

**Town of Brookfield  
Board of Selectmen  
Town Hall, Selectmen's Office  
Thursday, January 17, 2012**

**Executive Session**

At about 7:30 pm, Mr. O'Connell entertained a motion to go into executive session under exemption seven "to comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements"; so voted with Mr. Comtois and Mr. O'Connell each voting "Aye."

**Charge of Possible Ethics Violation:**

Mr. O'Connell reviewed a confidential e-mail that he had received from Town Counsel and which had been forwarded to the Board members by the Administrative Assistant.

Apparently someone had written to the Ethics Commission alleging some impropriety with the process recently used with choosing the Town Treasurer. He indicated that his wife, as Chairman of the Treasurer Screening Committee, had been contacted and had forwarded the requested documents.

The body of Counsel's e-mail is below:

I am writing to follow up on the request from the State Ethics Commission regarding a confidential investigation of the 2011 hiring process for the Town Treasurer. I have discussed the request with an investigator and attorney in the Commission's Enforcement Division. Because this matter concerns a confidential investigation by the Ethics Commission, it is my opinion that the Board of Selectmen may discuss the matter in a properly convened executive session under exception #7 of the Open Meeting Law. Please address this at your earliest convenience, although in my opinion, this is not an "emergency" that would reduce the required notice for a meeting under the Open Meeting Law. Alternatively, it is my opinion that you may use your discretion as the Chair and authorize me to proceed in whole or in part as recommended below and then to report the matter for discussion by the Board in an executive session.

The Ethics Commission is requesting all documents pertaining to the search and hiring of the Town Treasurer. It is my understanding that the Commission is seeking advertisements for the position, resumes submitted by applicants, screening materials used by the screening committee, minutes of the committee, minutes of the Board of Selectmen, all "evaluative materials" and all other documents in connection with the hiring process.

Additionally, the Commission has requested that all such documents be secured pending provision of the documents and I am requesting that you do so immediately.

As you know, many of the documents are public documents that would be available upon request under the Public Records Law. Some documents, however, contain personal information that would not be subject to disclosure and other documents, for example, resumes and applications of persons who were eliminated before the final screening, are exempt from disclosure for other reasons.

The Town may voluntarily make the requested records available without a subpoena from the Ethics Commission. Alternatively, the Town may request issuance of a subpoena from the Commission. In my opinion, for the reasons explained below, the Town should not turn over the documents without a subpoena. And, in my further opinion, even if a subpoena is issued, the Town should notify persons whose personal information would be provided before the information is provided.

In my opinion, to the extent that the requested information or portions thereof could constitute "intimate details highly personal in nature", disclosure of the same, even in response to a subpoena, could expose the Town to claims of invasion of privacy under G.L. c.214, §1B. Additionally, since applicants for public positions who are not selected as finalists for the position are entitled not to have their applications made public, those persons have an expectation of privacy.

For these reasons, I recommend that, instead of providing all of the records at this point, we send notice of receipt of the subpoena to the record subjects, indicating that we intend to turn over responsive records two weeks after sending the notice, unless they produce a protective order from an appropriate court to quash the subpoena.

The State Ethics Commission regulations concerning preliminary inquiries (930 CMR 3.01(2)) provide that members and employees of the State Ethics Commission must keep the nature or existence of a preliminary inquiry confidential. It is important to recognize, however, that the regulations (930 CMR 3.01(4)) provide further that if the State Ethics Commission later votes and makes public a finding of reasonable cause and authorization of adjudicatory proceedings in accordance with M.G.L. c.268B, §4(c), the participants in the Commission proceeding are no longer bound by the confidentiality provisions cited above. Thus, even if the Town were to provide the documents at issue in confidence, if the State Ethics Commission later determines to pursue the matter, the documents provided will become public. The regulations (930 CMR 3.01(3)) provide further that witnesses who have been contacted by the Commission "may be requested to keep confidential the nature or existence of a preliminary inquiry involving allegations of violations of M.G.L. c. 268A or 268B, or of an initial staff review to determine whether to conduct a preliminary inquiry, but are not required to comply with such a request." [Emphasis added].

In this case, therefore, although the request from the Commission has been characterized as confidential and presumably any subpoena from the Commission would be stamped "confidential," the Town is not required to keep the same confidential. Accordingly, to protect the Town's interests, I recommend that we send a letter from Town Counsel notifying any person who applied for the Town Treasurer position that we have received the subpoena, that responsive records may include, but are not limited to, reference and criminal background check information or similar information, as well as other identifying personal information and that such records will be turned over to the State Ethics Commission on a date two weeks after the date of the notice in the absence of a protective order issued by a court. Additionally, for all but the two finalists for the position, we should notify them that their resumes and other application-related documents will be provided if they do not obtain such a court order.

In summary, I recommend the following:

All records pertaining to the Town Treasurer hiring be secured immediately and that upon being so informed by you, I so inform the Ethics Commission.

You authorize me to request the Commission to subpoena the documents it is seeking.

After receipt of the subpoena, any person whose confidential information would be provided in compliance would be given notice of the subpoena by Town Counsel as described above.

The records would be provided to the Ethics Commission; and if certain records are to be withheld due to a protective order obtained, those records would be withheld pursuant to the order.

Mr. Comtois moved to accept Kopelman & Paige's recommendations, as outlined above and to authorize Counsel to request the Commission to subpoena the documents that it is seeking; Mr. O'Connell seconded; so voted with Mr. Comtois voting aye and Mr. O'Connell voting aye.

At 7:50 pm Mr. Comtois moved to return to open session for the sole purpose of adjournment, Mr. O'Connell seconded; so voted by roll call vote with Mr. Comtois and Mr. O'Connell each voting "Aye."

Respectfully submitted

Donna L. Neylon, Administrative Assistant

Approved: \_\_\_\_\_

Released: December 11, 2012