



Town of Thetford Vermont

3910 Vermont Route 113 • P.O. Box 126 • Thetford Center, VT 05075
802-785-2922 • thetfordvermont.us

Selectboard Special Meeting Minutes – Online Only – Wednesday, April 7th, 2021 7:00pm

Please note Section 6 of H.681, signed into law on March 30th, 2020, for the temporary suspension of designated physical meeting location requirements.

Selectboard members present: Sharon Harkay (Chair), Mary Bryant, Li Shen (Vice-Chair), Steve Tofel

Selectboard members absent: Nick Clark

Others present: Bryan Gazda (Town Manager), Brian Monaghan (Town Attorney), Tracy Borst (Town Clerk/Treasurer), Martie Betts (Selectboard Assistant)

Total Zoom attendees: 39

Sharon Harkay called the meeting to order at 7:02 pm.

Selectboard members introduced themselves.

1. Presentation and Discussion of the Vermont Open Meeting Law – Brian Monaghan

Sharon Harkay began by saying the meeting was originally planned for a possible executive session, but committee and commission members, along with members of the public, expressed interest in attending so the meeting was changed to a presentation.

Brian Monaghan introduced himself as the Thetford Town Attorney, and said he has been working with town starting in 2007. Brian has come to really love Thetford and working with the people of Thetford.

Attorney Monaghan shared his screen and said he wanted to give an educational overview on the Vermont Open Meeting Law, (Title 1 of Vermont statutes, Chapter 5, Subchapter 2). Attorney Monaghan explained that the underpinning of the law is that all boards exist to aid in the people's business, and they are accountable to the people.

There are 2 Vermont Constitutional provisions that pertain to the law, Chapter 1, Articles 6 and 7; essentially that government is here for the people, the people can change the government, and officers who work in the government or as volunteers are servants of the people. They are accountable to the people in a legal way.

Attorney Monaghan gave examples of what are considered public bodies. All public bodies need to follow the Open Meeting Law whether the members are elected, appointed, temporary or long term. The Town of Thetford is a political subdivision of the State of Vermont.

Attorney Monaghan next defined a meeting. Attorney Monaghan said that there are 2 primary groups subject to the Open Meeting Law: State bodies and agencies, and municipal bodies. The law was created over 50 years ago with a focus on state agencies and over the years the Legislature has tried to improve the statute, but there are still aspects that are geared toward State agencies. Attorney Monaghan said for this discussion a meeting is a gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action. The definition should be kept in mind because it is acceptable for



Town of Thetford Vermont

3910 Vermont Route 113 • P.O. Box 126 • Thetford Center, VT 05075
802-785-2922 • thetfordvermont.us

members of a board to get together and talk about things that are not considered business of the public body. Once discussion shifts to municipal business, it is considered a meeting and therefore subject to the Open Meeting Law.

There is an exclusion, the definition of a meeting does not include any communication, including emails, for the purpose of scheduling a meeting, organizing an agenda or distributing materials to discuss at a meeting. The proviso is that no other business of the public body should be discussed or conducted, and those emails are considered a written record that essentially become public record pursuant to the Public Records Act. Attorney Monaghan said there should not be any discussion of substantive town business, particularly with a quorum, but it is acceptable to do this one-on-one with a 5-member board. When you are having an email discussion with 2 people you do not trigger that quorum standard in the meeting definition, but three people will. As the Open Meeting Law was adopted in the late 1940s, email was certainly not envisioned at that point, so the law did not address the concept of emailing with other board members. That leaves an open question in Vermont law about emailing between a quorum of the members of a public body. Attorney Monaghan said there is no case in Vermont that defines it so he can't say it automatically equates to a meeting under the Open Meeting Law, but in his opinion, it is a dangerous practice. It is better discussed in an open meeting so all board members can hear and the public can hear what is being discussed. The spirit of the Open Meeting Law is the expectation that the board members will discuss the business of the public in public.

There are exceptions laid out in the statute, and the following are not considered a meeting; social gatherings, conferences, training programs, press conferences, and media events. As long as members do not discuss specific business of the public body, these things do not constitute a meeting under the statute.

Attorney Monaghan explained that the Open Meeting Law required 5 things when a board decides to conduct a meeting:

Public notice has to be given.

An agenda needs to be created.

Allow access by the public.

Allow the public reasonable opportunity to speak.

Take minutes.

Attorney Monaghan reviewed a flow chart on Open Meeting Law created by resident Laura Covalla. In general, Attorney Monaghan thought the diagram was helpful as a reference point, but he would be careful about using the term "violation", as a court would have to make that determination. It would be an "allegation of a violation". The other caution Attorney Monahan mentioned is the regulation of thoughts. The Open Meeting Law doesn't regulate thoughts, it regulates communications, particularly between board members.

The chart is a close representation of best practices and recommendations. There is a challenge with email in terms of communicating with a quorum, especially if the discussion is in real-time emails, email threads, text messaging or other new methods of communication. Again, there is no specific case law in Vermont, but it is treading on dangerous ground in terms of violating the Open Meeting Law.

Attorney Monahan opened the meeting up to questions.



Town of Thetford Vermont

3910 Vermont Route 113 • P.O. Box 126 • Thetford Center, VT 05075
802-785-2922 • thetfordvermont.us

Tracy Borst asked about non-board members communicating with board members i.e., the Town Manager or other officials or members of public.

Attorney Monaghan said the Town Manager and members of the public are not subject to the Open Meeting Law. It is incumbent on the board members not to reply all. The Town Manager can send agendas, board packets, and things like that to members of the board. They can also update board members concerning progress on projects. Response to the Town Manager should be through phone calls or direct discussion to avoid a board member accidentally hitting “reply all”.

Sharon Harkay asked about some committees and commissions with smaller working groups that are less than a quorum. Is it okay for these groups to report back in a single email to all members what they did during the course of a week, and is it okay for the whole committee to reply that the group has done a wonderful job, or any other type of positive feedback?

The Open Meeting Law does not address this. Plaudits like that would fall under the category of non-substantive discussion. It is also okay to share progress or a progress report with a committee.

Tim McCosker referred to the section of the flow chart marked “a private matter” and asked how that violates the Open Meeting Law.

Attorney Monaghan said he wouldn’t use the words “private matter”, as there are certain topics on which the Selectboard is allowed to discuss in private. These are specifically addressed by the Open Meeting Law. This is a section of the flow chart that Attorney Monaghan said he diverges from. The Open Meeting Law sets a default that all topics have to be discussed in public with exceptions to what is appropriate for executive session. The Open Meeting Law does not make it a violation to discuss those exceptions in an open meeting. Some boards have rules of procedure or operating rules, and a lot of boards will say it’s inappropriate to talk about certain topics outside of executive session. They need to rely on one another to not release confidential information.

Tracy Bach, referring to the flow chart, asked if by communicating with emails created a risk of making a quorum.

Attorney Monaghan said he generally agreed with that.

Tracy Bach said she understands that it is really hard for people who use email all the time and she appreciated Attorney Monaghan’s presentation. She asked if he had a set of best practices that he recommended.

Attorney Monaghan said the Vermont League of Cities and Towns has several different Open Meeting Law fact sheets calibrated toward Selectboards. The Secretary of State’s office has information as well.

Jody Biddle asked if it would be possible to get a copy of that flow chart.

The Selectboard assistant said it is already on the Town webpage under “Government”, and the Selectboard Rules of Procedures are also on the Selectboard page.

Laura Covalla said she made the flow chart and there are a lot of things we could talk about as to why she put things the way she did on there. Laura wanted to address the comment made about Open Meeting “private matter” being a violation. Laura said it is not a technical violation, but the intent of the law is to guide communication between a public body and the public, so whether it’s a public matter being discussed privately or a private matter being discussed publicly, having that guideline is helpful when considering if something should be discussed. Laura referenced



Town of Thetford Vermont

3910 Vermont Route 113 • P.O. Box 126 • Thetford Center, VT 05075
802-785-2922 • thetfordvermont.us

the past Selectboard meeting and said that Sharon said Brian told her that anyone from the public who would like to allege an Open Meeting violation should contact only her and/or the Town Manager, otherwise they would be breaking the Open Meeting Law. That every time you email the entire board that person would be breaking the Open Meeting Law, and Sharon stressed that this was the advice that you gave her. My understanding is that the Open Meeting Law is designed to protect members of the public, and that the only people who can violate it are members of the public body. Also, that the statute mandates that any member of the public who wants to give written notice of an alleged violation should and needs to send it to the entire Selectboard rather than to the chair and the Town Manager to ensure that it becomes part of public record. Is that the advice that you gave her, and is this accurate?

Attorney Monaghan said that he can speak to this in general, but as the Town's attorney, under attorney-client privilege he can't say what he specifically said to a member of the Selectboard. The Open Meeting Law does protect the public and constricts the board members. Probably the core issue is, if a member of the board is asserting an Open Meeting Law violation and creating a new discussion with all members of the board, that is a communication with a quorum of a body and potentially triggers the definition of a meeting. Again, Attorney Monaghan said he would advise members of this board not to be emailing one another to say you violated the Open Meeting Law, sharing that with the entire body, as that is essentially the exact same thing as the allegations. Attorney Monaghan does agree that members of the public should have the right to email anyone on the board, and his hope is that in having any member of the public relaying concerns about the Open Meeting Law is that they do their best not to try to trick board members. We need to remember that people on boards are lay people not trained in the law, volunteers who have families, jobs and lives, and this is not a game of "gotcha". This is a group of volunteers trying to conduct the public's business to the best of their abilities. A best practice is to have a single point of contact that can collect comments, do it in an efficient way and then have a protocol for acting on it.

Mary Bryant said there is so much gray area, it is hard, and she is still trying to learn. Mary gave an example of an email she received from a Selectboard members but was not sure what the context was or what it pertained to. She replied to the person who sent and copied the Selectboard chair to say she didn't know what she was supposed to do with the email. Some felt that was a violation of the Open Meeting Law. When is it a violation if you are breaking the intent of the law versus trying to be in the spirit of the law?

Attorney Monaghan said the Open Meeting Law violations that have been litigated in last 7 years provide some answer to that. In 2014 the Legislature amended the Open Meeting Law to try to respond to changes in technology, and changes in board practices. It was also to provide a little more framework for courts to rely on in evaluating Open Meeting Law cases. They provided in statute the chance for a member of the public who is aggrieved to file a lawsuit, and the Vermont Attorney General's office to commence a case of prosecution under the statute as well. They also provided a potential misdemeanor that carries a potential \$500 fine for a board member personally. Attorney Monaghan said he only knows of one Vermont trial court case that addressed some of those standards, and it really talked specifically about intent. Intent is an important piece, at least for the punitive component of the statute. If a court is going to punish somebody under the Open Meeting Law, the court is probably going to analyze all the facts and try to determine whether the board and the board members were intentionally violating or



Town of Thetford Vermont

3910 Vermont Route 113 • P.O. Box 126 • Thetford Center, VT 05075
802-785-2922 • thetfordvermont.us

flouting the Open Meeting Law or whether it was an innocent violation. The facts in these cases will really guide the courts analysis because there may be times when a board commits a violation and it's innocent and they learn from it, they correct it, and it doesn't happen again. In other situations, there may be violations that a board does on a regular basis and they decide they don't really care, and a court is going to look at that situation with a much more jaundiced eye than how they would view as these innocent violations. It is a gray area with no metric standard that can be used to measure.

Tracy Bach said she wanted to follow up with Mary because she really feels her pain and wondered if a best practice could be a standard reply when you get an email that you aren't sure what it pertains to, saying it could be discussed at the next meeting. Tracy feels that erring on the side of caution is the best way to handle it.

Attorney Monaghan said a good thing to remember is that it's been a year and a half since Thetford adopted the Town Manager form of government, and they can operate as an administrator. The Town Manger can handle it, even if it means putting it on a future agenda and hopefully that manager will become a resource that people feel they can rely on.

Steve Tofel said he can't imagine anybody using the flow chart because it is so complex. Several members of the board recently attended a VLCT workshop, and it is really pretty simple – don't form a quorum, whether it's by forwarding emails, by replying all to an email, just don't form a quorum in any way. Second, don't violate executive session. What we are here tonight, he thought, was to discuss the alleged violations of the Open Meeting Law. The primer has been worthwhile, but he's not sure that's why 35 people showed up. What we're here to talk about is what has been alleged. Most of the Selectboard members have already acknowledged that there were violations. There were 2 separate situations, one where the former chair of the board had lost confidence in the majority of the board, and board members were contacting each other to find out if one of them would step up. In that case, Steve said he is sure that emails were forwarded. The second situation involved the feelings of the former chair of the board, and the attempt to not put him in a position of where he was in an open, public meeting finding out that he was being voted out. Discussion did occur around that and one-on-one emails may have been forwarded. Steve said everyone has acknowledged it, apologized for it, and that's what we're really talking about. We're dancing around a subject that everyone keeps bringing up. That is really what happened.

Mary Bryant said Steve encapsulated the situation perfectly and she agreed with everything he said. Everything that was done was to avoid confusion or hurt feelings and that's really the gist of it. There was nothing underhanded, we just decided ahead of time we were organized and clear about things that people did not have to hear about why we made our decisions.

Laura Covalla said if it were really that simple, we wouldn't be having this meeting. You wouldn't have broken it so many times, and we wouldn't all be here tonight having an extended discussion over Open Meeting Law. If it were that simple, then don't violated it again. Feelings shouldn't have anything to do with it. You are here to do services for the public. People feel things all the time about every issue that you talk about and bring up. Savings feelings shouldn't be an excuse to keep the public out of a discussion. Laura said she thinks that's a lame excuse. Steve Tofel said the former chair keeps referring to Laura as a resident and asked her if she was his sister.

Laura said yes.



Town of Thetford Vermont

3910 Vermont Route 113 • P.O. Box 126 • Thetford Center, VT 05075
802-785-2922 • thetfordvermont.us

Mary Bryant said she likes to think of their actions as diplomatic. We were very diplomatic about our decision making. People can say that she doesn't need to consider feelings or whatever, but that's where Mary is coming from.

Laura said she doesn't think that being his (former chair) sister changes her questions or any of her points. Being diplomatic is something everyone can practice during meetings, rather than behind them.

Mary Bryant responded that some people have been choosing not to be diplomatic, especially during Executive Session meetings and she has confronted people and asked them if we should be adopting a code of ethics for our meetings and our emails. Mary said they have not come to that point, but she is hoping they will move toward that as a board of adopting a code of ethics that could perhaps be put in the way we run our meetings.

Li Shen said she thinks we should just limit our emails. In previous Selectboards, under previous chairs we hardly emailed, if ever at all. The only person that emailed was the chair and people could reply only to the chair. We're not going to have rules of conduct. That's just adding complication that's unnecessary. Let's just not email.

Mary said she is happy with not emailing but she does think we would have something to benefit if we did discuss a code of ethics for meetings because it could have been used in past meetings.

Alexis Jetter thanked Attorney Monaghan for a really helpful explanation of the Open Meeting Law and Laura for the flow chart. Alexis said she understands the human dimension of trying to save people's feelings in the succession of power to the chair, and while not specific to open meetings, Melissa Krzal has suggested that we have a different form of succession, where there is a clear rotation of the chair every year. The other comment is if the Selectboard is going to limit their email, that is going to expand the number of meetings you are going to have.

Attorney Monaghan said he thinks the conversation is becoming more of a Selectboard meeting and less of an instructional one by me. He suggested that Sharon take over the meeting and if there are questions for him, he'd be happy to answer them.

Sharon said she had been wondering if they should close out the meeting on the Open Meeting Law and is trying to figure out if there is an agenda item starting to form that should be put on a future meeting.

Dale Lewis (Road Foreman) asked if it was a violation of Open Meeting Law for more than 2 people to meet and gave the example of a meeting with 2 Selectboard members, the Town Manager and himself meeting with say DPW. Is that a violation?

Attorney Monaghan said there would need to be 3 Selectboard members, and the Town Manager does not count as part of a Selectboard quorum.

Sharon Harkay asked for possible agenda item ideas.

Mary Bryant said they could discuss best practices of other boards, discuss adopting best practices and consider what we learned from the VLCT workshop to add to our rules of procedure.

Tracy Bach said she had a question for Attorney Monaghan. She said with all due respect to Steve, she was at this meeting not because of what happened with the last chair and the transition to the new chair, but because this is about governance. It's much more complicated, and she understands wanting to boil it down, but Mary has had good questions and is now being questioned a town employee. The interesting piece with the town manager system, one of the best practices is moving more toward the town manager who will bring it to the public agenda



Town of Thetford Vermont

3910 Vermont Route 113 • P.O. Box 126 • Thetford Center, VT 05075
802-785-2922 • thetfordvermont.us

where you will talk about things in public. Are committees or appointed groups, sub-bodies also subject to the Open Meeting Law?

Attorney Monaghan said that is correct.

Steve Tofel wanted to clarify that a working group that comes out of a committee to study a problem is under the Open Meeting Law.

Attorney Monaghan said they are. He often hears the term “working group” but it is a fallacy to think they are not under Open Meeting Law. A sub-body meeting on a particular project is also subject unless they are less than a quorum.

Tracy Borst asked if committees can form their own sub-committees and working groups?

Attorney Monaghan replied maybe.

Tracy followed up by stating the important thing is whether it is a quorum. If it’s less than the quorum they can meet without warning a meeting.

Attorney Monaghan said he would agree with that and that the Open Meeting Law does not address sub-committees or working groups. It says any board or committee of the municipality, and he interprets that as any working groups, or sub-committees, etc. Any documents out of that group would be public records.

Attorney Monaghan did address the Development Review Board (DRB). The roles of government are the Executive branch, the Judicial branch and the Legislative branch. The Selectboard often functions with all of those hats from time to time. The DRB is entirely a quasi-judicial body, meaning they act on applications that are subject to its jurisdiction. The DRB acts essentially like a court. Their meetings have to be open to the public, warned and minutes taken but that’s where the similarities end. The DRB can hold private deliberative sessions. They can conduct these deliberations entirely by email and it does not violate the Open Meeting Law. As a matter of fact, all of their meetings could be conducted by emails. In some instances, the Selectboard may be allowed to send emails specific to a quasi-judicial matter such as a write-up of a decision. A draft document could be emailed around with comments to other members of the Selectboard and this would not violate Open Meeting Law.

Attorney Monaghan wanted to add that there is clear guidance from the Vermont Supreme Court regarding public officials using official email accounts or private emails accounts and texting using a public telephone number or private phone. No matter what the device, if it is used to conduct business of the public, those communications are public record and could be implicated in an Open Meeting Law violation as well.

Sharon Harkay thanked Bryan Monahan for his presentation, stating it was extremely helpful. Sharon said further questions could be directed to her and Brian Gazda and they can be collected and sent to Attorney Monaghan.

Motion by Steve Tofel to adjourn the special Selectboard meeting at 8:22 pm. **VOTE unanimous (4-0-0)**