

Memo

To: John Moosey, City Manager
City of Palmer

From: Scott A. Brandt-Erichsen *SBE*

Date: September 15, 2021

Re: Investigation Report Concerning Allegations of Alaska Open Meetings Act Violations

Attorney Client Privileged

Question:

You requested that I investigate and provide a report regarding allegations that four City of Palmer City Council Members violated the Alaska Open Meetings Act through their participation in on-line discussions in a limited membership Facebook group.

Facts:

There is an on-line Facebook group identified as "Mat-Su Moms for Social Justice." It is a group which has controlled access, and has approximately 350 members. Only members can post or see things which are posted. It is not open to the general public, but only to invited members. The allegation is that Council Members Brian Daniels, Sabrena Combs, Jill Valerius and Julie Berberich are members of the group, and that they participated in one or more conversations within this group which constituted a meeting in violation of the Alaska Open Meetings Act (AS 44.62-310-312). This allegation was made by a member of the public, and the City of Palmer has requested that the allegations be investigated and a report prepared.

I was not able to access the closed group, but I was provided with copies of screen shots from the conversations referenced in the complaint. These included:

1. A 105 page excerpt from various dates including: January 9, 2020 describing the group's purpose; June 4, 2020 regarding a scheduled protest; June 5, 2020 regarding the Mayor and militia discussions; June 9, 2020 regarding police chief support; June 18, 2020 summarizing an upcoming City Council agenda; June 22, 2020 regarding the police chief; June 22, 2020 regarding voting by mail; June 24, 2020 regarding City Council offices; July 21, 2020 regarding candidacy of Brian Daniels; July 29, 2020 regarding plastic bag ban issues; July 30, 2020 regarding plastic bag ban; August 3, 2020 regarding plastic bag bans; September 2, 2020 regarding local Council races; September 3, 2020 regarding local Council races; October 7, 2020

regarding politics and business boycotts; October 12, 2020 regarding newly elected persons; October 17, 2020 regarding a demonstration march; October 25, 2020 regarding masks; November 13, 2020 regarding masks; November 14, 2020 regarding masks; November 23, 2020 regarding mask issues; November 27, 2020 regarding mask issues; November 30, 2020 regarding Masks; January 2, 2021 regarding police issues; January 5, 2021 regarding presidential election issues; January 15, 2021 regarding voting by mail; February 12, 2021 regarding police commission issues; March 28, 2021 discussing a legislative town hall meeting; April 8, 2021 regarding police oversight; April 22, 2021 describing the group's purpose; May 5, 2021 regarding police oversight; May 8, 2021 regarding a police oversight committee; May 12, 2021 regarding police oversight. The excerpts also include posts sorted by topic regarding masks and regarding Palmer City Council.

2. A 6 page excerpt of a thread from October 12, 2020 with a post by Jill Valerius regarding certifying election. The thread included comments from Sabrena Combs and "likes" by Brian Daniels, Sabrena Combs and Jill Valerius. (This partially duplicates some of the 105 page materials.)

3. A "like" by Sabrena Combs and Jill Valerius on an October 15, 2020 comment by Meggie Aube-Trammell concerning board and commission appointments.

4. A comment by Jill Valerius in response to a comment by Andrea Fuller on the October 15, 2020 stream concerning board and commission appointments.

5. A comment by Brian Daniels in response to a post by Andrea Fuller on the October 15, 2020 stream concerning board and commission appointments.

6. A "like" by Brian Daniels and Jill Valerius to a post by Terry Snyder on the October 15, 2020 stream concerning board and commission appointments.

7. A "like" by Brian Daniels in response to a post by Lynalice Bandy regarding board and commission appointments with unknown date (likely October 2020).

8. A 4 page excerpt of a thread from October 23 with a post by Maggie Aube-Trammell regarding sign waiving. The thread included comments from Julie Berberich and "likes" by Brian Daniels, and Jill Valerius.

9. A 4 page excerpt of a thread from October 24 with a post by Brooke Heppinstall Kroenung regarding ballot measure 2. The thread included comments from Sabrena Combs.

10. A 6 page excerpt of a thread from October 25 with a post by Maggie Aube-Trammell regarding mask wearing. The thread included a comments from Brian Daniels and "likes" by Brian Daniels and Jill Valerius.

11. A 5 page excerpt of a thread from October 26 with a post by Andrea Hackbarth regarding masking. The thread included "likes" by Brian Daniels and Jill Valerius.

12. A 1 page excerpt of a thread from October 28 concerning event scheduling and covid 19 by Andrea Fuller with a comment by Brian Daniels.

13. A 4 page excerpt of a thread from October 28 with a post by Maggie Aube-Trammell regarding the Palmer City Council meeting. The thread included a comments from Brian Daniels and "likes" by Brian Daniels and Sabrena Combs.

14. A 15 page excerpt of a thread with unknown date (likely October or November 2020) concerning masks which included "likes" in the thread by Brian Daniels, Sabrena Combs and Jill Valerius, and comments by Brian Daniels and Julie Berberich.

15. An 8 page excerpt of a thread with unknown date (Likely October or November 2020) concerning masks which included "likes" in the thread by Brian Daniels, Julie Berberich and Sabrena Combs, and comments by Sabrena Combs, Jill Valerius and Julie Berberich.

16. A 7 page excerpt of a thread from October 30, 2020 with an comment by Julie Berberich regarding board and commission applications. The thread included comments by Brian Daniels and "likes" by Brian Daniels and Jill Valerius.

17. A 3 page excerpt of a thread from October 31, 2020 with an comment by Andrea Hackbarth. The thread included "likes" by Brian Daniels, Sabrena Combs, and Jill Valerius.

18. A 4 page excerpt of a thread from November 4, 2020 with an excerpt of the Palmer City Council meeting. The thread included a comment from Sabrena Combs and "likes" by Brian Daniels, Julie Berberich, and Jill Valerius.

19. A 4 page excerpt of a thread from November 5, 2020 concerning big cabbage radio with comments by Sabrena Combs and Brian Daniels and a "like" by Jill Valerius and Sabrena Combs.

20. A 2 page excerpt of a thread from November 7, 2020 concerning donations to big cabbage radio with a post by Brian Daniels and "likes" in the thread by Sabrena Combs and Jill Valerius.

21. An 8 page excerpt of a post November 13, 2020 by Sabrena Combs regarding a mask mandate which included "likes" in the thread by Brian Daniels, Jill Valerius and Julie Berberich.

22. A 36 page thread of comments regarding police personnel matters beginning January 2, 2021, initiated by Robin Nicole Moffet during which Brian Daniels commented and liked several posts, Sabrena Combs commented several times and liked some posts, and Jill Valerius liked at least one comment.

23. A comment by Brian Daniels on a thread initiated by a Meggie Aube-Trammell concerning board and commission appointments with unknown date (likely May 2021).

24. A 15 page excerpt of two undated threads with posts regarding police oversight and board and commission vacancies. The first string is likely from January or February 2021 and is a precursor to the string continued in another portion of the materials provided. It includes comments from Sabrena Combs. The second string is a continuation of the thread listed in dated October 15, 2020. The thread included comments from Julie Berberich, Brian Daniels, Sabrena Combs and "likes" by Brian Daniels, Julie Berberich, and Jill Valerius.

25. A "like" by Brian Daniels and Sabrena Combs to a post by Meggie Aube-Trammell concerning a police oversight board with unknown date (Likely May 2021).

Legal Requirements:

The Alaska Open Meetings Act (OMA), AS 44.62.310-312, is intended to enable the public to have notice of when meetings which are subject to the OMA are held, and to require that meetings covered by the OMA are open to the public so that the public can observe their public officials conducting public business. There are several preliminary questions to determine whether a meeting complies with the OMA:

1. Is it a meeting as defined in the OMA?
2. Is the body which is alleged to be meeting subject to the OMA?
3. Has proper notice of the meeting been provided?
4. Is the meeting open to the public or does it meet one of the exceptions permitting closed deliberations?

Here, there is no question that the Palmer City Council is a governmental body of a public entity, as defined in AS 44.62.310(a), and is therefore subject to the OMA (question 2). There is also no real question that the exchanges on Facebook which are the subject of the complaint were not made with notice of the date, time, place and location of a meeting as called for in AS 44.62.310(e) and Palmer City Code 2.04.075 (question 3). There is also not much room for dispute that the discussions on the Facebook group page were not open to the public and did not meet one of the exceptions (question 4). Thus, the focus of the inquiry is whether the discussions constituted a meeting for purposes of the OMA.

AS 44.62.310(h)(2)(A) defines a meeting for decision making or policy making bodies such as the Palmer City Council as:

"A gathering of members of a governmental body when more than three members or a majority of the members, whichever is less, are present, and a matter upon which the governmental body is empowered to act is considered by the members collectively."

The various communications referenced in the complaint cover a period of time from January 2020 until mid-summer 2021. From the City website, Council Member Brian Daniels was first elected in October 2020, taking office after October 12, 2020. Accordingly, any correspondence on the Facebook group page prior to October 13, 2020 would not have included him as a Council Member, and even if the other three were to collectively consider matters the City Council is empowered to act upon during the period prior to October 13, 2020, that activity, by itself, would not violate the OMA because it would not be more than three council members or a quorum.

The postings since October 13, 2020 must be individually evaluated to determine whether they constituted the collective consideration of matters upon which the Palmer City Council is

empowered to act by more than three members of the City Council. Where a string of communication on a topic only includes participation by three or fewer Council Members, then that communication would not be a meeting under the OMA even if it was concerning matters the City Council is empowered to act upon. Thus, the focus is on conversations or “likes” where four or more Council Members have participated. In the materials provided there were several conversations after October 13, 2020 which included either comments or “likes” by four Council Members. These included:

1. A 4 page excerpt of a thread from November 4 with an excerpt of the Palmer City Council meeting. The thread included a comment from Sabrena Combs and “likes” by Brian Daniels, Julie Berberich, and Jill Valerius.

2. An 8 page excerpt of a post November 13, 2020 by Sabrena Combs regarding a mask mandate which included “likes” in the thread by Brian Daniels, Jill Valerius and Julie Berberich.

3. An 8 page excerpt of a thread with unknown date concerning masks which included “likes” in the thread by Brian Daniels, Julie Berberich and Sabrena Combs, and comments by Sabrena Combs, Jill Valerius and Julie Berberich.

4. A 15 page excerpt of a thread with unknown date, Likely November 2020, concerning masks which included “likes” in the thread by Brian Daniels, Sabrena Combs and Jill Valerius, and comments by Brian Daniels and Julie Berberich.

5. A 15 page excerpt of two undated threads with posts regarding police oversight and board and commission vacancies. The first string includes comments from Sabrena Combs. The second string, dated October 15, 2020, included comments from Julie Berberich, Brian Daniels, Sabrena Combs and “likes” by Brian Daniels, Julie Berberich, and Jill Valerius.

The next step is to evaluate whether their participation constitutes collective consideration of a matter upon which the City Council is empowered to act. The courts in Alaska have not addressed the issue of whether a person posting a social media comment or just a “like” on another person’s comment constitutes consideration of a matter. Facebook posts by elected officials about official business have been held to be public records.¹ Where one or more Council Members does not make any comment other than posting a “like” it may be argued that they are not engaging in any collective consideration.

However, courts in other states have held under similar Open Meetings Act provisions that where a quorum is present the entire quorum need not actively engage in the discussion, but rather an Open Meetings Act can be violated simply by “some level of discourse on the issue of public policy that is being presented.”² If members later act consistently with the discourse even if they did not substantively reply it suggests some level of participation in deliberation occurred. This rule is consistent with the rule adopted by the Alaska Supreme Court in *Brookwood Homeowners v. Municipality of Anchorage*³, that a “meeting” includes every step in the

¹ See for example, *West v. City of Puyallup*, 410 P.3d 1197, Washington App.2018) (Facebook posts) citing *Nissin v. Pierce County*, 357 P.3d 45 (Wash. 2015) (text messages), and *West v. Vermillion*, 384 P.3d 634 (Wash 2016) (e-mails on personal computer).

² See *Tuscola Wind III, LLC. v. Almer Charter Township*, 327 F. Supp.3d 1028, 1056 (E.D. Mich. 2018) citing *Markel v. Mackley*, an unreported case decided November 1, 2016 (Mich App. 2016) .

³ 702 P.2d 1317 (Alaska 1985).

deliberative and decision-making process when a governmental unit meets to transact business. The meeting at issue in *Brookwood Homeowners* was a privately hosted opportunity to learn about a developer's plans prior to assembly consideration of a rezoning application.

Applying the reasoning from *Brookwood Homeowners* regarding the steps of the deliberative process, and the reasoning from the court in *Tuscola Wind* regarding a quorum collectively receiving the information related to the deliberations outside of a public meeting, where a quorum of the City Council participates in a forum which involves deliberation about matters upon which the City Council is empowered to act, and the information disseminated is a step in the deliberative process, then that communication may constitute a meeting even if not all members express their opinions. I believe that there is a substantial likelihood that the Alaska courts would follow this reasoning.

Turning to the examples and applying this criteria, the mask mandate discussion related to a matter the City Council was empowered to act upon, and the discussion in late October 2020 involved a quorum of the Council. The discourse included arguments bearing upon deliberations regarding a proposed ordinance regarding a mask mandate. The discourse took place in a forum which was not open to the public. The City Council considered an emergency mask ordinance at its November 8, 2020 meeting. The City Council received significant testimony over several meetings, and the ordinance was voted down at the December 4, 2020 Council Meeting. I believe that a court would find that the discourse in the Facebook group with a quorum of City Council Members participating, even if not fully debating the public policy issue, constituted a meeting under the OMA. Further, I believe that a court deciding the issue would find that the lack of public access and notice for that meeting violated the OMA. However, the subsequent full consideration of the measure over several meetings, and with substantial public testimony, remedied the violation. In any case, it has been more than 180 days since the communications took place, so it would be too late to challenge the validity of the action based upon an Open Meetings Act violation allegation.

The second subject matter was relating to the police oversight board. The City Council received information and testimony at its May 11, 2021 meeting concerning a proposed police advisory board. However, the posts I have seen did not include a quorum of the council participating in or receiving the information communicated in the discussion. With only three Council Members present there is no meeting in violation of the OMA.

The general discussion of boards and commissions dated October 15, 2020 did include likes or comments from four members, and related to issues upon which the council might have the power to act, but I did not locate any associated council consideration of the topic of procedures for appointments in that time frame. Where there is not an action brought up for a vote it is not clear whether there is a decision which could be challenged.

Conclusions:

The communications provided show conversations via posts to the Facebook group page. These communications raise serious concerns about OMA compliance. At least one of the streams of communications in October 2020 appears to have violated the OMA. Even if none of the posts contain sufficient detail to conclude unequivocally that the OMA is being violated by the communication, I recommend that Council Members not participate in communications by social media, e-mail or otherwise where a quorum of the Council is included in the communication and that quorum is either discussing or being presented with information provided by a fellow Council

Member for deliberation on matters upon which the Council is empowered to act and is outside of a public meeting. There are several risks arising from this course of conduct. These include:

1. The risk that Council Members may inadvertently violate the OMA by debating an issue on-line which is a matter the Council is empowered to act upon;

2. The risk that the Alaska Court would invalidate Council actions following the reasoning of the Michigan courts and extending the *Brookwood* analysis to include a quorum of the body receiving information concerning an issue upon which they are empowered to act in an on-line forum which is not open to the public, regardless of whether all members affirmatively participate in debate or comment; and

3. The risk that a petition for recall may be filed relating to the Council Members involved asserting that the communications violate the Alaska Open Meetings Act. The Alaska Supreme Court has held that compliance with the Act is a duty of office, and that violation of that duty is sufficient grounds to form the basis for a recall petition. If allegations are properly made in a petition, the voters would be the judge of whether in fact the acts alleged constituted an OMA violation.

It is important to distinguish the common practice of the clerk or manager providing Council Members with correspondence relating to City business via e-mail. Such communications are public documents (unless otherwise privileged) and so long as members do not respond to each other there is no collective consideration outside of a properly noticed meeting. Most clerks have a routine practice of blind copying the elected officials on such correspondence to prevent inadvertent discussion by hitting "reply to all". If members do "reply to all", then such chain e-mails may pose the same risks as social media communications and create a serial meeting which is neither properly noticed nor open to the public.