Harwood Unified Union School District Board of Directors

September 26, 2017

Dear Friends:

I am traveling and cannot join you at our upcoming meeting, but I feel obligated to register my serious concerns about our increasingly inexplicable refusal as a body to meet our obligations under the Open Meeting Law.

The law in question is crucial to public accountability, and it is not particularly punitive. A body that makes a mistake—as we rather obviously did on May 24—must publicly acknowledge the mistake, take measures to avoid repeating it, and move on with the lesson learned. Instead of doing that, as we should have and could have within ten days of the complaint in this matter, we have been led to do substantially nothing for four months, daring a growing line of irritated people to take us to court. That is apt to end badly, and we have a responsibility to avoid it.

I. How We Got Here

On the other side of summer, May 24th, the Board voted to go into executive session upon the superintendent's request to discuss what was described as a "matter of personnel contract." Those of us who've been around public bodies probably had some hunches about what that meant. Maybe a contractor needed to be called in breach, or maybe a dispute had arisen about interpretation of the master contract for teachers and somebody was threatening a grievance. Ordinary stuff for a big school district, and prudent for executive session.

What followed wasn't what most of us could have expected. The superintendent wanted to have a very blunt discussion of perceived Board dysfunction, which she saw as a crisis threatening the district generally and administrator morale particularly. The details have been bandied about publicly. I'll spare you another recitation. As the executive session wore on, we developed an awkward problem: the whole thing had not a whit to do with a contract.

Failing to interrupt that misbegotten executive session in the moment, once it should have been clear we'd never get to its stated purpose, was a significant failure on my part, for which I apologize to each of you and everyone the Board serves. That session left everyone involved in a difficult position and provoked predictable fallout we're just getting over.

II. Evaluating the Session Relative to the Open Meeting Law

In June, two Board members gave written notice protesting the executive session in question. They had other grievances and demands, too, and on August 30, the Board determined by vote that it wouldn't indulge those. Although I strongly favor moving ahead to more constructive things, I abstained from supporting the un-warned motion in question, which omitted any mention of the Open Meeting Law, because I cannot support locking the door with the elephant still inside.

> *No public body may hold an executive session from which the public is excluded, except by the affirmative vote of ... a majority of its members present in the case of any public body of a municipality or other political*

subdivision. A motion to go into executive session shall indicate the nature of the business of the executive session, and no other matter may be considered in the executive session ... (1 V.S.A. § 313)

"A public body may not hold an executive session except to consider" a narrow and strictly-construed set of topics including "contracts" and "labor relations agreements with employees." *Id.* § 313(a)(1)(A)&(B). In either case, an executive session is permissible only after the body has "ma[de] a specific finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage." *Id.*

We don't fare well under these tests. At all. No specific contract, contract term, nor even a single word of a single phrase from any contract or agreement was discussed. Nobody was threatening a contract action against us, and we weren't considering a contract action against anybody. The only nexus to contracts in the whole session was that people who were said to be unhappy with the Board *incidentally happened to have employment contracts.* That's true of everybody who works for a public school. The ink is dry on those, and they're a public record. Follow the reasoning to its conclusion: A school board can have a closed-door executive session any time, about anything, because District employees have contracts they might not renew if unhappy, and everything the Board does can make employees more or less happy.

If the deficiencies in that argument are insufficiently concrete, there is a completely separate, binary prerequisite to a proper executive session about contracts or labor agreements. A public body must make a "specific finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage," vis-à-vis the contract to be discussed. *Id.* § 313(a)(1). We fail on that count, too. There was no such finding, nor even discussion of the statutory requirement that there be such a finding. There wasn't even any contract or agreement to make the required finding *about*.

Finally, there is the requirement from § 313 that "no other matter [than the stated basis for the session] may be considered in the executive session." In other words, if one conceives of the Open Meeting Law as setting out three, must-pass tests for a lawful executive session, the May 24 session fails all three.

III. The Unresolved Problem

In late June, when we didn't seem to be responding appropriately, I got worried about our exposure on these points. At my request, Superintendent Nease and the chair called me on June 26. I suggested that this problem be addressed in the way I will suggest below, for the reasons I've described above. That got less traction than none. I backed off and asked if the Board's attorney had been consulted, thinking he'd be a more appropriate source of guidance in any event. I was told everything already had been run by him. There was no problem and nothing to discuss. The decision had been made and we were not responding.

In the past week, it has become clear that the Board's attorney never was consulted in June as I believed. That explains a lot. The Board should demand direct access to him right away.

I am painfully aware that some of you, whom I greatly respect, may be angry to read this and given to see it as the umpteenth picking of a scab. But picking or not isn't the choice confronting us now. The local paper and the grievants in this matter do not seem to be in a forgetful mood. It isn't realistic to expect that this will go away, and more important, we had a duty to fix this in June.

People have made a written protest that triggers certain obligations. These obligations are imposed by the Legislature upon the Board itself.

> ***Upon receipt of the written notice of alleged violation, [a] public body shall respond publicly*** *to the alleged violation within 10 calendar days by:*
>
> > *(A) acknowledging the violation of this subchapter and stating an intent to cure the violation within 14 calendar days; or*
> >
> > *(B) stating that the public body has determined that no violation has occurred and that no cure is necessary.*
>
> -1 V.S.A. § 314(b)(2).

Among my email yesterday was one informing a reporter that the Board's August 30 vote stood as its § 312(b)(2) a determination that no violation has occurred and that no cure is necessary. If that really is the sense of the majority, the Board should say it much more clearly, if the Board can.

On the other hand, if we erred as I think, we're obligated to "cure the violation at an open meeting by:"

(1) "either ratifying, or declaring as void, any action taken at or resulting from ... an executive session or portion thereof not authorized under" the Open Meeting Law, and
(2) "adopting specific measures that actually prevent future violations." 1 V.S.A. § 314(b).

The Open Meeting Law is a clever thing. If one has erred and must eat crow, he can eat it himself for free, or he can demand that a jurist serve it to him, after which he buys for the house. "The court shall assess against a public body found to have violated [the Open Meeting Law] reasonable attorney's fees and other litigation costs reasonably incurred in any case ... in which the complainant has substantially prevailed, unless the court finds that ... the public body cured the violation in accordance with" the subsection indented immediately above. 1 V.S.A. § 314(d)(1)(B). By the grace of some long-ago legislator, that lone provision protecting this District against costs appears to be untethered from timeliness.

Unless you genuinely believe the May 24 meeting was lawful, the available choices seem to be (1) to defy our obligations and gamble other people's money that nobody will be troubled to front a filing fee he'll probably get back, or (2) to say sorry and act like we mean it. Pride goeth before an assessment of costs. And even if nobody calls our bluff, there's the problem of emboldening the improper use of executive sessions where that is *exactly* the wrong message. We cannot promote transparency and accountability while thumbing our noses at the laws that protect those values.

IV. What to Do

I'd like to see two curative motions. The first would admit error. The second would announce a measures to avoid a similar mistake. Just off the cuff:

> ***Motion 1:*** *That the Board acknowledge its executive session of May 24 was inconsistent with the requirements of 1 V.S.A. § 313, declare void all actions considered to have been taken at or resulting from that executive session, and apologize to those affected.*
>
> ***Motion 2:*** *That the Board adopt the following specific measures to prevent a future violation: First, a motion for an executive session shall be out of order unless supported by a contemporaneous review of the text of 1 V.S.A. § 313 and a clear statement, having the maximum specificity possible in open session, of the subject matter to be discussed. Second,*

prior to entering any executive session, one member reasonably disinterested in the subject matter shall be specially designated to ensure that matters discussed are compatible with the stated basis for the session and that no other matter is discussed. Third, any executive session under § 313(a)(1) shall terminate after five minutes have been afforded to the proponent to explain the need for an executive session, after which, in open session, the Board shall reaffirm its finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage before a motion for an indefinite executive session is in order. Fourth, any executive session shall terminate upon the protest of two members that the subject matter is out of order.

It would be smart for the Board to speak directly with its attorney about where it is and what a curative plan would look like—I'm just giving an illustration of something I hope might work, and I'm not sure it's a particularly good one.

V. Consistency

It has been said that hypocrisy is the tribute vice pays to virtue. The report that launched this Board lists "promot[ing] transparency and accountability" among four specific goals of merging under Act 46. Until this episode, the Board's approach to the Open Meeting Law has been conspicuously cautious. For example, we chose a very conservative approach to subgroups, worried that working groups with no ability to take official action for the Board could yet be deemed little public bodies, meeting accidentally at the supermarket or the ski slope.

The crowning irony, however, is that the very last time the Board was a party to a civil action, it was the plaintiff in a complaint arguing directly against the position attributed to it now. This winter, without any motion from the Board, the administration sent the Board's attorney to the Washington Superior Court to argue that actual collective bargaining negotiations had to start in open session, and had to stay in open session unless somebody could show, on an issue-by-issue basis, that premature general public knowledge would clearly disadvantage a person involved. Our complaint zeroed in on the importance of the same required finding we never made or even discussed on May 24. It noted with concern, "If the Board violates Open Meeting laws, it can be held liable to any member of the public challenging the decision to engage in private negotiations." There was "no good faith basis" to have an executive session without that required finding. We said the public's right to know "far outweighs any desire for secrecy" by the defendants. We argued it was unacceptable that the District would "risk significant financial exposure and violation of the law" by using an executive session inappropriately. Our own filing in that matter devastates the nothing-to-do-here position we've taken all summer.

It is unclear how our District has swung from piety about the Open Meeting Law to the view of late that a plain violation of it, protested in writing, may be ignored. Crossing our fingers until the limitations period runs on May 24, 2018 is not responsible. The Board has a duty to protect taxpayers and preserve its integrity as a public body by acknowledging error, making a plan to avoid repeating that error, and moving on the best we can to serve the students of this District. I hope you will support moving us in that direction.

Yours,
/s/Gabriel M. Gilman
Vice-chair