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OML 2024 – 197

VIA EMAIL

Corey F. Williams, Esq.
City Solicitor
City of Lowell – Law Department
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Lowell, MA 01852-5909

cwilliams@lowellma.gov

RE: Open Meeting Law Complaints

Dear Solicitor Williams:

This office received a complaint from Kerry Jenness on August 14, 2024, alleging that the Lowell City Council (the “Council”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Council on July 10 and you responded on behalf of the Council by letter dated July 30.¹ The complaint alleges that the notice of the Council’s July 9 meeting was not sufficiently specific.

Following our review, we find that the Council violated the Open Meeting Law as alleged in the complaint. In reaching this determination, we reviewed the original complaint, the Council’s response to the complaint, and the complainant’s request for further review. In addition, we viewed a recording of the July 9 meeting² and reviewed the notice and minutes of the meetings of July 9 and July 23, and the minutes of the meeting of June 25. We reviewed emails from the Office of State Senator Ed Kennedy and Senate Counsel, concerning the home rule petition referenced in the complaint. We reviewed articles posted at Inside Lowell, relative to the subject home rule petition and the resignation of John Leahy from the Council.³ We reviewed the legislative history of Senate bill No. 2762, “An Act Relative to Vacancies on the City of Lowell City Council and School Committee.”⁴ Finally, I communicated with you via email.

¹ Unless otherwise indicated, all dates in this letter refer to the year 2024.

² The recording can be accessed at <https://www.youtube.com/watch?v=aGMZM3tFSHs>.

³ “Breaking News: Leahy Stepping Down from City Council,” July 2, <https://insidelowell.com/breaking-news-leahy-stepping-down-from-city-council/>; “Home Rule Petition History & Timeline,” July 11, <https://insidelowell.com/home-rule-petition-history-timeline/>.

⁴ The history may be accessed at <https://malegislature.gov/Bills/193/S2762>.

FACTS

We find the facts as follows.

Home Rule Petition

On April 23, the Council voted in favor of a home rule petition to govern how a vacancy is to be filled when a member resigns from the Council or School Committee prior to expiration of their term (“the Home Rule Petition”). The Home Rule Petition would permit a vacancy to be filled by special election, rather than by appointment. It was filed by State Senator Ed Kennedy on May 2, and was reported out of committee by the Joint Committee on Election Laws with a favorable recommendation on May 30.

Senate Counsel began its review of the Home Rule Petition in early June. On June 24, the Legislative Director of the office of Senator Kennedy, James Ostis, sent an email to Mayor Daniel Rourke and City Manager Thomas Golden Jr., forwarding “a few minor changes/fixes” proposed by Senate Counsel. Mr. Ostis indicated in his email that if the Council were amenable to Senate Counsel’s revisions, the Home Rule Petition could be amended on the Senate floor and advanced to the House. On July 8, Mr. Ostis forwarded to Mayor Rourke and members of the City Council an email from Senate Counsel explaining his reasoning behind the proposed changes. At its meeting on July 23, the Council authorized the City Manager to act on the Home Rule Petition, including execution of required documentation. An amended draft of the Home Rule Petition was enacted by the House and Senate on July 24 and was signed by Governor Maura Healey on July 25. Prior to passage of the Home Rule Petition, the filling of a vacancy was governed by statute. The statute provided that if a member who had run unopposed in the prior election vacated their seat, the Council would have 30 days to fill the vacancy by appointment. The statute did not allow for filling such a vacancy through special election.

Council Deliberations

The Council met on June 25. At the June 25 meeting, Mayor Rourke acknowledged receipt of Mr. Ostis’s June 24 email, and indicated that the proposed changes had been forwarded to the City Solicitor. Approximately one week later, on or about July 2, John Leahy announced that he would be resigning his seat on the Council effective July 24, to take a position with the Lowell Public Schools.⁵ At the time, Councilor Leahy represented District 3, also referenced as Belvedere. The Council next met on July 9. Notice of the July 9 meeting was posted electronically on July 5, at 11:00 a.m. Notice of the July 9 meeting did not list as topics to be discussed at the meeting the Home Rule Petition, communication with Senator Kennedy’s office, Councilor Leahy’s anticipated resignation, or how to fill a vacancy on the Council.

The Council’s usual practice relative to preparation of meeting notices, which was followed in relation to notice of the July 9 meeting, is complex, involving several offices and individuals. City departments, including the Law Department, the City Clerk’s office, and the City Manager’s office all play roles in creating the notice. The City Manager includes any “Communications from the City Manager” and the Mayor submits any “Mayor’s Business” to

⁵ As noted below, Mr. Leahy later moved his last day to July 23.

the City Clerk for inclusion in the notice. As the Chair of the Council, the Mayor enforces the agenda, in collaboration with the City Clerk and the City Solicitor.

The July 9 meeting took place as scheduled. Approximately 90 minutes into the meeting, Councilor Erik Gitschier requested and received permission to “suspend the rules” to discuss the July 8 email from Senator Kennedy’s office regarding the Home Rule Petition.⁶ Councilor Gitschier summarized Senate Counsel’s proposed revisions, as set out in the email that was forwarded on July 8. Councilor Gitschier elaborated that he had spoken to the City Manager the week prior to ask if the Home Rule Petition could be placed on the Council agenda so that the changes could be voted on and sent back to the Senate. Councilor Gitschier expressed his preference that any Council vacancy be filled by special election, not through appointment by the Council.

City Solicitor Corey Williams, who was in attendance at the July 9 meeting, was asked for his opinion about the proposed revisions to the Home Rule Petition.⁷ He noted that the July 8 email provided important explanations of the changes proposed in the June 24 email from Mr. Ostis. Solicitor Williams had reviewed the changes the week before and seemingly had spoken with the City Manager about them. Because the amendments were minor, and did not impact the ultimate objective of the Home Rule Petition, they could be approved by the City Manager, according to Solicitor Williams.

Councilor Rita Mercier agreed that ideally a special election should be conducted to allow the residents of Belvedere to choose a person to fill the anticipated vacancy.⁸ However, because the Home Rule Petition had not yet been finalized and signed into law, there was no mechanism in place to allow for a special election. Councilor Mercier moved to have interested residents submit their names to be considered for appointment to the Belvedere District seat. Pursuant to Councilor Mercier’s motion, only persons with at least one year of residency in Belvedere District 3 could submit their names for consideration, and the submissions would be due to the Clerk’s office prior to the Council’s next meeting on July 23. Spirited discussion ensued, with councilors largely agreeing that the residents of Belvedere should have a say in filling the anticipated vacancy but disagreeing whether the Council should appoint a replacement (as contemplated by Councilor Mercier’s motion) or wait for final approval of the Home Rule Petition to allow for a special election. Councilor Wayne Jenness asserted that the Council would need to follow the rules “on the books” when filling the “upcoming vacancy, which doesn’t even exist yet.” He distinguished the impending vacancy, which likely would have to be filled by appointment, from future vacancies, which would be filled by special election pursuant to the Home Rule Petition.

⁶ See Lowell City Council Rule 32, <https://www.lowellma.gov/DocumentCenter/View/20532/LOWELL-CITY-COUNCIL-RULES#:~:text=RULE%2032%20%2D%20SUSPENSION%20OF%20RULES,objected%20to%20by%20two%20Councilors>.

⁷ For the sake of clarity, you are referenced in the third person.

⁸ Like other councilors who spoke on the topic, Councilor Mercier repeatedly referenced Councilor Leahy’s district but did not identify Councilor Leahy by name. In his opening remarks on the subject of the Home Rule Petition, Councilor Gitschier did identify Councilor Leahy by name.

Councilor Gitschier expressed concern that a vote on Councilor Mercier's motion might violate the Open Meeting Law. Two councilors responded that they had suspended the rules. Solicitor Williams opined that a vote on Ms. Mercier's motion would not violate the Open Meeting Law. By roll call vote, Councilor Mercier's motion passed, with seven of the eleven councilors voting in favor. Following the vote, Mayor Rourke invited Councilor Leahy to address the chamber. Councilor Leahy acknowledged that "it's been out there" that he accepted a position with the City. He announced his resignation from the Council and School Committee, effective July 23.

On July 19, the Council posted notice of a meeting to be held on July 23. The notice included the following under the heading of "Mayor's Business":

Communication - Submissions/Selection District 3 City Council Vacancy:

- 1) Reverend Karina Fontanez;
- 2) Corey Belanger;
- 3) Erin Gendron;
- 4) Belinda Juran;
- 5) Ronald DiBerto;
- 6) Adam Mitchell;
- 7) Daniel Finn;
- 8) Rithy Uong; and
- 9) Martin Burke

At the July 23 meeting, the Council appointed Corey Belanger to fill the vacancy created by the resignation of Councilor Leahy. During the same meeting, Councilor Jenness moved for reconsideration of Councilor Mercier's July 9 motion, which had established the process by which the Council invited names of candidates to fill the District 3 vacancy. The motion to reconsider was defeated by roll call vote.

DISCUSSION

The Open Meeting Law was enacted "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 public body must post notice of every meeting at least 48 hours in advance, not including Saturdays, Sundays, and legal holidays. G.L. c. 30A, § 20(b). Notices must include "a listing of topics that the chair reasonably anticipates will be discussed at the meeting." Id. The list of topics must have sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting. 940 CMR 29.03(l)(b).

We generally consider a topic to be sufficiently specific when a reasonable member of the public could read the topic and understand the anticipated nature of the public body's discussion. See OML 2023-3; OML 2019-134; OML 2015- 35.⁹ The Open Meeting Law requires that the notice describe topics with sufficient specificity so that the public can make an

⁹ Open Meeting Law determinations may be found at the Attorney General's website, www.mass.gov/ago/openmeeting

informed decision whether to attend the meeting to observe the discussion regarding a topic of interest. See OML 2023-86; OML 2019-95; OML 2018-22.

A public body may discuss a truly unanticipated topic not included on the meeting notice, although the Attorney General strongly recommends that public bodies, as a matter of best practice, table discussion of unanticipated topics that might be of significant interest to the public so that the topics can be included on the notice for a future meeting. See OML 2019-131; OML 2018-119; OML 2013-87. When reviewing whether a topic was anticipated, we look to whether it was reasonably anticipated for discussion at the particular meeting at issue. See OML 2024-6; OML 2023-101; OML 2022-203. The Open Meeting Law does not require that the chair of a public body guess what will occur at a meeting or anticipate the course of deliberations. See OML 2021-39; OML 2020-55; OML 2018-134. Even where the chair considers that a topic is of interest to the public body and may be discussed at some time, it need not be included on the notice if the chair does not anticipate that it will be discussed at the meeting for which the notice is posted. See OML 2024-180.

As an initial matter, we address the suspension of the rules at the July 9 meeting. A public body may not suspend the application of the Open Meeting Law to its proceedings. Any suspension of the rules would concern rules particular to that body, and would not affect the requirements of the Open Meeting Law.¹⁰ Therefore, to the extent that some councilors at the July 9 meeting believed that suspension of the rules allowed for discussion of anticipated topics that were not listed on the notice, that belief was mistaken. When the Council voted in favor of “suspending the rules,” it did not, and could not, suspend the application of the Open Meeting Law.

Based upon our investigation, we find that the Mayor, who is Chair of the Council, and/or agents to whom he delegated preparation of the meeting notice, reasonably anticipated that the Council would discuss the Home Rule Petition and the vacancy of the District 3 seat at the Council’s July 9 meeting. Amendments of the Home Rule Petition had been the topic of the prior meeting on June 24. Councilor Gitschier asked the City Manager the week before the July 9 meeting (necessarily 48 hours prior to the meeting) to place the Home Rule Petition on the notice for the July 9 meeting, so that the changes could be voted on and sent back to the Senate. Solicitor Williams also had spoken to the City Manager about the amendments to the Home Rule Petition recently proposed by Senate Counsel. Although the Mayor serves as the Council Chair, he is not exclusively responsible for preparation of the notice. Some responsibility for the notice is delegated to others, including to the City Manager. As the City Manager plays a direct role in the creation of the notice, we may look to what topics he reasonably anticipated to be discussed at the July 9 meeting. The City Manager was asked explicitly to include the Home Rule Petition as a topic on the July 9 meeting and declined or failed to do so. Moreover, the status of the Home Rule Petition was all but certain to be discussed at the July 9 meeting due to the

¹⁰ The Division of Open Government is tasked with enforcing the Open Meeting Law. Therefore, we do not investigate whether it was proper for the Council to suspend its own rules. See OML 2022-135 (“We do not review this broader question of whether the Council’s practice of suspending its own docket rules, in general, violates the Open Meeting Law. Rather, we review the allegation raised in the complaint before us, which is that the Council violated the Open Meeting Law when it discussed a topic that was not included on the notice for the June 29 meeting.”)

outstanding request for approval of Senate Counsel's amendments, as well as the anticipated resignation of Councilor Leahy. Although Councilor Leahy formally announced his resignation *after* the extended discussion of Councilor Mercier's motion, the impending vacancy clearly was at top of mind for the councilors even before his announcement as they repeatedly referenced his district in the context of how to fill vacancies. Moreover, his impending resignation had been reported in the media a week prior to the July 9 meeting. See OML 2013-147 (finding that town administrator's resignation was a reasonably anticipated topic of discussion after selectboard chair received a phone call from reporter informing him that town administrator was still employed as town administrator in another town). Cf. OML 2017-37 (finding that resignation of member of board of selectmen was not reasonably anticipated where chair first learned of resignation on day of meeting).

In its response, the Council downplays the vote on Councilor Mercier's July 9 motion, noting that the motion served only to assist the Council in making the appointment. Pursuant to the statute governing the filling of vacancies, each councilor was free to advocate for whomever they wished to take Councilor Leahy's seat. We do not disagree that the July 9 vote simply provided nonbinding procedural guidance for the July 23 appointment. However, it is not the vote on Councilor Mercier's motion, but the extended deliberation surrounding it and the Home Rule Petition, that warranted mention in the notice of the July 9 meeting.¹¹ The Council's power to fill the seat to be vacated by member Leahy does not excuse it from compliance with the Open Meeting Law's notice requirements. The Council violated the Open Meeting Law on July 9 when it deliberated about anticipated topics that were not included on the notice for that meeting.

In her complaint, Ms. Jenness asks that we rescind the July 9 vote in favor of Councilor Mercier's motion. We decline to do so. On July 23, the Council selected a District 3 resident, Corey Belanger, to fill the seat vacated by the resignation of Councilor Leahy. Discussion of that selection was properly included in the notice of the July 23 meeting. The appointee appears to be one of nine residents who submitted their names in response to the call for candidates contemplated by Councilor Mercier's motion. However, the procedure that was implemented to facilitate the selection was not required for the Council to appoint a new member. Rescission of the July 9 vote would not necessitate reconsideration of the July 23 appointment.

CONCLUSION

For the reasons stated above, we find that the Council violated the Open Meeting Law by posting an insufficiently specific notice for its July 9 meeting. We 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.

¹¹ Indeed, the Open Meeting Law does not require that the notice of a meeting separately indicate the possibility of a vote, as it is reasonably foreseeable that a public body may hold a vote following discussion of a topic listed on a meeting notice. See OML 2024-156; OML 2019-36; OML 2012-75.

We now consider the complaint addressed by this determination to be resolved. This determination does not address any other complaints that may be pending with our office or the Council. 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: Kerry Jenness (via email: [REDACTED])
Mayor Daniel Rourke (via email: mayor@lowellma.gov)
City Manager Thomas Golden, Jr. (via email: tomgolden@lowellma.gov)
Lowell City Clerk (via email: mgeary@lowellma.gov)

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.