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MEMORANDUM

To: Massachusetts Municipal Association

From: Christopher J. Petrini, Petrini & Associates *C.J.P.*
Heather W. Kingsbury, Petrini & Associates *HWK*
On Behalf of the City Solicitors and Town Counsel Association

Date: January 20, 2010

Re: OPEN MEETING LAW
District Attorney for the Northern District v. School Committee of Wayland,
455 Mass. 561 (2009)

On December 31, 2009, the Supreme Judicial Court issued an opinion in the above-reference case holding that the Wayland School Committee committed certain violations of the Open Meeting Law. This memorandum is intended to provide a general overview of the Court's decision and holdings. We recommend that municipal officials consult with municipal counsel for advice as to the implications of this decision.

FACTS

In 2004, the School Committee Chair contacted the other members of the Committee via e-mail to solicit input on the superintendent's performance. Certain members replied directly to the Chair with comments, and one member replied to the entire Committee with comments. The Chair prepared a draft evaluation of the superintendent based on the comments received and distributed the draft to the members in advance of a scheduled meeting. At the meeting, the Committee convened in open session and then voted to enter executive session "for purposes of matters relating to Collective Bargaining as set forth in [G.L. c. 39, §23B]." Among other issues, the Committee discussed the superintendent's evaluation during the executive session. The following week the Committee again convened in open session and voted to enter executive session "for purposes of matters relating to Collective Bargaining and Personnel as set forth in [G.L. c. 39, §23B]." Among the issues discussed was the draft evaluation of the superintendent.

HOLDING

The Court found several violations of the Open Meeting Law occurred as a result of the School Committee's actions. The Court's decision is based on its interpretation of the following exemptions to the Open Meeting Law:

- Exemption 1, which allows an executive session “to discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual....”;
- Exemption 3, which permits an executive session “to discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel....”; and
- Exemption 7, which allows an executive session “to comply with the provisions of any general or special law....”

The Court instructed that a precise statement of the reason for entering executive session is necessary, and the votes to enter executive session for the stated purposes were not proper in this case. The stated purpose of the first executive session was to discuss collective bargaining and did not cover the matters discussed. The superintendent’s evaluation does not relate to collective bargaining because he is not a union employee. The addition of the words “and Personnel” in the vote to enter the second executive session may have been intended to refer to the provisions of Exemption 3 allowing an executive session to discuss matters related to contract negotiations with nonunion personnel, but the reference to personnel did not cover the discussion of the superintendent’s performance because there was no indication that the superintendent’s contract renewal or salary would be discussed.

The Court further held that the language of Exemption 1 explicitly prohibits discussions of the professional competence of an individual in executive session. However, Exemption 3 may apply to a discussion of an evaluation of a nonunion employee as part of its contract or salary negotiations with that employee. Therefore, professional competence must first be discussed in open session, which may be followed by an executive session to discuss how professional competence will factor into contract or salary negotiations.

Written performance evaluations are exempt from public disclosure pursuant to the Public Records Law. In order to maintain the confidentiality of the written evaluation, a board must first convene in open session to discuss professional competence and then enter executive session, pursuant to Exemption 7 to comply with the Public Records Law, when discussions reach the point that preparation and drafting of the written evaluation are imminent. Any individual member’s comments used to create a written performance evaluation are not, themselves, protected from disclosure. Therefore, the School Committee’s e-mail exchange was deemed a private deliberation of the superintendent’s performance and therefore a further violation of the Open Meeting Law.

Recent amendments to the Open Meeting Law will take effect on July 1, 2010. The Court’s decision in this case does not purport to interpret the amended statute.