STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 • www.riag.ri.gov

Peter F. Neronha
Attorney General

VIA EMAIL ONLY

October 8, 2020
OM 20-47

Ms. Nancy L. Driggs

Michael J. Marcello, Esquire
Solicitor, Town of Tiverton

RE: Driggs v. Tiverton Town Council

Dear Ms. Driggs and Attorney Marcello:

The investigation into the Open Meetings Act ("OMA") complaint filed by Ms. Nancy Driggs ("Complainant") against the Tiverton Town Council ("Council") is complete. For the reasons set forth herein, we find the Council did not violate the OMA.

Background and Arguments

The Complainant alleges the Council violated the OMA by discussing and voting upon certain applicants for a Town solicitor position during an improper executive session on December 4, 2019. Specifically, Complainant alleges that the notice to the applicants pursuant to R.I. Gen. Laws § 42-46-5(a)(1) was insufficient because the notice indicated that the December 4 executive session meeting was scheduled to "preliminarily review" and to "preliminarily discuss" applicants, but "that language [did] not fairly encompass an actual vetting and vote" that took place. The Complainant also alleges that the agenda topic pertaining to the executive session, "Review and Possible Votes on Solicitor Resumes for Further Interviews – Notice Given[,]" was insufficient because it did not accurately reflect that the applicants received notice only of "preliminary discussions" instead of "possible votes on solicitor resumes for further review." Finally, the Complainant alleges the executive session discussion was improper because "it is not possible to discuss the 'job performance' of external candidates who have not performed a job over which the public body had supervision[.]"

Attorney Michael Marcello provided a substantive response on behalf of the Council, which included copies of the Council's December 4, 2019 agenda and executive session minutes (*in*

camera), as well as a copy of the notice sent to the solicitor applicants regarding the December 4, 2019 executive session discussion. The Council contends that Complainant, who is a member of the Council, "is not an 'aggrieved person' [under the OMA] since the record is clear that she participated in the very meeting which she now alleges was defective. Having done so, she forfeits her ability to challenge the propriety of the town council's actions as she can not [sic] show how any of her rights were harmed or constrained." The Council further argues that "Ms. Driggs cannot be an aggrieved person for purpose of challenging the individualized notice [pursuant to R.I. Gen. Laws § 42-46-5(a)(1)] since the notice did not affect her rights as a council member in any way." The Council states that the applicants who received notice of the intended December 4, 2019 executive session discussion have not "raised an objection to its contents." The Council maintains that "[t]he emailed notice [to the applicants] clearly advises the recipients of their rights to request an open session and therefore is not defective as a matter of law."

Next, the Council argues that the December 4, 2019 executive session agenda item "clearly states what the town council was going to do in executive session: 'Review and possible votes on solicitor resumes for further interviews." Finally, the Council contends that convening into executive session to discuss the qualifications of the applicants and determine which applicant(s) to select for interviews is permissible under the OMA and consistent with this Office's precedent. The Council also cites *Benjamin v. South Kingstown School Committee*, OM 20-06 to support its position that "[n]othing in [R.I. Gen. Laws § 42-46-5(a)(1)] requires a public body to have a live person at a meeting when reviewing potential applicants for a municipal position in a properly closed meeting."

On rebuttal, the Complainant reiterates her argument that "the notice given to the applicants was deficient" and states that "because the meeting agenda notice referenced the defective applicant notice, the two are inextricably intertwined and the meeting agenda is defective too."

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 § 42-46-4. However, the OMA provides that a public body may hold a meeting closed to the public for certain specific reasons, including "[a]ny 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." R.I. Gen. Laws § 42-46-5(a)(1). The OMA also requires that a public body post supplemental public notice of a meeting (an agenda) at least 48 hours in advance of the meeting date (excluding weekends and holidays) that, among other requirements, contains a "statement specifying the nature of the business to be discussed." R.I. Gen. Laws § 42-46-6(b).

Based on the record before us, it is undisputed that on December 4, 2019, the Council held an executive session meeting to discuss candidates for the solicitor position.[1] The record before us, including our *in camera* review of the executive session minutes, indicates that the Council discussed each applicant and made comments as to applicants' character and job performance. The Council then identified a sub-group of the candidates whose job performance was deemed most desirable based on their resumes and related information discussed in executive session. The Council then returned to open session and voted "to request scheduled interviews of six candidates whose job performance was deemed most desirable based on resumes and other information discussed within executive session."

We will now address each of Complainant's allegations.

1. *Sufficiency of Notice Sent to Individuals Pursuant to R.I. Gen. Laws § 42-46-5(a)(1).*

The Complainant contends that the Council's notice to the candidates was "deficient" in that it did not give fair notice to the applicants that the Council would be voting on which applicants to interview. The Council argues that the Complainant does not have standing to file a complaint about this issue because "the notice did not affect her rights as a council member in any way."

The OMA provides that "aggrieved" citizens may file a complaint with this Office. *See* R.I. Gen. Laws § 42-46-8(a); *Graziano v. Rhode Island Lottery Commission*, 810 A.2d 215 (R.I. 2002). Here, pursuant to R.I. Gen. Laws § 42-46-8(a) and *Graziano*, in order to have standing to complain about an alleged violation, the Complainant must demonstrate that he or she is "in some way disadvantaged or aggrieved" by the allegation raised in his complaint. *Graziano*, 810 A.2d at 221. Based on the record before us, we find no evidence that the Complainant was aggrieved in connection with her allegation that the notice sent to the applicants pursuant to R.I. Gen. Laws § 42-46-5(a)(1) was defective.

It is undisputed that the Complainant was not the subject of the executive session discussion. Rather, Complainant is a member of the Council and was present for the start of the December 4, 2019 meeting. It is undisputed that the Complainant participated in the discussion concerning whether to convene into executive session, voted against convening into executive session, and then left and chose to not participate in the executive session. Although this Office does have authority to pursue complaints in the public interest, *see* R.I. Gen. Laws § 42-46-8(e), this particular allegation (and statutory requirement) chiefly implicates the interests of the specific applicants who were the topic of the discussion rather than the public interest. Indeed, as Complainant observes, R.I. Gen. Laws § 42-46-5(a)(1) does not require notice to the public at-large but rather only requires notice to an "affected" person(s) who would be the subject of the executive session discussion. None of the individuals discussed in the executive session submitted a complaint to this Office about the notice they received. In these circumstances, we conclude that the Complainant is not "aggrieved" with regard to this allegation and decline to address the merits of it. *See Jones v. Kingston Hill Academy Board of Trustees*, OM 20-26 (finding that complainant

[1] The minutes indicate that Complainant and another Council member left the meeting once the executive session was convened.

lacked standing to assert that meeting should have been held in open session per request of the discussed individual pursuant to R.I. Gen. Laws § 42-46-5(a)(1) when Complainant was not the individual discussed during the executive session).[2]

2. *Sufficiency of Agenda Item Pursuant to R.I. Gen. Laws § 42-46-6(b).*

Next, the Complainant argues that since notice to affected persons was "deficient," the executive session agenda item was also deficient to the extent that the agenda item indicated that notice was given to the applicants.[3] The relevant public-notice agenda item states: "Review and Possible Votes on Solicitor Resumes for Further Interviews – Notice Given[.]" The Complainant does not allege that the executive session agenda item failed to specify the nature of the business that was discussed during the executive session. In other words, the Complainant does not contest that "Review and Possible Vote on Solicitor Resumes for Further Interviews" sufficiently captures what actually occurred during the executive session. Rather, Complainant's only contention is that the notice to the applicants allegedly did not adequately describe the nature of the business to be discussed, and therefore the related public-notice agenda item was "deficient."

The evidence indicates, and Complainant does not contest, that "Review and Possible Votes on Solicitor Resumes for Further Interviews" accurately describes the business that occurred during the executive session. As such, there is no evidence to support Complainant's contention that the agenda item did not adequately specify the nature of the business that was discussed as required by R.I. Gen. Laws § 42-46-6(b), and we find no violation.

The fact that the public-notice agenda item also noted that the affected person notice (pursuant to R.I. Gen. Laws § 42-46-5(a)(1)) had been given does not impact or alter our determination that the public-notice agenda item sufficiently and accurately described what occurred during the executive session. It is evident that "Notice Given" was not intended to describe what would occur during the executive session, but rather to notate that notice (pursuant to R.I. Gen. Laws § 42-46-5(a)(1)) had been sent to the affected individuals who were going to be discussed in executive session. Moreover, as discussed above, it is uncontested that a notice was indeed sent to the affected individuals who would be discussed.[4]

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[2] Although we determine that Complainant lacks standing to raise this allegation, we note that the Council provided this Office with a copy of a written notice that it represents was sent to all the applicants and that advises them about the executive session on December 4, 2019 and provides notice that they may request the discussion of their application to occur in open session.

[3] Given that Complainant was a member of the Council and present at the meeting, we also question Complainant's standing to bring the other two allegations that are the subject of this Complaint. Nonetheless, we proceed to address them as they implicate the public interest and this Office may initiate a complaint on behalf of the public interest. *See* R.I. Gen. Laws § 42-46-8(e).

[4] We note that unlike the provision pertaining to the content of public-notice agendas, R.I. Gen. Laws § 42-46-5(a)(1) does not require that the advanced written notice given to the affected

3. *Propriety of Executive Session.*

Finally, the Complainant argues that the executive session discussion was improper under R.I. Gen. Laws § 42-46-5(a)(1) because "it is not possible to discuss the 'job performance' of external candidates who have not performed a job over which the public body had supervision[.]"

This Office's precedent has repeatedly held that discussions regarding applicant qualifications (regardless of whether the individual is interviewed) may permissibly be held in executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1). *See Jenkins, et al. v. Narragansett Town Council*, OM 19-38 ("Our *in camera* review of the executive session minutes confirms that the Council discussed applicants and their qualification and/or conducted interviews of potential applicants during its . . . meetings. As such, we find the discussions and interviews during these meetings, to the extent they related to the job performance or qualifications of specific applicants, were appropriate topics for executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1)."); *Avanzato v. North Kingstown Town Council*, OM 17-14 ("This Department determined that with respect to the review of the qualifications and background investigations of candidates to determine which candidate (based on qualifications, background investigations, performance evaluation and character traits) should be recommended to the Mayor and Board of Public Safety for Chief of Police, this Department referred to R.I. Gen. Laws § 42-46-5(a)(l), which permits any discussion of the job performance, character, or physical or mental health of a person or persons in closed session."); *Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing*, OM 00-07 ("In particular, we note that the June 9, 1999 open session minutes indicate that an executive session would be convened 'to discuss the qualifications of the candidates for the Executive Director's position and the recommendations of the search committee.' *See* R.I. Gen. Laws § 42-46-5(a)(1). … Consequently, based upon the evidence presented, we find that the subject matter for the June 9, 1999 executive session was appropriate for closed session. We also find no evidence within the OMA that the General Assembly intended to preclude from R.I. Gen. Laws § 42-46-5(a)(1) discussions concerning one's qualifications for state employment.").

Upon our review of the record, including the December 4, 2019 executive session minutes, we find that the executive session discussion was limited to discussing the qualifications, job performance, character, and/or physical or mental health of the applicants for the solicitor position.[5] Indeed, the record indicates that the Council took pains to ensure that their executive

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persons subject to executive session discussions contain a statement specifying the nature of the business to be discussed during the executive session. Instead, R.I. Gen. Laws § 42-46-5(a)(1) requires that the advanced written notice advise the person(s) subject to these discussions about the scheduled executive session and "that they may require that the discussion be held at an open meeting."

[5] The Council disclosed a copy of the December 4 executive session minutes to the Complainant "[s]ince Ms. Driggs was and is currently a member of the town council, *** she would have seen and approved these minutes as a member of that body anyway." The December 4 executive session minutes were sealed during the December 4 open session meeting and it is the understanding of

session discussion conformed with this Office's precedent regarding permissible topics for executive session.

The Complainant acknowledges that "[i]t is apparent your prior opinions suggest that discussion of out-of-town candidates may occur in closed session . . . In any event, voting/vetting is more than discussion." Complainant does not explain, and the evidence does not indicate, how the "vetting" that the Council conducted during executive session is any different than the discussions of candidates' job performance, character, and qualifications that we have previously held are permissible for executive session. The record shows that the vote to interview a sub-group of applicants derived from the executive session discussion of those candidates' job performance and qualifications and the minutes indicate that the actual vote to interview the six candidates who were deemed the most desirable based on those discussions occurred in open session. We find no violation.

To the extent Complainant additionally argues that the executive session was improper because the applicants were not present during the executive session, this Office has previously determined that "the option to extend an invitation to an individual to attend an executive session is held by the public body, and not the individual seeking to attend the executive session." *McFadden v. Exeter-West Greenwich School Committee*, OM 19-13.

Conclusion

Although this Office has found no violations, nothing within the OMA prohibits an individual from instituting an action for injunctive or declaratory relief in Superior Court. *See* R.I. Gen. Laws § 42-46-8(c). The OMA allows the Complainant to file a complaint 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. *See id.* Please be advised that we are closing this complaint 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/ Kayla E. O'Rourke*
Kayla E. O'Rourke
Special Assistant Attorney General

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this Office that said executive session minutes remain sealed and have not been disclosed outside of the Council members, Council personnel and this Office related to the pending Complaint.