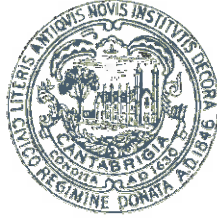


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November 6, 2015

Amy Nable, Assistant Attorney General
Director, Division of Open Government
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

**Re: Action taken by Cambridge Board of Zoning Appeals on Open Meeting
Law complaint of John A. Hawkinson dated October 26, 2015**

Dear Ms. Nable:

On behalf of the Cambridge Board of Zoning Appeals (the "BZA"), I am writing to advise you pursuant to 940 CMR 29.05(5) of the action taken by the BZA on the Open Meeting Law complaint of John A. Hawkinson. A copy of Mr. Hawkinson's complaint dated October 26, 2015 (the "Complaint") is attached as Exhibit A. Mr. Hawkinson primarily alleges that the BZA violated the Open Meeting Law when it delayed the release of the minutes of its May 28, 2015 executive session.¹ The BZA denies that it violated the Open Meeting Law.

Mr. Hawkinson filed an "Addendum" to his complaint on November 3, 2015, which alleges various insufficiencies with the May 28, 2015 executive session minutes; the BZA asserts that those minutes comply with the Open Meeting Law.

This response addresses both the October 26, 2015 Open Meeting Law complaint and the November 3, 2015 Addendum.

¹ In the letter accompanying Mr. Hawkinson's Open Meeting Law complaint, he outlines several alleged "ancillary violations" of the Open Meeting Law that he wishes to "highlight."

FACTS

On May 28, 2015, the BZA met in executive session with City attorneys to discuss pending litigation in Ling Yi Liu and 42 BSR LLC v. Board of Zoning Appeals, Land Court Docket No. 13-479551 (the “Liu case”). On June 11, 2015, Mr. Hawkinson requested a copy of the executive session minutes under the Public Records Law. The City responded on June 25, 2015, informing him that “because the litigation remains ongoing, the disclosure of the executive session minutes would defeat the purpose for having gone into executive session” and declined to produce the minutes at that time. On September 16, 2015, the parties filed a stipulation of dismissal in the appeal of the Liu case, and on September 18, 2015, the Appeals Court dismissed the case.

On September 21, 2015, Mr. Hawkinson renewed his request for the minutes of the May 28 executive session, noting that the litigation had apparently been concluded. On October 1, 2015, the City informed him that the minutes of the May 28 executive session had not been finalized, reviewed or adopted by the BZA. On Thursday, October 22, 2015, the BZA met in executive session, at which time it reviewed and adopted the minutes of the May 28 executive session, determined that the lawful executive session purpose for the May 28 executive session had concluded, and referred the minutes of the May 28 executive session to the City Solicitor for review and disclosure. On Monday, October 26, 2015, the City informed Mr. Hawkinson that the redacted minutes were available for his review in the BZA file for the case, and on Wednesday, October 28, 2015, the City provided those redacted minutes to Mr. Hawkinson in electronic format. The City also informed Mr. Hawkinson that the redacted material was protected by the attorney-client privilege.

DISCUSSION

1. Contrary to Mr. Hawkinson’s assertion, the City complied with G.L. ch. 30A, §22.

Mr. Hawkinson’s central claim is that the BZA did not perform the required review of its minutes of the May 28, 2015 executive session within the timeframe specified by the Open Meeting Law. However, at the time of Mr. Hawkinson’s request, the litigation that was the subject of the executive session was still ongoing, and the minutes from the May 28, 2015 executive session had not been finalized or approved by the BZA, and therefore, the review required by the Open Meeting Law was not yet ripe.

The Open Meeting Law specifies that public bodies “shall, at reasonable intervals, review the minutes of executive sessions to determine if the provisions of this subsection warrant continued non-disclosure.” M.G.L. ch. 30A, § 22 (g)(1). Moreover:

“[u]pon request by any person to inspect or copy the minutes of an executive session or any portion thereof, the body shall respond to the request within 10 days following receipt and shall release any such minutes not covered by an exemption...provided, however, that if the body has not performed a review pursuant to paragraph (1), the public body shall perform the review and release the non-exempt minutes, or any

portion thereof, not later than the body's next meeting or 30 days, whichever first occurs..."

M.G.L. ch. 30A, § 22 (g)(2)

Those provisions, however, presuppose that the executive session minutes exist and have been otherwise adopted by the public body. In this case, there were no adopted minutes of the May 28, 2015 executive session until the BZA's vote at its October 22, 2015 meeting.² As noted above, the Liu litigation to which the minutes refer was pending in court until late September, 2015. The BZA performed its required § 22 review at the October 22 meeting, the same meeting at which it adopted the minutes; the minutes were referred to the City Solicitor's office for privilege review, and the minutes were thereafter released to the public. Because of the BZA having performed its review at the same meeting in which it adopted the minutes, and having disclosed the non-privileged portions of the minutes thereafter, there was no violation of the Open Meeting Law.

2. The "Ancillary Violations" outlined by Mr. Hawkinson are either *de minimis* or not violations at all.

a. The BZA posts all necessary meeting agenda information.

Though Mr. Hawkinson quibbles with the way in which the agenda was posted, he alleges no actual violation of the Open Meeting Law. The BZA publicly posts notices of its meetings that contain the date, time, and place of the meetings as well as a list of the topics that the chair reasonably anticipates will be discussed at the meeting, in compliance with M.G.L. ch. 30A, §20(b). Although the agenda is, as Mr. Hawkinson notes, posted in two parts – the continued case agenda and non-continued case agenda – both parts are available online and in the physical posting. The posted BZA notice included the executive session matters to be discussed at the October 22 meeting.

b. The roll call vote to enter into executive session on May 28 was recorded.

Mr. Hawkinson notes that the stenographer at the May 28, 2015 meeting did not set up her equipment prior to the executive session, and that the transcript states that no minutes were taken of that executive session. As is apparent from the minutes of the May 28, 2015 executive session that have now been released, although the stenographer did not transcribe the executive session, minutes were taken by City staff, and those minutes record the vote to enter into the executive session and to close the executive session.

² To the extent that Mr. Hawkinson argues that time lapse between the May 28 meeting and the date on which the minutes were finalized and adopted is somehow in violation of the Open Meeting Law, there is no provision of the law that sets forth any particular deadline by which executive session minutes must be prepared and adopted.

c. The BZA's entry into October 22, 2015 executive session was valid.

Mr. Hawkinson expresses skepticism that the threat of an Open Meeting Law complaint was a sufficient basis to enter into an executive session to discuss the minutes of the May 28, 2015 executive session. As an initial matter, the BZA needed to determine whether the lawful purpose for which the May 28, 2015 executive session still existed such that continued non-disclosure of the minutes was warranted; that review could not be done in an open meeting without negating the very purpose of the discussion. The BZA acted appropriately when it entered into an executive session for the purpose of adopting and reviewing prior executive session minutes. OML 2015-88 (“[t]he Open Meeting Law permits a public body to convene in executive session in order to review past executive session minutes and deliberate on their potential release.”); OML 2013-99.

Moreover, your office has previously determined in other contexts that threat of administrative agency appeals constitutes a threat of litigation justifying an executive session under Purpose 3. OML 2015-13; OML 2012-81.

d. There is no evidence to suggest that the BZA fails to perform a periodic review of its executive session minutes.

Mr. Hawkinson alleges that the BZA fails to perform a periodic review of its executive session minutes as required by the Open Meeting Law, but offers no facts in support of that allegation, independent of his complaint regarding the May 28, 2015 executive session minutes. As described in greater detail above, the BZA promptly reviewed those minutes for disclosure. Mr. Hawkinson provides no other basis for his allegation that the BZA fails to perform a periodic review of its executive session minutes.

e. The minor inaccuracy in the October 22 agenda will be corrected in the minutes.

The BZA acknowledges that the docket number for the second item of the October 22, 2015 executive session agenda was inadvertently missing one digit (the docket number was printed as “4 MISC 484762-RBF” instead of “14 MISC 484762-RBF”). The minutes of the executive session will accurately reflect the docket number of the case that was discussed in the executive session.

f. The minor delay in the BZA's June response did not prejudice Mr. Hawkinson.

Mr. Hawkinson's initial request for the minutes of the May 28, 2015 executive session was made on June 11, 2015; the BZA responded on June 25, 2015 informing Mr. Hawkinson that “[b]ecause the litigation remains ongoing, the disclosure of the executive session minutes would defeat the purpose for having gone into executive session. M.G.L. c. 30A, § 22(f). Moreover, the minutes contain material protected by the attorney-client privilege.” Although the BZA responded in fourteen days rather than the ten days required by M.G.L. ch. 30A, §22(g)(2), the four day delay did not result in any prejudice to Mr. Hawkinson, because the minutes were not appropriate for disclosure at that time.

3. Despite the allegations in Mr. Hawkinson's November 3, 2015 Addendum, the May 28, 2015 Executive Session minutes comply with the Open Meeting Law.

In his November 3, 2015 Addendum, Mr. Hawkinson raises a list of alleged insufficiencies with the minutes of the May 28, 2015 executive session minutes. However, none of the alleged insufficiencies constitute violations of the Open Meeting Law. The minutes of the May 28, 2015 executive session accurately report who was present and the votes that were taken. The content of the discussion between the Board members and the City's attorneys who were present was redacted because it is protected by the attorney-client privilege; Mr. Hawkinson offers no substance for his claim that "it is hard to imagine" that this portion of the meeting was subject to attorney-client privilege, or his claim that the minutes do not contain a summary of discussion of each subject, or that a privilege log is required.

4. The remedy requested by Mr. Hawkinson is moot and unnecessary.

The only specific relief requested by Mr. Hawkinson, that the May 28 executive session minutes be disclosed, is moot; the BZA disclosed those minutes on October 26, 2015. To the extent he asks the BZA to "address the violations" he outlined, and to "correct its regular practice to conform to the Open Meeting Law going forward," those requests are neither appropriate or necessary because the alleged violations are either not violations, or were *de minimis* errors, not systemic problems, as described above.

As required by 940 CMR 29.05(5), the Board of Zoning Appeals reviewed the allegations of this Open Meeting Law complaint within the time permitted by the Open Meeting Law. At its meeting of November 5, 2015, the BZA voted to adopt this letter as its response and resolution. Mr. Hawkinson is being informed of the BZA's action by copy of this letter.

Very truly yours,

Nancy E. Glowa
City Solicitor

cc: John A. Hawkinson
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Cambridge, MA 02139-7103