



State of Rhode Island and Providence Plantations

OFFICE OF THE ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400

Peter F. Neronha
Attorney General

VIA EMAIL ONLY

March 13, 2020

OM 20-14

Mr. James Pierson

David D'Agostino, Esquire
Assistant Solicitor, Town of Coventry

RE: Pierson v. Coventry Town Council

Dear Mr. Pierson and Attorney D'Agostino:

We have completed our investigation into the Open Meetings Act (“OMA”) complaint filed by Mr. James Pierson (“Complainant”) against the Coventry Town Council (“Council”). For the reasons set forth herein, we find that the Council violated the OMA.

Background

The Complainant alleges that the Council violated the OMA during its October 15, 2019 meeting when it convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) for the purpose of discussing a “Report by Bernie Lynch on Town Manager Search” without discussing the job performance, character, or physical or mental health of any specific person. The Complainant also alleges that the Council improperly voted outside of an open meeting to advertise an increased salary offered for the new Town Manager position.

The Council submitted a substantive response, through its Assistant Solicitor, David D'Agostino, Esquire, and provided a copy of the executive session minutes of the subject meeting for this Office's *in camera* review. The Council acknowledges that “no specific candidate was discussed by Mr. Lynch” but contends that “[c]ertainly, it is appropriate for a public body to convene into executive session for a discussion with the Council's hired placement firm concerning the status of the on-going Town Manager candidate search.” The Council also does not contest that it advertised an increased salary for the new Town Manager position after the October 15 meeting and concedes that the executive session minutes “do reflect certain rationales for modifying the ‘offer’ in the ongoing Town Manager search process.” The Council nonetheless asserts that there was no OMA violation because the Council only discussed the salary amount that would be

“offered,” but the actual salary for the new Town Manager would be set in the future when a candidate was selected.

We acknowledge Complainant’s rebuttal.

Relevant Law and Findings

When we examine an OMA complaint, our authority is to determine whether a violation of the OMA has occurred. *See* R.I. Gen. Laws § 42-46-8. In doing so, we must begin with the plain language of the OMA and relevant caselaw interpreting this statute.

The OMA requires that “public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials[.]” R.I. Gen. Laws § 42-36-4. That said, the OMA permits public bodies to enter executive session for a limited number of enumerated purposes. *See* R.I. Gen. Laws § 42-36-4. One of those purposes is:

Any discussions of the job performance, character, or physical or mental health of a person or persons provided that such person or persons affected shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting.

Failure to provide such notification shall render any action taken against the person or persons affected null and void. Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any persons to be discussed have been so notified and this statement shall be noted in the minutes of the meeting.

R.I. Gen. Laws § 42-46-5(a)(1).¹

This Office has previously opined that the exemption in R.I. Gen. Laws § 42-46-5(a)(1) can apply to public bodies convening into executive session for the purpose of hiring an individual. *See Belmore v. Newport City Council*, OM 18-13 (we found that the City Council did not violate the OMA when it convened into executive session to interview applicants for the City Council position because the purpose of the interview was to discuss aspects of the interviewee’s job performance and character).

However, there are limitations on applying § 42-46-5(a)(1) in this context, as this Office recently discussed in *Jenkins, et al. v. Narragansett Town Council*, OM 19-38:

“We have, however, determined that certain interview-related matters are inappropriate for executive session discussion pursuant to R.I. Gen. Laws § 42-46-

¹ As the Council did not provide notice that they were going to convene into executive session to discuss these topics pursuant to any other exception, and did not argue that any other exception applies, we need not consider whether any other exception may have been applicable.

5(a)(1). *See Avanzato v. North Kingstown Town Council*, OM 17-14 (Town Council violated the OMA by distributing the resumes of applicants, interview schedule and interview questions for the Town Manager position without discussing the job performance, character, or physical/mental health of any applicants since these discussions fall outside R.I. Gen. Laws § 42-46-5(a)(1)); *Medeiros v. Tiverton Town Council*, OM 00-14 (Town Council violated the OMA by discussing the formation of potential interview questions in executive session); *Moon v. East Greenwich Fire District*, OM 96-23 (executive session to open job applications was improper).”

In *Jenkins*, we found that over the course of several executive sessions, the Narragansett Town Council not only interviewed applicants but also discussed other matters related to the Town Manager position, such as how to proceed with advertising the position, collecting resumes, and scheduling interviews for the position. We also noted that for a number of the meetings at issue in *Jenkins*, no individual had been provided notice that their job performance would be discussed, which is a requirement when entering executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1). Accordingly, we held that discussion of topics in executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) that did not pertain to any individual applicant’s job performance or qualifications violated the OMA.

Similarly, here, the Council acknowledges that it did not discuss any person(s) job performance, character or physical or mental health during the October 15 executive session. Additionally, it is uncontested that no individual was provided notice that their job performance would be discussed as required by R.I. Gen. Laws § 42-46-5(a)(1), which further confirms that no individual’s job performance, character or physical or mental health were discussed in the executive session. Consequently, we find that the Council violated the OMA by improperly entering executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) to discuss topics that do not fall within the purview of that exception.²

Additionally, our *in camera* review of the October 15 minutes reveals that the Council came to a “consensus” at this meeting about increasing the salary offered for the new Town Manager position, something the Council does not dispute. The Council’s contention that the “offered” salary may differ from the actual salary that will later be agreed to does not change the fact that the Council reached a consensus regarding offering an increased salary for the position.

As discussed in *Jenkins*, OM 19-38, a public body may not circumvent disclosure by contending that a “vote” was not taken, but instead, only a “consensus” was reached. *See* R.I. Gen. Laws § 42-46-7(a)(3) (requiring minutes to contain a record by individual member of all votes); *see also*

² We pause to acknowledge that public bodies engaged in a hiring process are faced with the challenge of adhering to the OMA’s requirements while carrying on strategy discussions and protecting applicants’ important privacy interests. Although it is our task to apply the OMA as written, we recognize that public bodies engaged in a hiring process often enter executive session in a good faith attempt to protect important confidentiality interests, the integrity of the hiring process, and/or the strength of their negotiating position with respect to a preferred candidate.

Celico v. Westerly Town Council, OM 19-37; *Mudge v. North Kingstown School Committee*, OM 14-01. Because both a “consensus” and a “vote” fall under the broader umbrella of decision-making, and because it is clear that the purpose of the OMA is to allow citizens the opportunity to become aware of the decisions made by public body members, we conclude that regardless of how the action is described, the Council voted during its October 15 executive session meeting regarding the issue of what salary to offer for the new Town Manager position. This executive session vote and the fact that it was not disclosed during open session violated the OMA. *See* R.I. Gen. Laws § 42-46-4(b) (requiring disclosure of votes taken in executive session once the session is reopened).

Conclusion

The OMA provides that the Office of the Attorney General may institute an action in Superior Court for violations of the OMA on behalf of a complainant or the public interest within one hundred eighty (180) days of public approval of the minutes of the meeting at which the alleged violation occurred. *See* R.I. Gen. Laws § 42-46-8(a), (e). The Superior Court may issue injunctive relief and declare null and void any actions of the public body found to be in violation of the OMA. *See* R.I. Gen. Laws § 42-46-8(d). Additionally, the Superior Court may impose fines up to \$5,000 per violation against a public body found to have committed a willful or knowing violation of the OMA. *Id.*

The Complainant did not request specific injunctive relief, apart from the unsealing of the executive session minutes. Within ten (10) business days of the issuance of this finding, the Council is instructed to provide this Office and the Complainant with evidence that it has taken the following measures:

- unsealed only the portion of its October 15, 2019 executive session meeting minutes that pertain to the agenda item “Report by Bernie Lynch on Town Manager Search Per RIGL 42-46-5(a)(1)”;
- disclosed any votes (including any “consensus” decisions) taken during its October 15, 2019 executive session meeting in connection with the agenda item “Report by Bernie Lynch on Town Manager Search Per RIGL 42-46-5(a)(1).”³

Although injunctive relief may be appropriate, we will allow the Council an opportunity to comply with this finding. The Council is welcome to contact this Office if it has any questions regarding what material should be unsealed and disclosed. At this time, we do not find that the violations found herein were willful and knowing, in part because there are no recent similar findings of violations against the Council.

Although the Attorney General will not file suit in this matter at this time, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court as specified in the OMA.

³ These instructions only pertain to the portions of the executive session meeting minutes regarding the executive session that was held pursuant to R.I. Gen. Laws § 42-46-5(a)(1) pertaining to the Town Manager position. Any different agenda items discussed in executive session at this meeting are outside the scope of this finding.

The Complainant may pursue an OMA complaint within “ninety (90) days of the attorney general’s closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later.” R.I. Gen. Laws § 42-46-8. We will leave this file open pending our review of the Council’s submission required by this finding.

We thank you for your interest in keeping government open and accountable to the public.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla E. O’Rourke
Kayla E. O’Rourke
Special Assistant Attorney General