



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

December 09, 2019
OM 19-40

Ms. Louise Durfee

Giovanni Cicione, Esquire
Tiverton Town Solicitor

RE: Durfee v. Tiverton Town Council

Dear Ms. Durfee and Solicitor Cicione:

We have completed an investigation into the Open Meetings Act (“OMA”) complaint filed by Ms. Louise Durfee (“Complainant”) against the Tiverton Town Council (“Town Council”). For the reasons set forth herein, we find that the Town Council violated the OMA.

Background and Arguments

The Complainant alleges that the Town Council violated the OMA at its April 8, 2019 meeting when the posted agenda failed to adequately inform the public of the nature of the business to be discussed. The agenda item in question reads (reproduced below in full, with formatting slightly altered):

- “11. OTHER ITEMS/ANNOUNCEMENTS/COMMENTS:
 - A. Town Administrator
 - (1) Update on Fire Rescue Purchase”

The Complainant asserts that under this agenda item, the Town Council voted to purchase a fire rescue vehicle utilizing funds from the General Fund. The Complainant contends that the agenda item did not provide notice that the Town Council would be voting to approve the borrowing of \$250,000 from the General Fund to purchase a fire rescue vehicle.

Tiverton Town Solicitor, Giovanni Cicione, Esquire, submitted a substantive response on behalf of the Town Council. The Town Council maintains that the agenda contained a “Note 2” provision,

which indicates that “[a]ll matters before the Town Council may be voted upon unless the agenda items specifies that it is ‘For Discussion Only.’” The Town Council also states that under the relevant agenda item, the Town Administrator provided an update as to the fire rescue vehicle purchase and that, “[g]iven the urgency of the purchase, discussion also included and [sic] the need to identify an available funding source for the rescue truck if it were to become necessary to pay for the acquisition within the current fiscal year.”

We acknowledge the Complainant’s rebuttal.¹

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 all public bodies provide supplemental public notice of all meetings at least forty-eight (48) hours in advance of the meeting. See R.I. Gen. Laws § 42-46-6(b). “This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed.” Id. (Emphasis added).

In Anolik v. Zoning Board of Review of the City of Newport, the Rhode Island Supreme Court held that R.I. Gen. Laws § 42-46-6(b) requires the “public body to provide fair notice to the public under the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon.” 64 A.3d 1171, 1173 (R.I. 2013); see also Tanner v. Town of East Greenwich, 880 A.2d 784, 797 (R.I. 2005) (appropriate inquiry is “whether the [public] notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted”).

Similarly, in Tanner, the Rhode Island Supreme Court determined that the agenda item “Interviews for Potential Boards and Commission Appointments” did not adequately apprise the public of the nature of the business to be discussed at a Town Council meeting because the Town Council voted to appoint individuals in addition to conducting interviews. 880 A.2d 797-98 (R.I. 2005) (contents of the notice “reasonably must describe the purpose of the meeting or the action proposed to be taken”). Id. at 797-98; see also Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education et al., 151 A.3d 301 (R.I. 2016) (agenda item stating “7.b. Approval of RIDE’s Executive Pay Plan and Organizations Chart” insufficient where there was no indication that more than one pay plan would be considered).

¹ To the extent that the parties’ submissions raise issues and/or additional allegations concerning potential violations of the Tiverton Town Charter or other state law in connection with the prospect of utilizing money from the General Fund to purchase a fire rescue vehicle, these allegations are outside the scope of this Office’s authority under the OMA and will not be investigated. See R.I. Gen. Laws § 42-46-8(a).

Here, we conclude that the agenda item “Update on Fire Rescue Purchase” failed to fairly encompass the Town Council’s discussion and action during the April 8, 2019 meeting. The undisputed meeting minutes record, in relevant part, that pursuant to this agenda item, “Councilor Katz motioned to purchase the Fire Rescue utilizing funding from the General Funds. Councilor Perry seconded the motion. The motion passed 5/1; Councilor Hilton abstained. Solicitor Cicione will work with the Treasurer and Administrator from a legal binding perspective.” In its response to this Complaint, the Town Council described the Town Council’s authorization to use the Unassigned General Funds for the purchase, if determined to be legally permissible, as essentially making “a bridge loan.”

While we have concerns whether a general notation at the top of a multi-page agenda advising that “[a]ll matters before the Town Council may be voted upon” is sufficient, in this case, we conclude in any event that the pertinent agenda item did not sufficiently inform the public that the Town Council would vote and/or discuss purchasing a fire rescue vehicle and selecting a source of funding that involved borrowing from a certain account. Indeed, the use of the term “[u]pdate” inferred that information about the “Fire Rescue Purchase” might only be discussed, not that a decision on purchasing and funding would be made. At the very least, the more specific agenda item, i.e., indicating that the Town Administrator would provide an “Update on Fire Rescue Purchase,” seems to conflict with the general notation that “[a]ll matters before the Town Council may be voted upon.” In this respect, it is also important that the pertinent agenda item appeared under the heading “OTHER ITEMS/ANNOUNCEMENTS/COMMENTS.” In a similar circumstance, the Rhode Island Supreme Court explained that “[a]dditionally, and determinatively, we conclude that designating the agenda item under the rubric of ‘Communications’ does not even remotely indicate that any action will be taken with respect to the agenda item.” Anolik, 64 A.3d at 1175. Equally important, the agenda item “Update on Fire Rescue Purchase” provides no indication that the discussion, let alone a vote, would concern authorizing the purchase of a fire rescue vehicle and selecting the source of funding to make such a purchase. As such, the agenda item did not “fairly inform the public of the nature of the business to be discussed or acted upon.” Id. Additionally, although we acknowledge the Town Council’s assertion that the “changing circumstances had accelerated the need” to assess funding the vehicle, the Town Council did not seek to hold an emergency meeting, nor has any evidence been presented that the changing circumstances created an urgency that would have fallen within the emergency meeting provision.

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 against a public body found to have committed a willful or knowing violation of the OMA. Id. Aggrieved individuals may also file a complaint within the time specified in the OMA. See R.I. Gen. Laws § 42-46-8(c).

Based on the evidence presented, we do not conclude that the Town Council's conduct evinces a willful or knowing violation of the OMA. Although the Town Council's agenda failed to provide adequate notice of a vote and/or discussion regarding funding the fire rescue purchase, it appears that the vote evolved out of developments that occurred while discussing the topic that was noticed on the agenda related to the fire rescue purchase update. Considering the totality of the circumstances, the evidence indicates that the failure to provide adequate notice was an oversight rather than an intentional failure. Additionally, there are no recent findings of a similar violation by the Town Council. Nonetheless, this finding serves as notice to the Town Council that its conduct violated the OMA and may serve as evidence in a future similar situation of a willful or knowing violation.

We next consider whether injunctive relief is appropriate. At our request, the Town Council provided a supplemental submission, which revealed that the Town proceeded to purchase a fire rescue vehicle shortly after the April 8, 2019 meeting. The Town Council's April 22, 2019 meeting minutes document that the Town Administrator stated that three bids had been received related to purchasing the vehicle and that he was going to compare the bids and "follow up with the Town Treasurer regarding payment and prior to the execution of the contract he will send a memo out to the Council." Documents provided by the Town Council indicate that the Town awarded a bid for the vehicle on April 26, 2019. Solicitor Cicione, on behalf of the Town Council, represented that "[g]iven the timing of the purchase (subsequent to the approval of the final FY2020 budget) the Town was able to purchase it against that budgeted line item." In these circumstances, we conclude that injunctive relief is not appropriate. To the extent the Complainant raised questions about whether the method of funding the purchase complied with applicable law, we do not make any determinations on those questions, which are outside the scope of the OMA.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court. 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 are closing our file as of the date of 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