

Town and County of Nantucket Select Board • County Commissioners

Jason Bridges, Chair
Matt Fee
Dawn E. Hill Holdgate
Malcolm W. MacNab
Brooke Mohr



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C. Elizabeth Gibson
Town & County Manager

***AGENDA FOR THE MEETING OF THE
SELECT BOARD
MAY 9, 2023 - 4:00 PM
REMOTE PARTICIPATION VIA ZOOM
NANTUCKET, MASSACHUSETTS***

Join Zoom Meeting

<https://us06web.zoom.us/j/84036720078?pwd=eFQ4OFBBNFIKNVROemlNcGMwQkNmZz09>

Meeting ID: 840 3672 0078

Passcode: 902240

- I. CALL TO ORDER***
- II. OPEN MEETING LAW COMPLAINT FROM MARY WAWRO, DATED APRIL 8, 2023:
ACKNOWLEDGEMENT OF THE OPEN MEETING LAW COMPLAINT AGAINST THE
SELECT BOARD AND CONSERVATION COMMISSION, DISCUSSION AND
RESPONSE TO SAME; VOTES MAY BE TAKEN.***
- III. ADJOURNMENT***



Agenda Item Summary

Agenda Item #	II.
Date	5/9/2023

Staff

Erika Mooney, Operations Administrator

Subject

Mary Wawro Open Meeting Law Complaint, dated 4/8/2023.

Executive Summary

Mary Wawro filed an Open Meeting Law complaint, dated 4/8/2023, on 4/10/2023 regarding the joint Select Board-Conservation Commission meeting held 3/21/2023 re: Sconset Bluff erosion control measures.

Staff Recommendation

The following actions should occur:

1. Acknowledge receipt of the Open Meeting Law complaint that has been circulated;
2. Discuss generally the allegations of the complaint;
3. Discuss the joint response and review the draft prepared by Town Counsel;
4. Vote to issue a response consistent with its discussion at the meeting/approve the draft prepared by counsel along with any additions/comments proposed.

Background/Discussion

N/A

Impact: Environmental Fiscal Community Other

N/A

Board/Commission Recommendation

N/A

Public Outreach

N/A

Connection to Existing Applicable Plan (i.e., Strategic Plan, Master Plan, etc.)

N/A



Attachments

Mary Wawro Open Meeting Law complaint dates 4/8/2023

Draft response to Open Meeting Law complaint





The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

OPEN MEETING LAW COMPLAINT FORM

Instructions for completing the Open Meeting Law Complaint Form

The Attorney General's Division of Open Government interprets and enforces the Open Meeting Law, Chapter 30A of the Massachusetts General Laws, Sections 18-25. Below is the procedure for filing and responding to an Open Meeting Law complaint.

Instructions for filing a complaint:

- o Fill out the attached two-page form completely. Sign and date the second page. File the complaint with the public body within 30 days of the alleged violation. If the violation was not reasonably discoverable at the time it occurred, you must file the complaint within 30 days of the date the violation was reasonably discoverable. A violation that occurs during an open session of a meeting is reasonably discoverable on the date of the meeting.
- o To file the complaint:
 - o For a local or municipal public body, you must submit a copy of the complaint to the chair of the public body AND to the municipal clerk.
 - o For all other public bodies, you must submit a copy of the complaint to the chair of the public body.
 - o Complaints may be filed by mail, by email, or by hand. Please retain a copy for your records.
- o If the public body does not respond within 14 business days and does not request an extension to respond, contact the Division for further assistance.

Instructions for a public body that receives a complaint:

- o The chair must disseminate the complaint to the members of the public body.
- o The public body must meet to review the complaint within 14 business days (usually 20-22 calendar days).
- o After review, but within 14 business days, the public body must respond to the complaint in writing and must send the complainant a response and a description of any action the public body has taken to address the allegations in the complaint. At the same time, the body must send the Attorney General a copy of the complaint and a copy of the response. The public body may delegate this responsibility to an individual member of the public body, its counsel, or a staff member, but only after the public body has met to review the complaint.
- o If a public body requires more time to review the complaint and respond, it may request an extension of time for good cause by contacting the Division of Open Government.

Once the public body has responded to the complaint:

- o If you are not satisfied with the public body's response to your complaint, you may file a copy of the complaint with the Division by mail, by email, or by hand, but only once you have waited for 30 days after filing the complaint with the public body. Mail may be sent to: The Division of Open Government, Office of the Attorney General, One Ashburton Place - 20th Floor, Boston, MA 02108. Emails may be sent to: openmeeting@state.ma.us.
- o When you file your complaint with the Division, please include the complaint form and all documentation relevant to the alleged violation. You may wish to attach a cover letter explaining why the public body's response does not adequately address your complaint.
- o The Division will not review complaints filed with us more than 90 days after the violation, unless we granted an extension to the public body or you can demonstrate good cause for the delay.

If you have questions concerning the Open Meeting Law complaint process, we encourage you to contact the Division of Open Government by phone at (617) 963-2540 or by email at openmeeting@state.ma.us.



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: MARY Last Name: WAWRO

Address: 3 EAT FIRE SPRING ROAD

City: NANTUCKET State: MA Zip Code: 02554

Phone Number: 213 458 2871 Ext. _____

Email: marycarita@me.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): Town of Nantucket

Specific person(s), if any, you allege committed the violation: _____

Date of alleged violation: March 21, 2023

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.

See Statement Attached as Exhibit A

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.

- 1 - Acknowledge the defects in the conduct of the referenced "planning" meeting of March 21, 2023
- 2 - Insofar as possible, cure the defects by public disclosure of all the materials pertaining to that meeting.
- 3 - Direct Town Counsel to prepare specific guidelines for conduct of all "planning" meetings such as was attempted at the March 21 meeting.
- 4 - Consider guidelines at a public meeting, receive public questions and comment, approve and post approved guidelines on the Town website.
- 5 - Publicly state these guidelines at the beginning of each "planning" meeting.

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: Mary Wawro

Date: April 8, 2023

For Use By Public Body	For Use By AGO
Date Received by Public Body:	Date Received by AGO:

EXHIBIT A TO OPEN MEETING LAW COMPLAINT

TO THE OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF
MASSACHUSETTS:

This is to thank your office and to follow up on my conversation with Attorney Kerry Kilcoyne on March 29. Ms. Kilcoyne was very helpful in addressing my concern and indicated that the Attorney General could provide me with written materials generally pertinent to my question as to regulations or other written guidance issued by the Attorney General concerning the proper conduct of and protocol for a so-called "scenario planning," "workshop" or other similar meetings held by a local body which is subject to the MA Open Meeting Law.

The most recent OML determination from your office that I located addressing the issue of concern to me was OML 2022-35. There, a violation was found under circumstances remarkably like the facts in the matter which is the subject of my complaint. Your Office found that the Wellesley Select Board failed to give sufficient notice of the "details about the specific nature of the discussion" and further noted "in this instance, even a member of the public who was familiar with the company would not understand the specific nature of the anticipated discussion from reading the topic as listed on the notice." Your office concluded that the Wellesley Board "violated the Open Meeting Law by failing to provide the public with sufficient understanding of the anticipated discussion."

I have observed that a number of meetings of public bodies appear to employ this type of "protocol" which is apparently commonly used in the private sector. Despite the merits and "flexibility" afforded by these processes, governmental bodies are required by Open Meeting Laws to observe procedures to guarantee the public access to their deliberations, to forestall secrecy, and foster transparency.

My specific concern stems from a meeting I attended virtually (via Zoom) on March 21, 2023. The meeting may be viewed here: <https://youtu.be/4df5f520e7s>

The meeting was posted as a "joint meeting" of the Town of Nantucket Select Board (SB) and Conservation Commission (Concom). The posted Notice referenced the physical location of the meeting, as well as the option to attend via Zoom. There was one item on the agenda: "JOINT MEETING WITH SELECT BOARD TO DISCUSS SCONSET BLUFF EROSION CONTROL MEASURES." There was no mention in the notice of "scenario planning" or of a "workshop" nor any explanation of the process to be followed.

Here is the meeting posting: https://nantucket-ma.gov/AgendaCenter/ViewFile/Agenda/_03212023-12393

The central features of this meeting as it was noticed and as it transpired appear inconsistent with the purpose and requirements of the Massachusetts Open Meeting Law.

My urgent concern stems from the announcement decision at the end of this meeting to schedule a similar follow-up joint meeting on April 11, 2023. In fact at this writing, notice of such meeting has since been posted: https://www.nantucket-ma.gov/AgendaCenter/ViewFile/Agenda/_04132023-12475. This notice appears to suffer from the same defects that characterized the notice of the March 21 meeting.

This schedule will likely preclude the possibility of a satisfactory and timely resolution of an OML complaint. Nevertheless, given these facts, I believe that, as an aggrieved citizen, it is necessary to get prompt clarification on the procedures necessary to assure that the Open Meeting Law is respected in future meetings of this nature and that all possible means are taken to cure the defects of the March 21 meeting. Accordingly, I will be separately filing an OML with the appropriate agencies of the Town of Nantucket.

In the interim, and by way of example, the following summary identifies some of the features of the March 21 meeting that appear to violate the OML:

The March 21 Meeting Notice lacked the required specificity. The specific topics called "scenarios" the "facilitator" identified to be discussed were not posted in the Notice of the meeting as was done in the meeting of the Wellesley Board OML 2022-35. The name of the company supplying the "facilitator" was not even mentioned.

Conduct and control of the meeting was done by a hired third-party "facilitator" who was not the Chair nor even a member of either body, and who was not introduced to the attendees or the public even at the meeting. The facilitator did not conduct the meeting in a manner which allowed for clear accessible discussion. Speakers were not consistently recognized and allowed to speak in order. The familiar procedure of "speaking through the chair" was wholly ignored. It was wholly unclear who, if anyone, was acting in the role of the chair controlling the meeting.

Town Counsel did not appear to be present physically and was not shown as a virtual attendee.

The normal practice of simulcasting the meeting on YouTube as a supplement to the Zoom participation was not followed.

On background, I am informed and believe that the "scenarios" were derived from "one-on-one" seriatim meetings by and between individual members of the bodies and the facilitator. The facilitator stated that the scenarios were ones that "we" developed, with no indication of who constituted the "we."

Rather than being attached to a "packet" provided to the public with the agenda for the meeting (as is normally done), the documents containing the "scenarios" (apparently handwritten) were taped to a wall by the facilitator during the meeting. They were not visibly

accessible to members of the public who virtually attended the meeting. They were not visibly accessible to those physically present unless they walked up to the wall. The full specific provisions of the "scenarios" were not read aloud to attendees. No explanation or rationale was offered for this process.

Members of the body were assigned into small groups by the facilitator and once assigned, were permitted, and encouraged to talk among themselves simultaneously with no one in control of the order of speakers and in a manner that prevented members of the public from hearing or understanding any discussion whatsoever. None of these discussions were accessible audibly to the public as contemplated by the OML.

Members of the body were also instructed to use "post-its" to attach their individual "comments" to each of the "scenarios" taped to the wall. These written comments were posted apparently without attribution to the commenter thus making them essentially secret. Additionally, once posted none of these comments were visibly accessible to members of the public attending the meeting virtually and were not visible to those physically present unless they walked up to the wall. The members of the body were further instructed to designate the scenarios with "a rose, a bud or a thorn." None of the comments were read to attendees with clear attribution to the commenter.

After comments were posted, the "facilitator" led a discussion of the "scenarios" and finally instructed each member to leave a post-it with "your personal opinion re what scenario you would actually follow." There was no explanation or disclaimer regarding the force and effect of such an act.

During the meeting, one member of the Conservation Commission stated that she had asked for but not received an opinion from Town Counsel as to the ability of the members to offer opinions or vote at this meeting. This comment was entirely ignored by the facilitator.

After adjournment, the "facilitator" collected all documentation posted and represented that the results of the postings would be collated for a follow-on meeting in April. Thus far I have found no "packet" with these materials has posted on the Town website as is normal practice for documents the body will consider at an open meeting.

While I recognize that 940 CMR 29.08 states that the Attorney General does not generally provide advisory opinions, your office may issue written guidance to address common requests for interpretation. Ms. Kilcoyne indicated that your office has not issued such guidance regarding the specifics of my inquiry but kindly offered to provide materials of a more general nature applicable to the requirements for conduct of "workshop" meetings in assessing whether the requirements of the OML are met in any particular case.

With that in mind, I have copied attorneys at KP Law, Town Counsel for the Town of Nantucket, on this communication and hereby request that they join me in requesting your office to consider further addressing the issue of conducting such meetings.

I also hereby request that KP Law provide me with all formal and informal opinions rendered by the firm to the Town of Nantucket with respect to the conduct of such meetings and also as to the question of the legality of the secret seriatim one-on-one interviews with members of a an OML body in order to drive a consensus, as apparently was done in this case.

Meanwhile, time is short before the next such meeting is planned to occur. There is no choice for me except to file an OML complaint regarding the conduct of the March 21 meeting in order hopefully to avoid a repetition of the violations that occurred. Accordingly I am attaching this statement as Exhibit A to my OML complaint to provide the details of the violations.

In conclusion, and for the record, I do not presume an intentional violation by members of these OML bodies. I believe their reliance on administrative back-up was sadly misplaced and was compounded by the unfortunate absence of Town Counsel guidance at the meeting.

These types of "planning" processes which have gained acceptance in the private sector may well also afford flexibility and be useful in addressing municipal concerns. However, they must conform to the statutory principles surrounding our fundamental value of openness in government.

I believe that OML bodies need additional thoughtful direction and support in crafting and executing processes that meet both these goals.

May ----, 2023

Janelle M. Austin
jaustin@k-plaw.com

BY ELECTRONIC MAIL ONLY (openmeeting@state.ma.us)

Carrie Benedon, Esq.
Director, Division of Open Government
Office of Attorney General
One Ashburton Place
Boston, MA 02108

Re: Town of Nantucket –Select Board and Conservation Commission
Open Meeting Law Complaint from Mary Wawro, dated April 8, 2023

Dear Attorney Benedon:

Please be advised that this office serves as Town Counsel to the Town of Nantucket (“Town”). The Town’s Select Board (“Board”) and Conservation Commission (“Commission”) are in receipt of an Open Meeting Law Complaint filed by Ms. Mary Wawro, dated April 8, 2023.¹ The Complaint alleges that these Town public bodies violated the Open Meeting Law relative to a March 21 joint meeting. See Complaint, a copy of which is attached hereto as Exhibit A. Specifically, in the Complaint, Ms. Wawro alleges that the meeting notices were not sufficiency specific, and that the joint meeting, which was held in person, was not accessible during portions of the discussion via Zoom.

The Board and Commission met on [REDACTED] in a properly posted meeting in open session to discuss the Complaint and consider an appropriate response. At such meeting, the Board and Commission carefully reviewed the allegations contained in the Complaint, and following such discussion, authorized this office to submit the following response on its behalf, in accordance with G.L. c. 30A, §23 and 940 CMR 29.05(5).²

Discussion

By way of background, this Complaint relates to a joint meeting of the Board and Commission held in person on March 21, with a Zoom option to attend. True and accurate copies of the meeting notices are attached as Exhibits B and C, respectively. As set forth below, the Board and Commission submit that their meeting notices contained sufficient detail to reasonably advise members of the public of the items of possible discussion, and as such, there has been no violation of the Open Meeting Law, as alleged in the Complaint. Moreover, members of the public had meaningful access to attend the joint meeting both in person and virtually, as a courtesy, on March

¹ Unless otherwise indicated, all dates referenced herein are to the year 2023.

² The Town previously requested and was granted an extension of time to respond to this Complaint. The Town appreciates the Division’s cooperation in that regard.

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21. To the extent that the Complaint raises allegations that do not implicate the Open Meeting Law, they are not addressed herein.

The Open Meeting Law requires that a public body post notice of every meeting that it holds. G.L. c. 30A, § 20(b). Among other details, meeting notices must include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” *Id.* The listing of topics must contain “sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 CMR 29.03(1)(b). The Division of Open Government generally considers 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 2022-239; OML 2018-7; OML 2015-35.

In this matter, the complainant alleges that the meeting notices for the joint meeting of the Board and Commission lacked sufficient specificity. The Town denies such allegations. The meeting notices specifically listed the following topic of discussion: “Joint Meeting with Conservation Commission to Discuss Sconset Bluff Erosion Control Measures” and “Joint Meeting with the Select Board to Discuss Sconset Bluff Erosion Control Measures.” Exhibits B and C. The complainant subjectively claims that this description was insufficiently specific because the notice did not expressly indicate that the discussion on erosion control measures would involve “scenario planning” and “workshops.” *See* Exhibit A.

The joint meeting of these public bodies involved a discussion of Sconset Bluff erosion control measures, as noted on the meeting notices. There can be no dispute that the meeting notices described the topic with sufficient specificity as to reasonably advise the public of what would be discussed. To the extent that the complainant alleges that the violation arose from the discussion expanding into scenario planning and workshops, no violation of the Open Meeting Law occurred for this reason because the substance of the discussion was erosion control measures for Sconset Bluff. The Open Meeting Law does not require a public body to include each and every detail about a topic in order for the listing of topics to be “sufficiently specific.” OML 2021-181.

The Town submits that case is distinguishable from facts reviewed in OML 2022-35 identified by the complainant, wherein the Division determined that a meeting notice listing “Future Management Systems Training” lacked sufficient specificity because members of the public could not reasonably anticipate that the meeting discussion would involve employee training on specific topics by the “Future Management Systems” company, with which the Town had worked for several years. In this matter, in contrast, the description in the meeting notices for the joint meeting was clear and any member of the public could read “Joint Meeting with Conservation Commission to Discuss Sconset Bluff Erosion Control Measures” and reasonably anticipate the essence of the discussion. Therefore, as the meeting notices described the topic of discussion with sufficient specificity, no violation of the Open Meeting Law occurred.

In addition, the complainant claims that the joint meeting was not accessible to the public, notwithstanding that the public was able to attend the meeting in person, as listed on the meeting

Carrie Benedon, Esq.

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notice, along with the public body members, because the joint meeting was not simulcast through YouTube. The Open Meeting Law does not require that a meeting be simulcast. Accordingly, no violation of the Open Meeting Law occurs with respect to this allegation.

The remainder of the Complaint consists of general allegations about the discussion during the March 21 joint meeting. As noted, the complainant, and all members of the public, were able to attend the joint meeting in person to observe the meeting's proceedings, which was also made available via Zoom for members of the public, as a courtesy. There is no violation of the Open Meeting Law if a public body holds meetings in-person at a location accessible to members of the public. See OML 2021-79. Lastly, the Open Meeting Law "does not require that the public body attach any documents to the meeting notice." OML 2021-181. For these additional reasons, the Board and Commission submit that no violation of the Open Meeting Law occurred.

CONCLUSION

As always, the Town of Nantucket's public bodies remain committed to their obligations under the Open Meeting Law and in full transparency in its practices for members of the public. The Select Board and Conservation Commission reviewed this matter in good faith following its receipt of the Complaint and considers it resolved.

If you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Very truly yours,

Janelle M. Austin

JMA/

Enc.

cc: Town Manager

Select Board

Conservation Commission

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