



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

February 28, 2022
SPR22/0363

Melissa Noe
Town Administrator
Town of Monterey
435 Main Road
P.O. Box 308
Monterey, MA 01245

Dear Ms. Noe:

I have received the petition of Jon Sylbert appealing the response of the Town of Monterey (Town) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On December 13, 2021, Mr. Sylbert requested, “[a]ll communications—including texts and emails—between [named individuals] ... since October 31, 2021.”

Prior appeals

The requested records were the subject of previous appeals. See SPR21/3364 Determination of the Supervisor (January 11, 2022). In my January 11th determination, I learned that the Town responded to Mr. Sylbert’s fee estimate appeal with a response dated January 3, 2022. See SPR22/0091 Determination of the Supervisor (January 28, 2022). The Town further responded on February 14, 2022. Unsatisfied with the response, Mr. Sylbert petitioned this office and this appeal, SPR22/0363, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). “Public records” is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency or municipality of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also Dist. Att’y for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of

establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

The Town's February 14th Response

In its February 14, 2022 response, the Town advised, "Mr. Sylbert has not reasonably described a public records request."

Current appeal

In his appeal, Mr. Sylbert asserts, "I write to appeal the February 14, 2022 response of the Records Access Officer (RAO) to my appeal of January 13, 2022, SPR22/0091 for the following reasons: The RAO's February 14, 2022 response to my appeal of January 13, 2022 begins as follows: 'The reason for the appeal is unclear as per 950 C.M.R 32.08(1). Mr. Sylbert has not reasonably described a public records request.'" Mr. Sylbert further states, "... the nature of my 'objections' in my appeal of January 13, 2022 are perfectly clear."

Additionally, Mr. Sylbert inquires, "... why did Ms. Miller send her email to your office—who prompted her?—and why did Ms. Noe falsely accuse me of 'improper use of [my] title as a finance committee member when sending these requests?' Second, Ms. Noe's claims that 'it has always been Monterey's policy to charge fees for public records requests that were not a simple 5-10 minute request.' This is false." Mr. Sylbert concludes by stating, "I maintain that Ms. Noe has not applied the discretionary option to charge a fee consistently, and, in fact, has not applied it when it suited her."

Conclusion

In compliance with the Public Records Law, the Supervisor of Records may only issue determinations where a violation of G. L. c. 66, § 10 has occurred. G. L. c. 66, § 10A(a). Given that no violation of G. L. c. 66, § 10 has been asserted by Mr. Sylbert in his appeal petition, I am unable to issue a determination at this time. If Mr. Sylbert is not satisfied with the resolution of this administrative appeal, please be advised that this office shares jurisdiction with the Superior Court of the Commonwealth. See G. L. c. 66, § 10A(c) (pursuing administrative appeal does not limit availability of applicable judicial remedies).

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Jon Sylbert



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

March 3, 2022
SPR21/3294

Melissa Noe
Town Administrator
Town of Monterey
435 Main Road
Monterey, MA 01245

Dear Ms. Noe:

I have received the petition of Jon Sylbert appealing the response of the Town of Monterey (Town) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On December 16, 2021, Mr. Sylbert requested, "...the tape recording of the 12/14/21 Finance Committee meeting."

Prior Appeal

This request was the subject of a previous appeal. See SPR21/3294 Determination of the Supervisor of Records (January 3, 2022). The Town responded on December 20, 2021. In my January 3rd determination, I found that no recording occurred on December 14th, consequently no responsive records existed. At the request of Mr. Sylbert, a reconsideration was opened on February 24, 2022.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency or municipality of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv) (written response must "identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based..."); 950 C.M.R. 32.06(3); see

Melissa Noe
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SPR21/3294

also Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption).

The Town's December 20th response

In its December 20th response, the Town stated, “[t]he meeting on 12/14 was cancelled due to lack of a quorum and therefore was not recorded as the meeting did not occur.”

Current Appeal

In his appeal, Mr. Sylbert asserts, “[t]he meeting was opened and recorded; therefore, it did occur. A ‘lack of a quorum’ does not mean the meeting wasn’t recorded or that it did not occur. The meeting was ended, not ‘canceled,’ during the meeting time, by the Chair of the committee, and this was recorded. The meeting wasn’t ‘canceled’ until 7:34am the next day, 12/15/21, as is shown on the Monterey town website. ...”

Based on a conversation between a Public Records Division staff attorney and a Town representative, it is my understanding that no recording was created on December 14th. Consequently, no responsive records exist.

Conclusion

Accordingly, I will now consider this administrative appeal closed. If Mr. Sylbert is not satisfied with the resolution of this administrative appeal, he is advised that this office shares jurisdiction with the Superior Court of the Commonwealth. See G.L. c. 66 §10(A)(c).

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Jon Sylbert



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

March 4, 2022
SPR22/0449

Melisa Noe
Town Administrator
Town of Monterey
435 Main Road
P.O. Box 308
Monterey, MA 01245

Dear Ms. Noe:

I have received the petition of Jonathan Sylbert appealing the response of the Town of Monterey (Town) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On January 31, 2022, Mr. Sylbert requested “the minutes of the Select Board executive session of October 4, 2021, whether in draft or approved form.” The Town responded on February 15, 2022, stating that it was withholding responsive records. Unsatisfied with the Town’s response, Mr. Sylbert appealed, and this case was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). “Public records” is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency or municipality of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also *Dist. Att’y for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response, a written good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records

Melisa Noe
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March 4, 2022

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custodian must provide the responsive records.

Current Appeal

In his appeal petition, Mr. Sylbert states that “the October 4, 2021 Select Board executive session was entered under: ‘G.L. c. 30A, sec. 21(a)(1) – To hear complaints or charges brought against public officials.’” He contends that an individual “‘defeated the purpose of the executive session’ . . . and those portions pertaining to [the individual] are no longer entitled to the exemption afforded under G.L. c. 30A, sec. 21(a)(1).”

The Town’s February 15th Response

In its February 15, 2022 response, the states that “the minutes of the October 4th executive session have not been resolved and are part of an ongoing investigation and therefore are not available to the public in any form.”

Open Meeting Law

The Town’s response and Mr. Sylbert’s appeal raise issues potentially related to the Open Meeting Law. See G. L. c. 30A, § 22(f). Given that an interpretation of the Open Meeting Law falls within the authority of the Attorney General’s Office (AGO) and not this office, I am unable to address those issues in this determination. See G. L. c. 30A, § 23. Consequently, I encourage the parties to contact the AGO for a determination on the status of the executive session minutes.

Conclusion

Accordingly, I will consider this administrative appeal closed.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Jonathan Sylbert



OPEN MEETING LAW COMPLAINT FORM

Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Please note that all fields are required unless otherwise noted.

Your Contact Information:

First Name: John Last Name: Weingold

Address: PO Box [REDACTED]

City: Monterey State: MA Zip Code: 01245

Phone Number: [REDACTED] Ext. _____

Email: [REDACTED]@gmail.com

Organization or Media Affiliation (if any): _____

Are you filing the complaint in your capacity as an individual, representative of an organization, or media?

(For statistical purposes only)

Individual Organization Media

Public Body that is the subject of this complaint:

City/Town County Regional/District State

Name of Public Body (including city/town, county or region, if applicable): Monterey Selectboard

Specific person(s), if any, you allege committed the violation: Steve Weisz & Justin Makuc

Date of alleged violation: 2/16/22

Description of alleged violation:

Describe the alleged violation that this complaint is about. If you believe the alleged violation was intentional, please say so and include the reasons supporting your belief.

Note: This text field has a maximum of 3000 characters.

The 2/22/22 executive session SB Agenda public notice did not have a precise statement of the actual reasons for the 2/2/22 executive session (ES). Secondly the open session announcement of the 2/2/22 Executive Session failed to have a precise statement for the specific reasons for convening an executive session under MGL Chapter 30A Section 21 (1). The announcement of the specific reasons for ES is not recorded or mentioned in the approved open session SB minutes of 2/2/22. More disturbing is the violation of C. 30A, Section 21(1), because the ES was actually held to talk with a hired investigator for a HR investigation status update and questions about investigator's billing invoice. The ES had nothing to do with any exemptions for a ES under c. 30A, sec. 21(1) versus an open session. Lastly, the 2/2/22 ES minutes are insufficiently detailed, the minutes are not in substantial compliance with sufficient detail, the minutes do not contain a summary of all discussions on each topic/subject discussed. The 2/2/22 ES minutes do not have enough detail or accuracy so that a member of the public (or a SB member (me) who was on vacation) who was not in attendance, could read the minutes and have a clear understanding of what occurred. 2012-106, 2019-145. I only have a clear understanding of what happened because I listened to the 2/2/22 audio recording and compared it to the approved minutes. The approved 2/2/22 ES minutes are missing numerous summaries of numerous discussions, (i.e. Justin Makuc, SB; Shawn Tryon, and Attorney Greene; numerous discussed topics are missing or falsely recorded and stated incorrectly (i.e. Coburns contacting investigator via emails, Mr. Weisz trying to manipulate the investigator, questioning investigator's judgment, improper questions from Mr. Weisz, and investigator's telling Mr. Weisz he could take over the investigation, the reasons behind the Sexual harassment no further investigation is not accurate etc.). The 2/2/22 SB ES minutes do not accurately reflect the discussions that took place at the meeting and do not reflect what actually was discussed at the meeting as evidenced by the recording of the 2/2/22 meeting. The SB did not approve 2/2/22 ES accurate minutes. The Chair likely approval of inaccurate minutes was intentional, Mr. Makuc's approval was likely unintentional.

Attached is the recording of the 2.2.22 minutes.

What action do you want the public body to take in response to your complaint?

Note: This text field has a maximum of 500 characters.

Stop allowing employee under investigation to create the Chair's initial draft of ES minutes for the SB. Stop allowing the employee to frame the content of SB minutes. Use the recording to refresh your own memory Chair start doing your own minutes. Stop approving minutes from memory, without 1st reviewing the audio recordings of the meetings for accuracy. Correct the 2/2/22 ES minutes, put the missing summaries, and discussions in the minutes so once released, the minutes will be accurate.

I demand mediation. Release the minutes of 2.2.22, nota proper ES.

Review, sign, and submit your complaint

I. Disclosure of Your Complaint.

Public Record. Under most circumstances, your complaint, and any documents submitted with your complaint, is considered a public record and will be available to any member of the public upon request.

Publication to Website. As part of the Open Data Initiative, the AGO will publish to its website certain information regarding your complaint, including your name and the name of the public body. The AGO will not publish your contact information.

II. Consulting With a Private Attorney.

The AGO cannot give you legal advice and is not able to be your private attorney, but represents the public interest. If you have any questions concerning your individual legal rights or responsibilities you should contact a private attorney.

III. Submit Your Complaint to the Public Body.

The complaint must be filed first with the public body. If you have any questions, please contact the Division of Open Government by calling (617) 963-2540 or by email to openmeeting@state.ma.us.

By signing below, I acknowledge that I have read and understood the provisions above and certify that the information I have provided is true and correct to the best of my knowledge.

Signed: _____

Date: 3/4/22

For Use By Public Body

For Use By AGO

Date Received by Public Body:

Date Received by AGO:



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

MAURA HEALEY
ATTORNEY GENERAL

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

March 4, 2022

OML 2022 – 40

VIA EMAIL

Steve Weisz, Chair
Monterey Select Board
435 Main Road
Monterey, MA 01245
steve@montereyma.gov

RE: Open Meeting Law Complaint

Dear Mr. Weisz:

This office received a complaint from Jonathan Sylbert on September 10, 2021, alleging that the Monterey Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on July 21 and then-Chair Justin Makuc responded on behalf of the Board on August 4.¹ The complaint alleges that the Board held a meeting without posting notice 48 hours in advance of the meeting, and that no emergency existed which justified posting notice less than 48 hours in advance.

Following our review, we find that the June 1 meeting satisfied the Open Meeting Law’s definition of “emergency,” which allowed the Board to post notice less than 48 hours in advance of the meeting. We therefore find that the Board did not violate the Open Meeting Law. In reaching this determination, we reviewed the original complaint, the Board’s response to the complaint, and the complainant’s request for further review. We also reviewed a copy of the notice and meeting minutes of the Board’s June 1 and June 2 meetings.

FACTS

We find the facts as follows. On May 5, the Board approved hiring a grant writer to work on a particular grant application that was due on Friday, June 4. The grant writer was expected to work on the grant application with assistance from the Town Administrator. On the evening of Friday, May 28, the Board was informed that the grant writer had resigned from her role. The

¹ Unless otherwise noted, all dates refer to the year 2021.

Office of the Town Administrator was scheduled to be closed on Monday, May 31 in observance of the Memorial Day holiday, as well as on Thursday and Friday, June 3 and 4.

On Tuesday, June 1, which was the first business day following the grant writer's resignation, the Board posted notice of an emergency meeting to take place that same day at 4:00 PM. During the meeting, Board Chair Justin Makuc explained that he called the meeting to ensure that the Town could still submit a strong grant application, and to possibly bring the grant writer back to work on the grant application. The grant writer agreed to continue working on the grant application. The Board discussed a plan to complete the grant application. The Board then agreed that it should discuss the circumstances that led to the grant writer's resignation, but that such discussion should occur at a future meeting.

The Board held a separate meeting on Wednesday, June 2, at 6:00 PM, for which notice had previously been posted. During the meeting, among other matters, the Board discussed the grant application and the grant writer's resignation, and explained that the resignation was a misunderstanding and that the involved individuals would be moving forward in a cooperative manner.

DISCUSSION

The Open Meeting Law requires that "[e]xcept in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting excluding Saturdays, Sundays and legal holidays." G.L. c. 30A, § 20(b). The Open Meeting Law defines an emergency as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." G.L. c. 30A, § 18; 940 CMR 29.02. The burden of justifying the need for an emergency meeting falls on the public body. See OML 2020-123.

Emergency meetings are reserved for circumstances that are unanticipated and require an immediate response, that is, action that could not wait for notice of a meeting to be posted 48 hours in advance. See OML 2021-119; OML 2017-131; OML 2016-70; OML 2011-45. Here, the Board explains that June 1 and 2 were the only business days that the Office of the Town Administrator was scheduled to be open between when the Board learned of the grant writer's resignation and the grant application deadline. Therefore, the Board asserts, it could not wait to discuss the grant application issue at its regularly scheduled meeting at 6:00 PM on June 2, because that would not have left any time for the Town Administrator to assist in ensuring that the grant application was completed on time.

We are persuaded that, in light of the specific timing of the grant writer's resignation and the grant application deadline, an "emergency" existed which allowed the Board to hold a meeting to discuss a plan for finalizing and submitting the grant application without posting notice 48 hours in advance. The circumstances were both unexpected and required immediate action, that is, action that could not wait for notice to be posted 48 hours in advance. See OML 2021-119 (explaining that the incremental delay caused by posting notice 48 hours in advance to discuss a matter still several days away will not always constitute an emergency, but the specific timing over a holiday weekend and the limited business days available to implement the matter under discussion justified holding an emergency meeting). Under these circumstances, we find

that an emergency existed which allowed the Board to post notice of its meeting less than 48 hours in advance, and the Board did not violate the Open Meeting Law.

CONCLUSION

For the reasons stated above, we find the Board did not violate the Open Meeting Law when it held a meeting on June 1, as an emergency existed which justified posting notice less than 48 hours in advance.

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 Board. Please feel free to contact the Division at (617) 963 - 2540 if you have any questions.

Sincerely,



Carrie Benedon
Assistant Attorney General
Division of Open Government

cc: Melissa Noe, Town Administrator (via e-mail: admin@montereyma.gov)
Monterey Select Board (via e-mail: justin@montereyma.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.

Monterey Town Administrator

From: Steven Weisz <steve@montereyma.gov>
Sent: Monday, March 7, 2022 11:34 AM
To: Monterey Town Administrator
Subject: Fwd: Select Board Minutes of 2/23/22

FYI.

Begin forwarded message:

From: Shaw <[REDACTED]>
Date: March 5, 2022 at 4:51:25 PM EST
To: Steven Weisz <steve@montereyma.gov>, "John F. Weingold" <[REDACTED]>, Justin Makuc <justin@montereyma.gov>, Jonathan Levin <jlevin@lawglm.com>, Terry Walker <[REDACTED]>
Subject: Select Board Minutes of 2/23/22

I was distressed to read the published minutes of the 2/23/22 Select Board meeting on the Town website. I feel that for some reason, some important information was left out of the minutes. In section 4 under New Business, my question to Mr. Levin ("If I told you that I didn't have any information on any personal device that a records request asked me to provide, would that be sufficient, or would I somehow have to prove it?") was omitted from the minutes, as was his answer ("We would probably take you at your word"). Later in the meeting I asked Mr. Levin why he would take me at my word if I said I didn't have requested information on my personal device, but he refused to take Ms. Walker at her word when she stated it". Unfortunately, before Mr. Levin could reply, Mr. Weisz intervened, and I never got an answer to my question.

Is there some reason these interactions were not included in the minutes?

Please amend the minutes to include my statements. If the Select Board does not wish to amend the minutes thusly, could one of the members send me the reason in writing. I would suggest that you review the digital record for the exact wording, as my recollections may not be word for word.

Thank you for your immediate attention to this matter.

Gary Shaw

To: Members of the Monterey Select Board:

From: Jon Levin, Records Access Officer

Date: March 7, 2022

I'd like to address two matters arising from the recent Select Board Meeting where I was asked to comment on my report on the status of certain Public Records Requests.

First, I think it was extremely ill-advised for the Select Board to post the matter of my Report for a Select Board Meeting without first (i) confirming my availability and (ii) advising me of the subject matter of the discussion. If my wife was not diligent in checking Select Board Agendas prior to meetings, I would not have been aware of the meeting. Further, understanding in advance the purpose of scheduling the matter would have allowed me to properly prepare for the meeting and discussion.

Secondly, I believe that Chairman Weisz ended the discussion with respect to my report before I had an opportunity to answer a question raised by Gary Shaw. Mr. Shaw had earlier asked me whether I would press him for his personal email/texts if he were to state to me that he did not have any such records. I answered that I would take his statement on face value and would not pursue it further. I answered the question based on the assumption that Mr. Shaw was not and has not been using his personal email or cell phone for substantive Town business. When Mr. Shaw then followed up and asked whether I would treat Ms. Walker the same way, my answer would have been 'no'. Since Ms. Walker requested that appointments and other communications be conducted using her personal cell phone, and since I had previously concluded that Ms. Walker had at times used her personal email accounts for Town business, and had not fully responded to the records request even with records that were not within her cell or email accounts, I would not have given Ms. Walker the benefit of the doubt, and I would have continued to insist that Ms. Walker provide for archival purposes her personal cell and email records that related to Town business.

Respectfully submitted.
Jon Levin

Monterey Town Administrator

From: Steven Weisz <steve@montereyma.gov>
Sent: Thursday, March 17, 2022 10:57 AM
To: Monterey Town Administrator
Subject: Fwd: Investigation completion

To be added to minutes.

Steven

Begin forwarded message:

From: Steven Weisz <steve@montereyma.gov>
Date: March 9, 2022 at 7:59:24 PM EST
To: corinne greene <cgreene@greeneandhafer.com>
Cc: Justin Makuc <justin@montereyma.gov>, John Weingold <johnw@montereyma.gov>
Subject: Investigation completion

Good Evening Ms. Greene,

The Selectboard is requesting an estimation of date of completion and receipt of the Investigation and Report for Monterey.

Thank you,
Steven Weisz, Chair
Monterey Selectboard