



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

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

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

November 22, 2024

OML 2024 – 221

VIA EMAIL

John Foskett, Esq.
Valerio Dominello & Hillman, LLC
One University Avenue, Suite 300B
Westwood, MA 02090
John.Foskett@VDHBoston.com

RE: Open Meeting Law Complaints

Dear Attorney Foskett:

On August 9, 2024, this office received a complaint from David Matson, alleging that the Andover School Committee (the “Committee”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Committee on June 10, 2024. You responded on behalf of the Committee by letter dated June 28, 2024. The complaint alleges that the Committee deliberated outside of a posted meeting.

Following our review, we find that the Committee violated the Open Meeting Law as alleged in the complaint. In reaching this determination, we reviewed the original complaint, the Committee’s response to the complaint, and the complainant’s request for further review. We also reviewed emails between members of the Committee, with attachments, meeting minutes of March 7, 2019, April 4, 2019 and April 11, 2019, filings in the matter of Fusion Learning, Inc. v. Andover School Committee, et al., U.S. Dist. Ct., No. 1:21-cv-11059-PBS (D. Mass.) (“the Litigation”), including the Motion for Leave to File Second Amended Complaint, the Second Amended Complaint, and Andover School Committee’s Amended Answer to Plaintiff’s Second Amended Complaint, and newspaper articles about the Litigation and its background.¹

¹ Jessica Valeriani, *School Committee rejects Fusion school proposal*, ANDOVER TOWNSMAN (April 18, 2019), https://www.andovertownsmen.com/news/school-committee-rejects-fusion-school-proposal/article_9f907d94-7ff1f-5a87-b134-5010f17bd7a0.html; Dave Copeland, *School Committee Broke Open Meeting Law: Lawsuit*, ANDOVER NEWS (Jan. 26, 2023), <https://andovermanews.com/school-committee-broke-open-meeting-law-lawsuit/>; Teddy Tauscher, *Fusion Academy Adds Two Complaints to Lawsuit Against Town*, ANDOVER TOWNSMAN (Feb. 7, 2023), https://www.andovertownsmen.com/news/fusion-academy-adds-two-complaints-to-lawsuit-against-town/article_88b51dcc-9e68-11ed-abdb-df4d3ff7f0e6.html; Teddy Tauscher, *Fusion Academy Lawsuit Documents: Schools Feared Cost of Approving Fusion Academy*, EAGLE TRIBUNE (May 11, 2024), https://www.eagletribune.com/news/local_news/documents-schools-feared-cost-of-approving-fusionacademy/article_662fd0f6-0c78-11ef-845f-d7ad263b739e.html.

FACTS

We find the facts as follows. The Committee is a five-member body. Therefore, three members constitute a quorum. Fusion Academy is a corporation that owns and operates private schools for grades six through twelve. Pursuant to Massachusetts statute, operation of a private school requires approval from the school committee in whose district the school would be located. On or about May 29, 2018, Fusion Academy submitted an application to the Committee to operate a private school in Andover (“the Application”). From July 2018 to March 2019, Andover Assistant Superintendent for Teaching and Learning Sandra Trach conducted a review and analysis of the Application. At a posted meeting held on March 7, 2019,² Assistant Superintendent Trach provided the Committee with information and documentation obtained in the review of the Application. She informed the Committee about the process to review the Application, including applicable criteria and laws.³

On April 1, the Committee posted notice of a meeting to be held on April 4. The notice included the Application as a topic of discussion. Also on April 1, School Superintendent Sheldon Berman issued a School Committee Update, which was sent to Committee members. The Update covered several topics, including the Application, noting that Assistant Superintendent Trach would be “recommending against approving Fusion Academy’s application. Her detailed report covers the most significant concerns. I support that recommendation.”

On April 2, at 10:37 p.m., Committee member Joel Blumstein sent an email to Committee member Tracey Spruce, attaching an outline of arguments against approving the Application (the “April 2 Outline”). In the email, Member Blumstein wrote: “The attached lays out how I think Sandy’s memo should be structured. I’m hoping that Sandy and Cat will fill in all the details. Let me know what you think, both in terms of format and other areas that the memo should focus on or points that should be made.” The April 2 Outline stated: “Of the 11 criteria established by DESE for approval of a private school, I have determined, based on my best professional judgment, that Fusion fails to satisfy the following criteria.” Four criteria were identified in the list that followed. Specific concerns were listed under each of the identified criteria, such as “focus on lack of nurse” and “Focus on substance of what is offered, rather than student learning time.” The April 2 Outline also stated: “In addition, despite numerous requests for information, I am unable to conclude that Fusion satisfies the following criteria due to the lack of adequate documentation:” and listed documents that Fusion purportedly failed to produce under several criteria in support of its application.

The next day, April 3, Member Spruce responded to Member Blumstein: “I agree with this structure and will [sic] all of the points you raised. I added some additional thoughts. Let me know if you want to discuss.” She attached a revised draft of the April 2 Outline, which included her tracked changes. With Member Spruce’s additions, the revised April 2 Outline was approximately twice the length of the original April 2 Outline Member Blumstein sent the day before. In the revised draft, Member Spruce noted her agreement with specific points made in

² Hereinafter, all dates in this letter refer to the year 2019 unless otherwise indicated.

³ Minutes of the March 7 meeting note: “It is important for the Committee to review Sandy’s memorandum for a full account of her determination and findings.” We have not been provided with or reviewed this memorandum.

the original April 2 Outline and also included suggestions for improvement (e.g. “Need more explanation of why Fusion’s curriculum isn’t thorough”). At 11:40 a.m., Member Blumstein forwarded the revised April 2 Outline to Assistant Superintendent Trach, noting that the revisions are “a lot” but that “it is worth the time to make your memo as strong as possible,” and that “[i]t will help persuade any doubting members of the SC of the soundness of your recommendation and will show the community the thoroughness of your analysis.” Member Blumstein then forwarded this email and the revised April 2 Outline to Committee Chair Shannon Scully, calling it an “FYI.” The Committee’s April 4 meeting took place, as scheduled. However, the discussion of the Application was continued to the Committee’s April 11 meeting. The Committee discussed the Application at length during the April 11 meeting. Following the discussion and upon motion by Member Blumstein, the Committee voted unanimously to decline the Application.⁴

DISCUSSION

I. The complaint was timely filed.

As an initial matter, we address the Committee’s assertion that the complaint was not timely filed. Complaints alleging violations of the Open Meeting Law must be filed with the public body within 30 days of the alleged violation. G.L. c. 30A, § 23(b). If the alleged violation could not reasonably have been known at the time it occurred, then the complaint must be filed within 30 days of the date it should reasonably have been discovered. 940 CMR 29.05(3). The complainant alleges that the Committee violated the Open Meeting Law when it deliberated outside a meeting over five years ago, in April 2019. The Committee maintains that the complainant reasonably could have discovered the alleged violation upon reading a newspaper article published in the Andover Townsman on February 7, 2023. We have stated that when an alleged violation occurs during an open meeting, the alleged violation is reasonably discoverable at the time it occurs. See OML Declination 10-17-24 (Warwick Selectboard); OML 2014-85; OML 2012-52.⁵ However, we have not declined to review a complaint on the grounds that a violation was reasonably discoverable by reading an article in a community newspaper.⁶ Therefore, we find that the complaint was timely filed.

⁴ Chair Scully and Members Blumstein and Spruce no longer sit on the Committee.

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

⁶ In support of its argument that the complaint is untimely, the Committee relies on a prior determination issued by our office, OML 2019-170. In that determination, we rejected a school committee’s argument that alleged Open Meeting Law violations relating to executive sessions were discoverable when the committee voted in open session to enter executive session. In finding that the complaints were timely filed, we noted that the Saugus Advocate published an article on June 14, 2019, relative to the executive sessions, and that the complaint was filed on June 19, 2019, “well within 30 days of the reasonable discovery of the potential violations.” We did not establish that an alleged Open Meeting Law violation is as a rule reasonably discoverable when it is the subject of reporting in a community newspaper.

II. The Committee engaged in deliberation via email in violation of the Open Meeting Law.

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. Sch. Comm. of Southbridge, 376 Mass. 70, 72 (1978). 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 Open Meeting Law defines “deliberation” broadly 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; ...” Id. For the purposes of the Open Meeting Law, a “quorum” is a simple majority of the members of a public body. Id. See also OML 2022-45. Additionally, a public body may not engage in a serial communication whereby a quorum communicates in a non-contemporaneous manner outside of a meeting on a particular subject matter within the public body’s jurisdiction. See OML 2024-189; OML 2015-3; 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).

There are several exceptions to the definition of deliberation, which are construed narrowly. See OML 2021-91; 2016-172; OML 2014-51. For example, “deliberation” does not include the distribution of a meeting agenda or scheduling information. G.L. c. 30A, § 18. Deliberation also does not include the “distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” Id. Distribution via email of a draft report, which contains the opinions of members of a public body, constitutes improper deliberation in violation of the Open Meeting Law. See OML 2018-135; OML 2013-29. A one-way communication from one public body member to a quorum on business within a body’s jurisdiction constitutes deliberation, even if no other member responds. See OML 2024-35; OML 2020-136; OML 2015-33.

On April 2 and April 3, Members Blumstein and Spruce engaged in extensive communication to refine arguments against the Application, clearly public business squarely within the Committee’s jurisdiction. This communication in isolation did not constitute deliberation, as it involved less than a quorum of the Committee. However, when Member Blumstein forwarded the revised April 2 Outline to Chair Scully, the Committee engaged in serial communication in violation of the Open Meeting Law. The revised April 2 Outline and the email that were forwarded to Chair Scully did not fall outside of the definition of “deliberation” as a document to be discussed at a meeting, as the opinions of the two members were clearly expressed in the email and attachment. Indeed, the April 2 Outline was crafted and revised by Members Blumstein and Spruce as a means to organize their arguments against the pending Application. Sharing those arguments with a quorum of a public body is precisely the kind of deliberation that the Open Meeting Law is meant to prevent. See OML 2013-194.

Having found that the Committee violated the Open Meeting Law, we next must determine whether this violation was, as the complainant urges, intentional. See G.L. c. 30A, § 23(c). An intentional violation is an “act or omission by a public body or a member thereof, in

knowing violation of [the Open Meeting Law].” 940 CMR 29.02. An intentional violation may be found where the public body acted with deliberate ignorance of the law’s requirement or has previously been advised that certain conduct violates the Open Meeting Law. *Id.* We acknowledge that at least two members of the Committee are attorneys, as noted by the complainant. However, we do not find that this fact alone requires a finding of intent. Moreover, we have not previously warned the Committee about deliberation outside a posted meeting. Therefore, we find that the violation was not intentional.

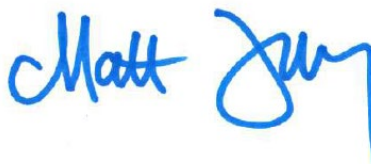
Finally, it bears noting explicitly that the Division of Open Government is responsible for enforcing the Open Meeting Law. Our investigation and the determination here are limited to the allegations raised in the Open Meeting Law complaint filed by David Matson. Our finding of a violation as alleged by Mr. Matson does not preclude the possibility that the Committee violated the Open Meeting Law in other ways which were not alleged in the Open Meeting Law complaint. Moreover, we take no position regarding the applicability of our analysis or findings, if any, to the Litigation.

CONCLUSION

For the reasons stated above, we find that the Committee violated the Open Meeting Law by communicating via email about Fusion Academy’s application to operate a private school in Andover. We order the Committee to release **within 30 days of the date of this letter** the email with attachment that Member Blumstein sent to Chair Scully on April 3, 2019, at or about 3:41 p.m. We further order immediate and future compliance with the law’s requirements and we caution that similar future violations 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 that may be pending with our office or the Committee. Please feel free to contact the Division at (617) 963-2540 if you have any questions.

Sincerely,



Matthew Lindberg
Assistant Attorney General
Division of Open Government

cc: David Matson (via email: david.p.matson@gmail.com)
Andover Superintendent of Schools (via email: magda.parvey@andoverma.us)
Chair, Andover School Committee (via email: lauren.conoscenti@andoverma.us)

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.