

Mike Holman
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October 18, 2019
[Hand Delivered]

Office of the City Attorney
City of Ketchikan
334 Front Street
Ketchikan, Alaska 99901

Office of the City Clerk
City of Ketchikan
334 Front Street
Ketchikan, Alaska 99901

Attn: Mitch Seaver, City Attorney

Attn: Kim Stanker, City Clerk

Dear Mr. Seaver and Clerk Stanker,

I am concerned that the executive session convened by the City Council on October 10th violated the Alaska Open Meetings Act. Therefore I am requesting that the Council immediately cure the violation by holding another meeting in compliance with notice and other requirements of the Act and conduct a substantial and public reconsideration of the matters considered during the executive meeting. See AS 44.62.310(f). I also request a copy of the log of the private meeting tape recording required by KMC 2.04.025(c)(2) of the executive meeting.

Because any action taken in violation of the Open Meetings Act (Act) is voidable by the Superior Court, I strongly encourage the City's legal counsel to consider the following reasons why a public meeting of the Council must be convened to correct the unlawful executive session on October 10:

- The motion for the executive session was vague (“negotiation options and strategies related to the Request for Proposals”) and failed to clearly and with specificity describe the subjects to be discussed.¹ Thus one can only speculate about what was discussed and decided during the private meeting. Was it about which members of the Council would be involved in the negotiations with prospective bidders, and how so, or was it about a methodology or the criteria for ranking proposals or use of a certain “matrix” after proposals are received? Or was it about both these things - or something else? There is no way to tell from the recommended motion what was the subject matter of the executive session. Clear delineation of the purpose of the meeting is mandatory so the public can better determine whether the stated purpose is allowed under the Act.

¹ “The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question.” AS 44.62.310(b)

- Insofar as the City is not currently in any contract negotiations related to the RFP and the processes for reviewing proposals and negotiating with proposers who respond to the RFP are (or should be) fully set forth in the RFP itself, any discussion about these processes in a private meeting was inappropriate and unnecessary.² These processes should be fully known by the public in advance of any such review and negotiations and public knowledge of these processes cannot possibly have a clearly adverse effect upon the finances of the City. See, A.S. 44.62.310 (c)(1)³ To the contrary, any adverse effect would result from the public being kept uninformed about these processes. After all, the subject underlying all this is the potential alienation of one of the largest pieces of public infrastructure in the City for which voter approval by referendum is provided in its Charter. Likewise, there would be no clear adverse effect upon the finances of the City for the public to hear a discussion or debate among councilmembers about what these processes should be prior to the receipt of any proposals or conduct of any actual negotiations.
- Similarly, to the extent the subjects discussed during the executive session involved the methodology or criteria for ranking proposals there would be no clear adverse effect upon the finances of the City for the public to know in advance what the proposal ranking methodology or criteria will be or to hear a discussion or debate among councilmembers about them. Instead, at this juncture before any proposals have even been received, it is a

² “AS 44.62.310(c) . . . shall be construed narrowly in order . . . to avoid exemptions from open meeting requirements and unnecessary executive sessions.” AS 44.62.312 (b)

“There must be a real and legitimate need for the executive session, and the reason must be spelled out in the motion called to go into executive session. The motion must state specifically the nature of what will be discussed and must be approved by a majority vote. The motion must contain enough detail that the public (and, if necessary, a court) will be informed of exactly why the executive session is appropriate, without defeating the purpose of going into executive session. Only the item(s) identified in the motion may be discussed in the executive session.” www.commerce.alaska.gov/web/dcra/LocalGovernmentResourceDesk/LocalGovernmentElectedOfficials/MeetingsHeldinExecutiveSession.aspx

³ The following subjects may be considered in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;

However, “[i]t is not enough to qualify for an executive session to merely say the matter is one of “pending litigation” or a “financial matter,” as is often heard. As a practical matter, for an adverse financial impact executive session to withstand a court challenge, there must be facts in the record to enable the court to conclude it was clear that immediate public knowledge of the particular issue to be discussed would harm the government’s financial interests. A court is directed to construe the law narrowly to avoid unnecessary executive sessions,⁷³ so an informative on-the-record statement of the facts justifying an executive session seems necessary.” Perkins Coie, *Alaska’s Open Meetings Law*, by Gordon Tans, October 2002, 3rd Edition

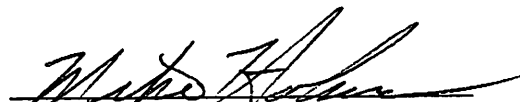
discussion of these matters in a private meeting itself which would have a clear adverse effect upon the finances of the City because it would tend to prejudice the outcome of the entire RFP process. Indeed, the effect of holding such discussions in private would be to stifle public debate among councilmembers and keep members of the public uninformed on a matter they may be called upon to vote. In the end, if a referendum is called it will likely be put forth as a single choice for the people to vote yes or no on a final deal negotiated by the City with a single proposer. The people are entitled to make an informed decision based not just on the substance of the final deal but on the integrity of the review and negotiating processes both real and perceived. To do so they must know what alternative proposals were made but not advanced by the City, at what stage in the process they were rejected and all the reasons why they were not pursued. The holding of unnecessary and premature executive sessions to discuss these matters can only undermine public confidence that the City negotiated and obtained the best possible deal with the best proposer.

Furthermore, my understanding is that it was the specter of going through an RFP process which has already led to the anticipated loss of one of the City's largest port customers and several millions of dollars in port and sales tax revenues per year. The City's holding of secret meetings to discuss "negotiation options and strategies related to the Request for Proposals" and lack of transparency risks the loss of more port customers and is likely to create uncertainty about the fairness of the RFP process among potential proposers. Thus, rather than adversely affecting the City's finances, public discussion by the Council of "negotiation options and strategies" is likely to result in the receipt of more proposals and put the City in a better bargaining position with proposers who have confidence their proposals will be considered on an equal footing without prejudice.

Again, full public knowledge and timely awareness of all these things, including any differing viewpoints among councilmembers themselves along the way, would not clearly have an adverse effect upon the finances of the City. Instead the opposite is true, advance public knowledge about any and all of these matters is essential to protecting their City's economic future for the next thirty years.

For these reasons the executive session held on October 10, 2019 was improper, ill-advised and illegal and the business conducted should be rescinded and conducted immediately in an open session of the City Council.

Sincerely,



Mike Holman

MWH:mwh

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Dear Clerk Stanker,

Under the Alaska Public Records Act, I am requesting an opportunity to inspect and obtain copies of the following public records:

- The “market sensing” survey described by Luis Ajamil during his presentation to the City Council on October 10, 2019 including all questions posed therein, notes thereof and memorandums relating thereto. (Ajamil description of same can be heard at 20.08 of meeting video posted on the City of Ketchikan website);
- All records which evidence the identity of the persons and/or entities to which the “market sensing” survey (or any part thereof) described by Luis Ajamil during his presentation to the City Council on October 10, 2019 was submitted;
- All responses to the “market sensing” survey described by Luis Ajamil during his presentation to the City Council on October 10, 2019 including notes thereof and memorandums relating thereto;
- All records relating to the establishment of a review committee to review proposals received in response to the City of Ketchikan Berths I, II & III RFP (“RFP” herein) and the procedures to be followed by any such committee;
- All records evidencing the methodology and/or criteria for ranking proposals received in response to the RFP including any documents relating to a “matrix” that was mentioned during the city council meeting on October 10, 2019;
- All records reviewed and/or discussed during the City Council’s executive session held on October 10, 2019. See, Municipality of Anchorage v. Daily News, 794 P.2d 584 (1990)

Sincerely,


Mike Holman

MWH:mwh

cc: Office of the Ketchikan City Attorney