM's offer to provide services to Freetown before stating, "Bob [Marshall]'s board is meeting this week, so I would like to be able to give him an idea of where we stand."¹

That same day, a significant snow storm was expected to hit the region. Town Administrator Richard Brown called Ms. Fox to discuss closing town hall. The Board, which has the authority to close Town Hall, has held emergency meetings in the past to discuss this very topic. On this occasion, in lieu of a meeting, Ms. Fox asked Mr. Brown to "poll the board" to determine if they agreed with her that Town Hall should be closed. Mr. Brown called Ms. Pacheco and asked whether she wanted to close Town Hall, to which she agreed. Mr. Brown then called Mr. Sadeck to determine whether he agreed with Ms. Fox's decision.

DISCUSSION

The Open Meeting Law requires that all meetings of a public body be properly noticed and open to members of the public, unless an executive session is convened. See G.L. c. 30A, §§ 20(a)–(b), 21. The Law's purpose is "to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). 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" as "an 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; provided, however, that 'deliberation' shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of

¹ Despite the Board's clear intent to discuss this topic at its next meeting, we note that it was not listed as a topic for discussion on its meeting notice. Instead, the February 14, 2013 meeting minutes reflect that this discussion was held under "New Business." We remind the Board that the Open Meeting Law requires that public bodies post notice 48 hours in advance of a meeting and include "the date, time and place of such meeting and *a listing of topics that the chair reasonably anticipates will be discussed at the meeting.*" G.L. c. 30A, § 20(b) (emphasis added).

reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” *Id.* (emphasis added)

We find that the Board engaged in improper deliberation by email and telephone on February 7, 2013. First, although Ms. Pacheco could not recall whether she spoke with Ms. Fox by telephone on that date, Ms. Fox’s telephone conversation with Mr. Sadeck alone constituted improper deliberation between or among a quorum of the Board because two members constitute a quorum. *See* G.L. c. 30A, § 18. Certain discussions regarding procedural or administrative matters may relate to public business within a body’s jurisdiction, such as discussions of whether the body should consider or take action on specific topics at a future meeting. OML 2013-27;² OML 2011-38. Here, determining whether to license, or execute a contract with, a third party for cable access services is certainly a matter within the Board’s jurisdiction, and therefore should have been discussed during a properly posted meeting.

Second, Ms. Fox’s follow-up email to the Board expressed policy positions and opinions on matters that were under active consideration by the Board. *See* G.L. c. 30A, § 18 (excluding “scheduling” and “procedural” matters from the definition of “deliberation” provided that “*no opinion of a member is expressed*” (emphasis added)). Ms. Fox’s email to her fellow Board members provided detailed background information on a topic under active consideration by the Board. While the distribution of background material only would have been permissible, Ms. Fox’s email stated she was distributing this information “to get the Board’s thoughts,” inviting the other Board members to assist her in expressing its position to LakeCAM before its meeting with the Committee that evening. This communication clearly invited the Board to deliberate outside of a meeting, although we do not find any evidence that any other Board member responded to this request. Additionally, Ms. Fox’s January 26, 2013 email to the Board also constituted an improper deliberation because she expressed her opinion on a matter within the Board’s jurisdiction. Expression of an opinion on matters within the body’s jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds. *See* OML 2013-27; OML 2012-15.

Third, Ms. Fox should not have asked Mr. Brown to take a poll of the Board about whether to close Town Hall for inclement weather. By the time Mr. Brown reached Mr. Sadeck, he had already polled the opinions of Ms. Fox and Ms. Pacheco, who agreed that Town Hall should close, a fact that he shared with Mr. Sadeck. A public body may not use a non-member, such as a staff member, to communicate on matters that the Board would otherwise save for discussion at an open meeting. *See District Attorney for the Northern District v. School Committee of Wayland*, 451 Mass. 561, 570-571 (2009) (“Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form.”) In the past, the Board has held emergency meetings to make this type of decision, and it would have been appropriate to do so here as well. If the Board believes that it needs the ability to make even more immediate decisions on such issues in the future, the Board could adopt a policy that the chair or a third person, such as the Town administrator, has the sole authority to make the decision under such circumstances. However, Mr. Brown may not facilitate serial communication between the Board’s members. *See* OML 2012-105.

² Open Meeting Law determinations may be found at www.mass.gov/ago/openmeeting.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by engaging in deliberation outside of a properly posted meeting, by telephone and through a third party. Additionally, we find that Ms. Fox individually violated the Open Meeting Law by sending an electronic communication discussing public business within the Board's jurisdiction to a quorum of the Board. We order the Board to disclose the content of Ms. Fox's January 26, 2013 and February 7, 2013 emails at a properly posted open meeting. We also order immediate and future compliance with the Open Meeting Law, and caution that future similar conduct may be considered evidence of 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 regarding this letter.

Sincerely,



Hanne Rush
Assistant Attorney General
Division of Open Government

cc: Paul Sadeck
Freetown 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 this order 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 this order.

Richard Brown

From: jeancfox@comcast.net
Sent: Saturday, January 26, 2013 2:47 PM
To: psadeck; Lisa Pacheco; Richard Brown
Cc: Ali Golz
Subject: Cable

I was contacted by two Lakeville selectmen regarding our contract for video services and meeting coverage with Middleboro. Evidently, Bob Marshall is going before the Lakeville Board on Monday to see about removing the two Freetown channels.

LakeCam has been pushing for more robust community videos. The middle school just installed a broadcast room, and it is up and running. Their hope is to run community-based videos -- school events, etc. -- to share with both towns. They already did the Techno Ninja Falcon Style video, and have others in the works. If we lose the channels, Freetown folks won't see those. Nor will they see sporting events, graduation, and the like.

A town resident who works in the schools mentioned that this is a terrible shame. LakeCam's efforts have resulted in equipment in all the schools and greatly expanded coverage of things -- far beyond just the meetings. She went on to say that the schools are in need of community involvement and are working tirelessly to disseminate good information. She is quite upset that almost half of the school community will no longer have access. Freetown residents.

Bob Marshall told both Derek and Scott that he had been in touch with us about coming together as a community on several occasions, but according to the selectmen, he did not hear back from anyone. I did explain to all that we were not timely with our work on this, and that Bob became impatient with us, prompting Richard to look elsewhere. I also explained that the preliminary numbers we received from Lakeville were not favorable to us. Evidently, Bob is saying that he could have met Middleboro's offer.

We have signed the contract with Middleboro. In my opinion, we should double check the contract and have another conversation with LakeCam. I will not be at Monday's meeting, but I hope you will have an opportunity to discuss this and determine whether or not we should re-visit a Lakeville partnership. I know Richard worked hard to get the Middleboro plan in place, but it does seem unfortunate that our broadcasts will be fairly limited vis-a-vis the content that LakeCam will have -- to which we will not have access.

One more point: LakeCam pays a \$50 stipend to folks who film something that they air. That's a pretty good plan for aspiring videographers and reporters.

Jean

Richard Brown

From: jeancfox@comcast.net
Sent: Thursday, February 07, 2013 2:48 PM
To: Richard Brown; Lisa Pacheco; psadeck
Cc: Ali Golz
Subject: Cable

I was hoping to discuss the cable issue at our upcoming meeting. Paul is unavailable for Wednesday, when I was hoping to piggy back on the school meeting. Thursday will be tough for me to get to early (6 p.m.) because I will be coming from Concord. The agenda was mostly some housekeeping that is time sensitive, plus I wanted to talk about my meeting with Bob Marshall of LakeCAM and get the Board's thoughts.

I will provide brief details of my discussion with Bob Marshall regarding some possibilities for Freetown, so you can have some background before we deliberate.

Bob had gone before his Board of Selectman to ask that both Freetown channels be dropped immediately because of our contract with Middleboro. I heard from two selectmen that they would like us all to give the discussion another chance.

Since we need a full year's notice to Middleboro, should we decide to extricate us from that contract, Bob offered to allow us to keep the educational channel so that Freetown students, parents, and other interested individuals can view such things as concerts, games, graduation, and the like. He understands that our Middleboro commitment requires a full year's notice before it can be terminated, but agrees that we could take that time to talk about how we could move ahead with LakeCAM in the future. LakeCAM now offers a wide variety of shows that would interest Freetown viewers, but we will not be seeing those unless we move forward with a new agreement -- after a year with Middleboro.

The education channel will cost \$5,000.

Bob also told me that he could have matched Middleboro's offer (which I don't think was where the conversation was going early on, as I thought I heard a much higher number some time ago), and his offerings would have been far more extensive. Unfortunately, we did not engage in deep enough discussion with Bob earlier on to understand what the programming would be and what it would cost.

We have \$25k for cable, based on the 1% we get for it. That \$25K is supposed to be dedicated to local cable, I believe.

Please let me know if you have any questions. Bob's board is meeting this week, so I would like to be able to give him an idea of where we stand. It would certainly ease some ruffled feathers.

Thank you,

Jean