



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

July 3, 2020
OM 20-35

Ms. Renu Englehart

Thomas Moses
Legal Counsel, RI Industrial Facilities Corporation

RE: Englehart v. Rhode Island Industrial Facilities Corporation

Dear Ms. Englehart and Attorney Moses:

We have completed our investigation into the Open Meetings Act (“OMA”) complaint filed by Ms. Englehart (“Complainant”) against the Rhode Island Industrial Facilities Corporation (“RIIFC”). For the reasons set forth herein, we find that RIIFC did not violate the OMA.

Background

The Complainant alleges that RIIFC cited inapplicable reasons to enter executive session regarding two items on its October 24, 2019 agenda. The relevant executive session matters were as follows: the first regarded the adoption of an Inducement Resolution of Approval relating to RIIFC’s proposed bond financing for Narragansett Brewing Fox Point, Inc. (“Narragansett”); the second regarded the approval of an amended and restated Inducement Resolution of Approval relating to RIIFC’s proposed bond financing for Medrecycler-RI, Inc. (“Medrecycler”).¹

The Complainant alleges that RIIFC improperly cited R.I. Gen. Laws §§ 42-46-5(a)(2), (5) as a basis for both executive session items. The Complainant maintains that R.I. Gen. Laws § 42-46-5(a)(2) was inapplicable because neither agenda item related to collective bargaining or litigation.

¹ The record indicates that RIIFC is a non-business corporation organized under Rhode Island law that has the authority to issue revenue bonds, construction loan notes, and equipment acquisition notes for financing projects regarding further development in Rhode Island. RIIFC operates through a Board and approval of issuance of its bonds comes after consideration of a so-called “Inducement Resolution of Approval,” which is an action of the RIIFC Board committing RIIFC to issue its bonds for a particular project, subject to certain conditions.

The Complainant also argues that because neither of the projects associated with the inducement resolutions involved properties that were publicly owned or publicly leased, neither matter qualifies for executive session under R.I. Gen. Laws § 42-46-5(a)(5).

RIIFC also cited R.I. Gen. Laws §§ 42-46-5(6) (discussions related to a prospective business locating in Rhode Island where an open meeting would be detrimental to public interest) and (7) (matter related to investment of public funds where premature disclosure would adversely affect public interest) as purposes for entering executive session regarding these two items. The Complainant did not raise any specific arguments regarding the applicability of §§ 42-46-5(a)(6) and (7), but generally contended “that the RIIFC is incorrectly citing the reasons for this executive session and instead is using a sweeping reasoning to convene an executive session.”

In its substantive response – which included an affidavit from Mr. William Ash, RIIFC’s treasurer – RIIFC avers that the relevant executive session discussions concerned RIIFC’s acquisition of real property such that they were proper under R.I. Gen. Laws § 42-46-5(a)(5). RIIFC explains that both projects discussed in executive session pertained to prospective businesses locating to Rhode Island. RIIFC describes how RIIFC bond-financed projects are structured so that RIIFC takes title to the project owner’s real property, which is leased to the project owner until the bond is fully repaid. RIIFC also argues that having these discussions in open session could disclose the strategies and confidential information of the businesses they work with and thus could undermine RIIFC’s work to promote and facilitate economic development in Rhode Island.

RIIFC also asserts arguments regarding why it was appropriate to enter executive session for these items pursuant to R.I. Gen. Laws §§ 42-46-5(a)(6) and (7). RIIFC acknowledges that R.I. Gen. Laws § 42-46-5(a)(2) was inapplicable but argues its inadvertent citation to an additional purpose for entering executive session does not constitute a violation because the three other listed reasons provided an appropriate basis for entering executive session. RIIFC also notes that it will be mindful going forward to ensure that it does not cite any extraneous statutory bases for entering executive session. Along with its response, RIIFC provided copies of the October 24, 2019 draft executive session minutes for our *in camera* review.

We acknowledge the Complainant’s rebuttal.² Complainant’s rebuttal specifically “refute[s] the argument that [the] complaint was that the RIIFC had no reason to go into the executive session”

² To the extent the rebuttal references other executive sessions that were not the subject of the Complaint or takes issue with the notice provided on the agenda regarding the executive sessions that are the subject of this Complaint, those matters are outside the scope of this Complaint and will not be addressed. This Office conveyed in its initial letter to Complainant that any rebuttal should be limited to the matters addressed in RIIFC’s response and should not raise new issues not presented in the Complaint or addressed in the RIIFC’s response. As such, we decline to review issues raised for the first time on rebuttal since the public body has no opportunity to respond to the new allegations and this Office cannot fully investigate them. *See Mulanaphy v. South Kingstown School Committee*, OM 19-24. To the extent the statute of limitations has not expired, Complainant is free to submit a new complaint regarding those issues.

and clarifies that the “complaint was about only two of the four reasons for the RIIFC going into executive session for October 24, 2019.” As such, Complainant does not dispute that RIIFC could enter executive session to discuss the two agenda items pursuant to two of the four cited purposes.

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.

Unless exempt, the OMA requires that all meetings of public bodies be held open to the public. *See* R.I. Gen. Laws § 42-46-3. “A public body may hold a meeting closed to the public pursuant to Sec. 42-46-4 for *one or more* of the following purposes . . .” R.I. Gen. Laws § 42-46-5(a) (emphasis added).

Among the purposes for which a meeting may be held in executive session (but does not have to be held in executive session) is for “[a]ny discussions or considerations related to the acquisition or lease of real property for public purposes, or of the disposition of publicly held property wherein advanced public information would be detrimental to the interest of the public.” R.I. Gen. Laws § 42-46-5(a)(5) (emphasis added).

We have previously noted a public body may convene into executive session pursuant to *any applicable exemptions*. *See* *Burke v. Exeter West Greenwich Regional School Committee*, OM 19-31. As Complainant does not contest RIIFC’s argument that it properly entered executive session to discuss these two agenda items pursuant to R.I. Gen. Laws §§ 42-46-5(a)(6) and (7), we do not find that the RIIFC improperly entered executive session.

Although that may well end the inquiry, we also note that RIIFC also provided undisputed evidence regarding its process for issuing bonds, which involves the acquisition of property. *See* R.I. Gen. Laws § 42-46-5(a)(5). As averred in Mr. Ash’s affidavit, “RIIFC bond transactions are structured so that the bond issuer (RIIFC) takes title to the project owner’s real property, which RIIFC then leases to the project owner until the bonds are fully paid. . . . Both the Narragansett and Medrecycler projects are structured in this way.” We note that the Complainant does not dispute these facts. Because the record indicates that RIIFC takes title to the real property when it issues a bond, and because both executive session agenda items here involved the approval of inducement resolutions for issuance of RIIFC bonds, we accordingly find that the executive session items related to “the acquisition or lease of real property for public purposes.” R.I. Gen. Laws § 42-46-5(a)(5). The Complainant also did not contest RIIFC’s assertion that public disclosure could reveal sensitive information that would negatively impact development in Rhode Island. We therefore find that R.I. Gen. Laws § 42-46-5(a)(5) was a permissible basis for the RIIFC’s October 24, 2019 executive session relating to the two relevant items.

Finally, we consider the Complainant’s contention that RIIFC’s executive session agenda should not have listed R.I. Gen. Laws § 42-46-5(a)(2), which pertains to collective bargaining or litigation,

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as grounds for convening into executive session. RIIFC acknowledges as much. In these circumstances, where we have found that RIIFC permissibly entered executive session pursuant to other provisions, we do not find a violation. We also acknowledge RIIFC's statement that it will be mindful to not inadvertently list an additional, inapplicable purpose going forward.

We close by noting that we certainly understand the Complainant's desire for transparency in this situation. While there is no provision within the OMA that automatically unseals properly sealed executive session minutes, we would encourage RIIFC to consider reviewing and unsealing relevant portions of the executive session minutes as appropriate if the need for sealing the minutes no longer exists.

Conclusion

Although the Office of Attorney General has found no violations in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The Complainant may do so within ninety (90) days from the date 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. Please be advised that we are closing our file as of the date of this letter.

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Sean Lyness

Sean Lyness
Special Assistant Attorney General