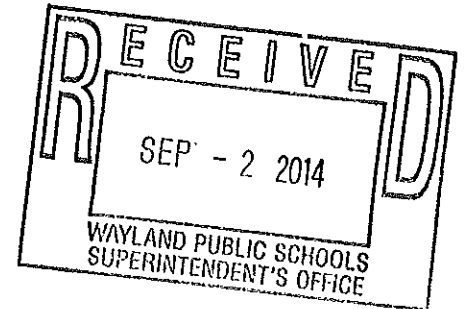


August 29, 2014

**VIA FIRST CLASS MAIL**

Paul Stein, Ed. D.  
Superintendent of Schools  
Wayland Public Schools  
41 Cochituate Road, P.O. Box 408  
Wayland, MA 01778



***Re: Public Records Request for Minutes of Wayland School Committee Meetings Held in Executive Session Concerning Mabel Reid-Wallace***

Dear Dr. Stein:

This firm represents GateHouse Media, Inc., publisher of the *MetroWest Daily News* and the *Wayland Town Crier*. I write in further support of the public records request made by Richard Lodge, Editor-in-Chief of the *MetroWest Daily News* and the *Wayland Town Crier*, for minutes of executive sessions of the Wayland School Committee (the "Committee") in which METCO Director Mabel Reid-Wallace was mentioned or discussed.

The records requested by Mr. Lodge are presumptively public, and the public interest in these materials is obvious. Because the Wayland School Department (the "Department") has failed to satisfy its burden of demonstrating that an exemption permitting non-disclosure under the Massachusetts Public Records Act (the "Act") applies in these circumstances, the requested records should be made available for public inspection forthwith.

**RELEVANT BACKGROUND**

**A. The Committee Learns Ms. Reid-Wallace Used METCO Funds to Pay Credit Card.**

In 2013, the Committee commissioned an audit of the Wayland Public Schools' discretionary accounts. Based on the auditor's report in September 2013, the Committee learned that, over a five-year period, Ms. Reid-Wallace had written 25 checks from a METCO account to pay down \$20,440 on her personal credit card.

**B. Ms. Reid-Wallace Fails to Provide Copies of Her Credit Card Statements.**

When the auditors asked Ms. Reid-Wallace for copies of her credit card statements, she advised the auditors that she had discarded all of the statements. She then told the auditors that she had requested copies of the statements from her bank. Despite multiple extensions of time, Ms. Reid-Wallace failed to produce copies of her credit card statements to the Committee. One

of the auditors stated that “[w]ithout any supporting documentation we are left with the undisputed fact that METCO funds were used to directly pay off a personal credit card.”

**C. The Committee Meets in Repeated Executive Sessions to Discuss Ms. Reid-Wallace’s Account.**

The Committee discussed Ms. Reid-Wallace and her credit card account during numerous “executive sessions” in late 2013 and 2014, including at least 11 executive sessions in 2014. It appears that these executive sessions focused on Ms. Reid-Wallace’s inability to locate and provide her credit card statements or receipts. Unlike full Committee meetings, the executive sessions were not open to the public.

**D. The Department Rejects Mr. Lodge’s Public Records Request.**

On April 8, 2014, Mr. Lodge requested (the “Request”) the following materials pursuant to the Act:

[A] copy of all Wayland School Committee meetings held in executive session during which Mabel Reid-Wallace was mentioned or discussed, from Sept 1, 2013 to March 30, 2014.

On behalf of the Department, you responded to Mr. Lodge’s public records Request by e-mail dated April 16, 2014, stating only that the Department was “unable to provide [Mr. Lodge] with these records as they are exempt under the Public Records Law.” The Department failed to identify the exemption on which it claims it was relying, and failed to explain how any of the Act’s exemptions applied to Mr. Lodge’s Request.

**E. The Supervisor of Public Records Finds that the Department Failed to Comply with the Law.**

On April 21, 2014, Mr. Lodge appealed the Department’s denial of the Request to the Supervisor of Public Records (the “Supervisor”). Relying on the Act’s provision that “the burden shall be upon the custodian to prove *with specificity* the exemption which applies,” the Supervisor concluded in a decision dated July 21, 2014, that the Department failed to comply with the Act. It explained:

The response by the Department did not contain the specificity required in a denial of access to public records. Accordingly, the Department is advised that to comply with the Public Records Law and its Regulations it must provide specificity with respect to any denial of access to public records. This requires a records custodian to not only cite an exemption, but to specifically explain the applicability of the exemption to the requested records.

The Department has yet to meet its burden in proving with specificity why responsive records have not been made available.

Accordingly, the Department is hereby ordered, within ten (10) days of this order, to provide Mr. Lodge with the requested records, or to provide to Mr. Lodge and this office, *with specificity*, how a particular exemption applies to each record.

(Emphasis in original)

Notwithstanding the Supervisor's order that the Department explain *with specificity* how a particular exemption applies to the Request, the Department sent a four-sentence letter to Mr. Lodge on August 1, 2014. The letter references exemption (a) and states, without any explanation or analysis, that "publication of [the Requested Records] will defeat the lawful purpose of the executive session."

**F. The Committee Declines to Take Further Action Concerning the Credit Card Statements.**

In late July 2014, the Committee refused to seek proof that Ms. Reid-Wallace attempted to obtain her credit card statements. At a meeting on July 31, 2014, Committee member Donna Bouchard made a motion to ask Ms. Reid-Wallace for evidence that she had attempted to obtain copies of her statements, and that the credit card company refused to comply with her request. None of the other four Committee members offered to second the motion. One Committee member who objected to the motion said that he opposed the motion because he believed that the Committee has "already taken action."

**G. The Attorney General Concludes that Certain Executive Sessions Were Invalid.**

On June 16, 2014, the Attorney General's Division of Open Government concluded that the Committee violated the Open Meeting Law by failing to provide sufficient detail in the notice for its meeting of February 10, 2014, by entering into executive session for an improper purpose during that same meeting, and by failing to inform the public that it would reconvene in open session following its February 3, 2014, executive session.

**ANALYSIS**

**A. Legal Standard for Public Records.**

The definition of "public records" is broad: "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose," unless the item is excluded by one of the statute's exemptions. Mass. Gen. Laws ch. 4, § 7, twenty-sixth.

Moreover, there is a presumption that a requested record is public, and the burden is on the public official refusing to permit inspection "to prove with specificity the exemption which

applies. Mass. Gen. Laws ch. 66, § 10(c); *Globe Newspaper Co. v. District Attorney for Middle Dist.*, 439 Mass. 374, 380-81 (2003). The purpose of the Act is “to give the public broad access to governmental records.” *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 382-83 (2002). Because of the Act’s presumption in favor of disclosure of public records, exemptions to the Act must be “strictly and narrowly construed.” *Globe Newspaper*, 439 Mass. at 380-81.

**B. The Department Has Failed to Demonstrate that the Statutory Exemption Justifies Nondisclosure.**

The Department relies on the so-called “statutory exemption” to justify nondisclosure of the executive session minutes. This exemption allows public officials to withhold records if a statute “specifically or by necessary implication” exempts the records from disclosure. Mass. Gen. Laws ch. 4, § 7, twenty-sixth(a).

Although the Department never actually cites the statute pursuant to which it claims the statutory exemption applies, it appears the Department is relying on a provision of the Open Meeting Law that permits nondisclosure of minutes of executive sessions if publication “may defeat the lawful purpose of the executive session.” Mass. Gen. Laws ch. 30A, § 22(f). Significantly, § 22(f) requires disclosure of executive session minutes “[w]hen the purpose for which a valid executive session was held has been served.” *Id.* (emphasis added). Section 22 also specifically provides that executive session minutes may only be withheld if “the executive session was held in compliance with section 21,” the provision of the Open Meeting Law setting forth the circumstances under which a public body may meet in executive session.

For the following reasons, the Department has failed to meet its burden of demonstrating that the statutory exemption applies.

1. The Department Has Failed to Explain Specifically How the Statutory Exemption Applies to the Executive Session Minutes.

First, the Department has failed to provide the specificity required in asserting that the executive session minutes are exempt from disclosure under the Act.

The Act is clear: a public entity refusing to permit inspection must “prove with specificity the exemption which applies.” Mass. Gen. Laws ch. 66, § 10(c); *Globe Newspaper*, 439 Mass. at 380-81; *Roman Catholic Bishop of Springfield v. Travelers Cas. & Surety Co.*, 2008 WL 650392, at \*2 (Mass. Super. Jan. 7, 2008) (concluding that district attorney failed to make specific arguments demonstrating that exemption applied); *see also Oleskey v. United States Dep’t of Defense*, 658 F. Supp. 2d 288, 292 (D. Mass. 2009) (construing cognate provision of FOIA, and holding that “[w]hen an identified responsive record is withheld because of an exemption, the government must provide a brief description of the withheld record and a *detailed explanation* of why a particularized exemption applies”) (emphasis added); *Lion Raisins v. U.S. Dep’t of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (“Ordinarily, the *government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed,*

*and a particularized explanation of why each document falls within the claimed exemption.”*) (emphasis added).

Despite this unambiguous mandate, the Department provided a single, conclusory statement that merely parrots the language of the Open Records Act: “publication of [the executive session minutes] will defeat the lawful purpose of the executive session.”

This is woefully insufficient. As the Supervisor explained, the Department must not only cite an exemption, but specifically explain how that exemption justifies the withholding of the executive session minutes in this instance. Yet the Department has provided no information whatsoever about the content it claims is protected by the Open Records Act, much less a particularized showing that the content falls within the statutory exemption. It has submitted no affidavit, and provided no detail that would permit Mr. Lodge or a court to assess the Department’s unilateral decision to withhold these materials, which are unquestionably of legitimate interest to the public.

Because the Department has failed to explain the applicability of the statutory exemption to the requested records, the Department has not overcome the presumption that the executive sessions are public nor met its burden under the Act. *See* Mass. Gen. Laws ch. 66, § 10(c); *Globe Newspaper*, 439 Mass. at 380-81. The records must therefore be produced.

2. Disclosure Would Not Defeat the Lawful Purpose of the Executive Session.

Second, even if the Department *had* explained how the statutory exemption justifies nondisclosure of the requested records (and it has not), the provision of the Open Meeting Law on which the Department appears to rely – namely, that disclosure would “defeat the lawful purpose of the executive session” – plainly does not apply here.

The Committee learned about Ms. Reid-Wallace’s use of METCO funds to pay her personal credit card more than a year ago. Since that time, the Committee has received numerous reports from the auditor it hired to review these payments, granted Ms. Reid-Wallace multiple extensions of time to produce copies of her credit card statements, and discussed Ms. Reid-Wallace’s credit card account during more than a dozen executive sessions. Beyond the passage of time, the Committee has *affirmatively declined* to take further action concerning Ms. Reid-Wallace’s credit card statements. As set forth above, during a meeting in July 2014, the Committee refused to consider a motion to ask Ms. Reid-Wallace for additional evidence concerning her account. One Committee member went so far as to say that he objected to the motion because the Committee has “already taken action.”

In view of these facts, the lawful purpose of the executive sessions at issue – *i.e.*, to consider Ms. Reid-Wallace’s inability to explain the payments to her credit card – cannot possibly be defeated by disclosure of the minutes of these sessions. The Committee itself has made clear that it is no longer interested in addressing the very issue for which it claims to have met in executive session. Thus, any lawful purpose for which the executive sessions were held is no longer extant. *See Foudy v. Amherst-Pelham Regional Sch. Comm.*, 402 Mass. 179, 182-84

(1988) (school committee required to release minutes of executive session after purpose for executive session ended).

3. At Least One Executive Session Failed to Comply with § 21 of the Open Records Law.

Third, a prerequisite for withholding minutes of an executive session is that the executive session be "held in compliance with section 21." Mass. Gen. Laws ch. 30A, § 22(f). Because the Attorney General's Division of Open Government concluded that the Committee failed to comply with § 21 of the Open Meeting Law with respect to the February 10, 2014, executive session, the minutes from that executive session should be disclosed forthwith. To the extent other executive sessions were conducted that failed to comply with § 21, the minutes for those sessions should also be disclosed.

**CONCLUSION**

For the foregoing reasons, Mr. Lodge, through counsel, respectfully requests that the Department immediately provide public access to all minutes of Committee meetings held in executive session during which Ms. Reid-Wallace was mentioned or discussed.

The foregoing is without any prejudice to any of the rights or remedies of GateHouse Media, Inc., the *MetroWest Daily News*, or the *Wayland Town Crier*.

Very truly yours,

  
Zachary C. Kleinsasser

ZCK/rsb

cc: Richard K. Lodge (via e-mail)  
Supervisor of Public Records (via first-class mail)  
Mark J. Lanza (via first-class mail)

ALB 1804850v2