

October 24, 2018  
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VIA EMAIL ONLY

Re: Open Meeting Law Violations: Plymouth County Commissioners

Dear Assistant Attorney General Benedon:

This is a request for an investigation under G.L. c. 30A, § 23(b) and (c) and § 24 as well as 940 CMR 29.05(7) regarding the Plymouth County Commissioners, a public body subject to the Open Meeting Law (“OML”) whose general powers are derived from G.L. c. 34, § 14 (“the Commissioners”).

On August 20, 2018, I filed an Open Meeting Law (“OML”) complaint with the Chair of the Plymouth County Commissioners pursuant to 940 CMR 29.05 with a copy to your office (“the Complaint”). *See*, **Exhibit 1**.

The Complaint alleges the Commissioners violated the OML in five ways:

1. As of August 14, 2018, withholding executive session minutes for 2016-2018.
2. Failing to review executive session minutes at reasonable intervals as required by G.L. c. 30A, § 22(g).
3. On repeated occasions from January 2016 and continuing until the date of the Complaint, unlawfully entering into executive session without a valid purpose under G.L. c. 30A, § 22(a).
4. Failing to identify in open and executive session minutes the documents and exhibits used at the meeting as required by G.L. c. 30A, § 22(a), and
5. Intentionally violating the OML.

The Commissioners’ response to my Complaint has been inadequate for several reasons.

First, it treats my Complaint as a simple request for public records while making no effort to explain or address the four remaining aspects of my Complaint.

Second, even when treating it as just a public records request response, the response was inadequate. The Commissioners' sole response to the Complaint was to provide some, but not all, of the public records I requested. The September 4, 2018 letter from their Legislative Counsel Shannon Resnick states, "As it appears that the grievance relates to the production of executive session minutes, and the Plymouth County Commissioners have agreed to produce nearly all of those minutes you requested, it is the hope of the Plymouth County Commissioners that this resolves any dispute contained in your Open Meeting Law Complaint." The letter also says that "any minutes withheld have been withheld for valid purposes, namely they relate to attorney-client privileges and/or that the matters for which they relate are legal matters still pending, which the disclosure would frustrate the purpose of executive session." **Exhibit 2**, Resnick Letter. As described further below, the Commissioners have failed to comply with the Public Records law and have violated the OML in the manner set forth in the Complaint.

At least 30 days have passed after I filed my Complaint with the Commissioners and I am unsatisfied with the Commissioners response and, therefore, have filed this appeal with your office as provided by G.L. c. 30A, § 23 and 940 CMR 29.05(7).

This appeal is timely and has been filed within 90 days of the alleged violations of G.L. c. 30A, §§ 18-25. The Commissioners' non-disclosure of records occurred first on August 14, 2018 and other violations of the OML occurred as recently as July 26, 2018. The Complaint was filed within 30 days of July 26, 2018, on August 20, 2018, a date upon which another open meeting law violation occurred, as described below. The July 2018 violations are the continuation of an ongoing pattern and practice the Commissioners have made no effort to address. In addition to the unlawful continued non-disclosure of public records, the County has violated the OML continuously over a period of at least three years by, *inter alia*, unlawfully entering into executive session as recently as July 26, 2018 and possibly also on September 6, 2018.

The Commissioners' violation of the Public Records law by unlawfully withholding public records (specifically executive session minutes of nineteen meetings from 2016 to August 9, 2018), makes it impossible to conduct a factual investigation into potential OML violations during that time. 940 CMR 29.05(7). This puts me in a Catch-22 situation: I cannot ascertain what was discussed in executive session and whether the Commission complies with all other aspects of the OML, such as whether the executive session minutes meet the accuracy standards of G.L. c. 30A, § 22 and identify the documents relied upon. I filed the Complaint within 30 days and this appeal within 90 days of the date all of the OML violations should reasonably have been discovered given the Commissioners' withholding of public records. 940 CMR 29.05(7).

Further facts and documentation to show that my Complaint has not been adequately addressed are provided below.

## **I. Complaint ¶1 unresolved: inadequate response to Public Records request.**

The Complaint ¶ 1 concerns two public records requests I sent to the Commissioners on August 9, 2018 seeking, *inter alia*, open and executive sessions minutes for 2010, 2016, 2017, and 2018 (“the August 9, 2018 Request”).<sup>1</sup> The Commissioners have withheld all executive session minutes for the 25 executive sessions held in 2010, although I did not address this in my complaint since the Commissioners said they would produce executive session minutes for 2010 but after the date of the Complaint, did not. I have not filed another OML complaint regarding the 2010 minutes.

From 2016-2018, the Commissioners held 24 executive sessions. **Exhibit 3** contains the Meeting Notices and Agendas for 2018 showing 7 executive sessions were held so far this year. The Meeting Notices and Agendas for 2016 and 2017 have not been made available on the County’s website as of 10/15/2018. A review of the open session minutes for 2017 and 2016 reveal 6 executive sessions held in 2017 and 11 in 2016. **Exhibit 4.**

The Commissioners have produced executive session minutes for only five of the 24 executive sessions (these five, 1/25/18, 6/1/17, 1/3/17, 8/25/16, and 1/14/16, are in **Exhibit 5.**) without citing adequate grounds for withholding the rest. The County Administrator’s email providing the five sets of executive session minutes for 2016-2018 states these executive session minutes “have been approved by the Commissioners and released as open records....This fulfills your Public Records Request.” **Exhibit 6.** (Email 9/10/18 Basler to Sheehan). Due to the inadequacy of the Commissioners’ response to my Public Records request, I have appealed to the Supervisor of Public Records. **Exhibit 7.**

As described in my appeal to the Supervisor of Public Records, the Commissioners have not provided a lawful explanation of why the minutes of 19 executive sessions for 2016-2018 and all the executive sessions in 2010 are exempt from disclosure by this public body. G.L. c. 30A, § 22(f) provides, in part, that executive session minutes can be withheld only “as long as publication may defeat the lawful purposes of the executive session, but no longer; provided, however, that the executive session was held in compliance with section 21. When the purpose for which a valid executive session was held has been served, the minutes, preparatory materials and documents and exhibits of the session shall be disclosed unless the attorney-client privilege or 1 or more of the exemptions under said clause Twenty-sixth of said section 7 of said chapter 4 apply to withhold these records, or any portion thereof, from disclosure.”

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<sup>1</sup> The August 9, 2018 Request also sought two other categories of information: 1. Minutes of executive sessions of the Plymouth County Advisory board, and 2. Minutes of “statutory meetings” of the County Commissioners. The County’s August 14, 2018 response states that the Advisory Board had not met in the years requested, and that the statutory meetings are treated as the same as regular Commissioners’ meeting. It appears at this time that these two categories of minutes are not germane to the Complaint and therefore are not addressed here, but I reserve my right to raise this issue if facts are discovered that show there may be violations.

The Commissioners have not made a threshold showing that G.L. c. § 22(f), the attorney-client privilege, or an exemption under G.L. c. 4, § 26(7) applies to exempt the records from disclosure. The Commissioners have failed to show, in each instance, that they went in to executive session for a proper purpose and that that purpose still exists, or that any litigating, negotiating or bargaining position will be jeopardized for any executive session held for the purposes stated in Clause 2 or 3 of c. 30A, § 21.

**II. Complaint ¶ 2 unresolved: Continued failure to review executive session minutes at reasonable intervals to determine whether continued non-disclosure is warranted.**

Executive session minutes “may be kept secret ‘only as long as publication may defeat the lawful purposes of the executive session but no longer’”. Foudy v. Amherst-Pelham Regional School Committee, 402 Mass. 179, 182 (1988) (quoting prior codification of OML).

Chapter 30A, § 22(g) provides that the public body “shall, at reasonable intervals, review the minutes of executive sessions to determine if the provision of this subsection warrant continued non-disclosure. Such determination shall be announced at the body’s next meeting and such announcement shall be included in the minutes of that meeting.”

The County Administrator admits in his August 14, 2018 email that, as of that date, none of the 2016-2018 executive minutes had been reviewed by the Commissioners to determine if continued non-disclosure was warranted. **Exhibit 8** (8/14/18 Basler Email).

With regard to the executive session minutes of May 31, 2018 and July 26, 2018, the August 10, 2018 open session minutes (p. 3) state that a member of the audience requested executive session minutes of May 31 and July 26, 2018 and Chair Pallotta “explained those minutes have not been reviewed and approved.” **Exhibit 4**. Thus, as of August 10, 2018, the Commissioners had not conducted a review within a reasonable interval – over 60 days had passed since the May 31 meeting. As of September 6, 2018, two days after the Resnick letter, it was still unclear whether the Commissioners had in fact reviewed the May 31 and July 26, 2018 executive session minutes, despite the Resnick letter, since the Meeting Notice and Agenda for the Commissioners’ September 6, 2018 meeting says there will be executive session for “executive session minute acceptance: May 31 and July 26, 2018” and the September 6, 2018 minutes have not been released. **Exhibit 3**.

The AG’s Open Meeting Law Guide (October 7, 2018) states that if at the time of a public records request, “the public body has not conducted a review of the minutes to determine whether continued nondisclosure is warranted, the body must perform such a review and release the minutes, if appropriate, no later than its next meeting or within 30 days, whichever occurs first.” See also, G.L. c. § 22(g)(2). The Commissioners also have violated this provision of the OML.

### **III. Complaint ¶ 3 unresolved: Unlawfully entering into Executive Session**

Time and again from at least January 14, 2016, and continuing until at least July 26, 2018, and perhaps even until September 6, 2018 (no open or executive session minutes have been made available yet for that date), the Commissioners violated multiple aspects of G.L. c. 30A, § 21 governing executive sessions. The purposes for executive session “are not to be used as a subterfuge to retreat from an open meeting into an executive session.” District Attorney for the Northwestern Dist. v. Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666 (1981). Almost every Meeting Notice and Agenda for 2016-2018 lists that an executive session will be held for one or more of the following reasons: accepting executive session minutes, union negotiations, to consider the purchase, exchange, lease or value of real property (sometimes giving the location), and/or to discuss strategy with respect to litigation. See, e.g., G.L. c. 30A, § 21, Purposes 2 and 3. See, e.g., the Jan. 25, 2018, February 9, 2018 and June 29, 2018 Meeting Notices and Agendas. **Exhibit 3.**

A review of the Meeting Notices and Agendas reveals that the Commissioners routinely provide boilerplate language attempting to justify an executive session, often without providing the specifics required by each purpose under G.L. c. 30A, § 21 for which an executive session may be held. The executive session minutes that have been released contain the same boiler plate statement of purposes without the required specifics and, on at least one occasion, the open session minutes say the Commissioners will enter executive session for one or another purpose, but the minutes do not reflect that the stated topic in fact was discussed. Compare: January 25, 2018 Meeting Notice and Agenda, Open Session Minutes, and January 25, 2018 Executive Session Minutes. **Exhibit 9.**

Since 19 of the 24 executive session minutes for 2016-2018 have not been released, it is impossible to know whether the topics listed on the Meeting Notices and Agenda were in fact discussed in executive session.

In addition, in none of the open session minutes from 2016-2018 that I have reviewed did the Chair make the required declaration on the record as to why executive session was required or authorized by one or more of the purposes under G.L. c. 30A, § 22(a). In most instances where the purported purpose was “negotiations” or litigation, the minutes do not describe who the third party was with regard to the negotiations for real property or other transactions, why disclosure would defeat the purpose of executive session, and nowhere have the Commissioners explained that the purpose of the 24 executive sessions held between Jan. 2016 and August 2018 still warrant continued non-disclosure of the minutes.

The open session minutes of 4/26/18, 5/31/18, and 7/26/18 illustrate the Commissioners’ pattern and practice of flouting the OML law requirements for executive session. **Exhibit 4.**

First, the **4/26/18 Meeting Notice and Agenda** says executive session will be held for 3 purposes: accept minutes of five prior meetings, “union negotiations...” and “to consider the purchase, exchange lease or value of real property located at 155 West Elm Street, Brockton, and the “Woodlot...including access options, if the chair declares that an open

meeting may have a detrimental effect on the negotiating position of the governmental body.” **Exhibit 3.** (The Commissioners have withheld the executive session minutes of this meeting.) The three Commissioners voted to enter executive session, but the Chair did not “state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called, did not meet the criteria of Purposes 2, 3 or 6 under G.L. c. 21(a), and has not demonstrated a reasonable basis for the claims of executive session in response to my challenge. When challenged, the public body “must be able to demonstrate a reasonable basis for” any claim, including details of the real property that is the subject of the executive session “would compromise the purpose for an executive session.” OML Guide, Page 12, 14. The burden to show the need to go into executive session lies on the public body. District Attorney for Northern Dist. v. School Committee of Wayland, 455 Mass. 561, 566 (2009) (quoting District Attorney for the Northwestern Dist. v. Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666 (1981)).

Second, the **5/31/2018 Meeting Notice and Agenda** repeat the executive session agenda from 4/26/18 and, at the meeting, the three Commissioners voted to enter into executive session once again without the Chair making the required declaration. **Exhibit 3.** Although the alleged purpose of executive session is “negotiations”, the Chair never declared that an open meeting would have a detrimental effect on any negotiating position with a third party, did not identify a third party, if any, with whom the County was negotiating over the “purchase, exchange, lease or value” of 155 Elm Street or the “Woodlot” as required by c. 30A, § 21(6). The Commissioners have not provided a reasonable basis for claiming executive session. AG Guidance, Page 14.

The **7/26/2018 Meeting Notice and Agenda** and open session minutes are a third example. **Exhibit 3.** Here again, the Commissioners have provided no evidence that it was negotiating with a third party about either piece of real property. The Commissioners did not identify a third party if there was one, and do not state that the Chair made the required statement on the record that holding the meeting in open session would jeopardize negotiations with a third party. Further, the 7/26 Meeting Notice stated that executive session would be held for “non union employee negotiation strategy” but the open session minutes do not reflect this as a purpose for entering the executive session. Purpose 2 generally requires identification of the specific non-union personnel with which is negotiating. AG Guidance, 12. Here the personnel were not identified.

The same pattern is repeated over and over in 2016 and 2017 based on a review of the open session minutes and five of the 24 executive session minutes that the Commissioners have provided. Typically, the Meeting Notice and Agenda mimics one or more of the statutory purposes of G.L. c. 30A, § 21, but the minutes show that no declaration is made by the Chair, no explanation is stated of why executive session is needed, and the Commissioners’ vote to enter executive session are missing, or are being withheld.

**IV. Complaint ¶ 4: pattern and practice of failing to include list of documents and other exhibits used at meetings in open session and executive session**

A review of the open session minutes and 5 sets of executive session minutes from 2016 up until August 10, 2018, show that it was and is the Commissioners' practice not to identify documents relied upon as required by G.L. c. 30A, § 22. **Exhibits 4 and 5.**

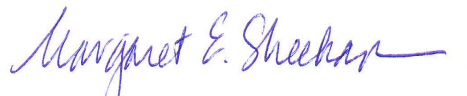
**V. Complaint ¶ 5: Intentional Violations**

The facts and documents set forth with my Complaint and this update show that there is reasonable cause to believe that the County Commissioners have violated the Open Meeting Law, violated it repeatedly, and continue do so. Accordingly, an Attorney General investigation is warranted under G.L. c. 30A, § 24.

I have set forth in the Complaint form the remedies sought. In addition to those remedies, which are authorized under G.L. c. 30A, § 23(c) and 940 CMR 29.07(3)(a), (c), (d), and (f), I request that the Attorney General resolve the investigation with a formal order that requires the Commissioners' attendance at a training session authorized by the Attorney General. 940 CMR 29.07(3)(b).

Thank you for your attention to this matter. I can be contacted at 508-259-9154 or via email at megsheehan07@gmail.com

Very truly yours,



Margaret Sheehan

Cc: Plymouth County Commissioners