State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

March 19, 2018
ADV OM 18-01

Attorney Nicholas Gorham

In Re: South Foster Volunteer Fire Company

Dear Attorney Gorham:

In your capacity as legal counsel for the South Foster Volunteer Fire Company ("SFVFC"), you have requested an Open Meetings Act ("OMA") advisory opinion from this Department. You sought this Department's advice concerning the applicability of the OMA to the SFVFC in light of the circumstances described below. More specifically, you submit, in relevant part:

> "The South Foster Volunteer Fire Company, like Prudence Island Volunteer Fire Department, is a Rhode Island non-profit, membership controlled, corporation/association that is also tax exempt from Federal Income Tax under 501(c)3 of the Internal Revenue Code.
> I request an advisory opinion from the Department of Attorney General as to the applicability of the Open Meetings Act to the South Foster Volunteer Fire Company, based on the following facts.
> 1. The SFVFC provides certain fire and emergency rescue services to Foster residents but does not have any fire service agreement with the Town of Foster; and
> 2. The SFVFC has no taxing authority over the residents of the Town of Foster, or any other area that it serves; and
> 3. In the absence of taxing authority, the SFVFC derives its support from the payments made by the Town of Foster, private donations, and federal and state grants; and
> 4. The SFVFC is a tax-exempt charity but is not duly registered with the Rhode Island Department of Attorney general. However, copies of its IRS Form 990 (years 2012 – 2016) as filed with the IRS are enclosed. If SFVFC's registration with the Rhode Island Attorney General would have a material effect on your opinion, the SFVFC would be pleased to register."

In response to further inquiry from this Department, you also provided the SFVFC Articles of Incorporation and By-Laws, which will be supplemented below as necessary.

At the outset, we note that in examining whether an entity is subject to the OMA, or a specific provision thereof, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an entity falls within the purview of the OMA, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate and this advisory opinion are limited to determining, per your request, the obligations of the SFVFC under the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

We initially observe the purpose of the OMA is that:

> "[i]t is essential to the maintenance of a democratic society 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 and the deliberations and decisions that go into the making of public policy." R.I. Gen. Laws § 42-46-1.

Rhode Island General Laws § 42-46-7(b)(2), which was enacted on July 15, 2003, states:

> "[i]n addition to the provisions of subdivision (b)(1),[1] all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards, whether it is incorporated or not, and whether it is a paid department or not, shall post unofficial minutes of their meetings within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state's website."

On November 4, 2013, Attorney General Peter F. Kilmartin mailed a letter to all Rhode Island fire-related entities advising of the 2013 amendment to R.I. Gen. Laws § 42-46-7. The correspondence did not make a determination as to whether individual fire-related entities were or were not public bodies under the OMA, but rather advised, in pertinent part:

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[1] Subdivision (b)(1) states:

> "A record of all votes taken at all meetings of public bodies, listing how each member voted on each issue, shall be a public record and shall be available, to the public at the office of the public body, within two (2) weeks of the date of the vote. The minutes shall be public records and unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier, except where the disclosure would be inconsistent with §§ 42-46-4 and 42-46-5 or where the public body by majority vote extends the time period for the filing of the minutes and publicly states the reason."

> "During the past legislative session, the General Assembly amended the Open Meetings Act ('OMA'), R.I. Gen. Laws § 42-46-1 et seq., to require that all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards, post unofficial minutes of its meetings on the Secretary of State's website within twenty-one (21) days of the meeting. Prior to this amendment, there was no legislative requirement that fire-related entities post or electronically file minutes on the Secretary of State's website. The entire legislative amendment is included within this letter, but in pertinent part reads:
> ***
> Since this 2013 amendment pertains only to fire-related entities, I wanted to take this opportunity to notify you of this change and to ensure future compliance. I ask that you also notify any other appropriate personnel within your Department or District of this change. If you have any questions regarding this amendment, please be sure to consult with your legal counsel, or contact this Department."

In order for the OMA to apply, a "quorum" of a "public body" must convene for a "meeting" as these terms are defined by the OMA. See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). For purposes of the OMA, a "public body" is defined as "any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government." R.I. Gen. Laws § 42-46-2(c). The 2013 amendment to R.I. Gen. Laws § 42-46-7(b)(2) did not amend or otherwise alter the OMA's existing "public body" definition.

This Department previously addressed the 2013 amendment in In Re: R.I. Gen. Laws § 42-46-7(b)(2), ADV OM 14-01. There, we determined that although R.I. Gen. Laws § 42-46-7(b)(2), as amended, added a requirement that certain fire-related entities file minutes on the Secretary of State's website, this amendment did nothing to change the definition of a "public body." As noted in Fischer, as well as the OMA, as a prerequisite to any entity being required to comply with the OMA, including R.I. Gen. Laws § 42-46-7(b)(2), that entity must be a "public body" as defined by R.I. Gen. Laws § 42-46-2(3). In In Re: R.I. Gen. Laws § 42-46-7(b)(2), we made clear that "if a fire-related entity was not a public body for purposes of the OMA prior to the amendment, absent a determination made by this Department to the contrary, it remains so."[2] Id. "Likewise, if a fire-related entity was not a public body for purposes of the OMA prior to the amendment, absent a determination made by this Department to the contrary, it remains so." Id. Accordingly, here we must determine whether the SFVFC is a "public body" under the OMA.

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[2] We have previously rejected any suggestion that the 2013 amendment was intended to bring all volunteer fire departments within the purview of the OMA. We noted, "[g]iven the language of the broad amendment, a contrary opinion would lead to an absurd result where a fire-related entity is not governed by the OMA – including the requirement to have a public meeting and maintain minutes – yet was governed by R.I. Gen. Laws § 42-46-7(b)(2)'s requirement to post minutes on the Secretary of State's website." See In re R.I. Gen. Laws § 42-46-7(b)(2).

We have previously noted that determining whether a particular entity is or is not a "public body" is "a fact-intensive question not subject to 'bright line' rules." See Oliveira v. Independent Review Committee, OM 04-10. In order to seek clarity on whether an entity is or is not a "public body," the following factors about an entity are frequently considered: (1) the text under which it is established; (2) the scope and type of authority within its control; (3) the nature of public business delegated to it; and (4) its membership and composition. See id.

The Rhode Island Supreme Court examined this question in Solas v. Emergency Hiring Council, 774 A.2d 820 (R.I. 2001), which considered the application of the OMA to an entity formed by two executive orders of then-Governor Lincoln Almond to "manage and control the state's hiring practices and its fiscal resources." The Emergency Hiring Council consisted of five senior executive branch staff members who met on a biweekly basis "to determine whether creating a new position in state government or filling a vacancy is absolutely necessary." Id. at 824. It was the Governor's intent that "no person or persons other than the Council shall have the authority to make any determinations in this regard." Id. (internal quotation omitted). Based on these facts the Supreme Court concluded the Council was subject to the OMA:

> "[T]he EHC [Emergency Hiring Council] is composed of a group of high level state officials that convenes to discuss and/or act upon matters of great interest to the citizens of this state. In addition, our reading of the executive orders creating the council persuades us that the EHC possesses significant supervisory and executive veto power over creating or filling state employment positions. At the very least the council functions in an advisory capacity in state hirings. Whether supervisory or advisory, both functions are regulated by the act. As the plain language of the statute provides, a council's exercise of advisory power is enough to bring it under the act's umbrella." Id. at 825.

The Court in Solas examined the text of the executive orders under which the Emergency Hiring Council was established, the scope of its stated authority, its actual authority, the nature of the public business delegated to it, and its membership and composition. We have found each of these factors relevant, to varying degrees, in findings issued by this Department.

For example, in Finnegan v. Scituate Town Council, OM 97-05, we concluded a committee with three "citizen members" appointed by the Town Council President to conduct oral interviews of finalists for the police chief position was a public body under the OMA. The interviews were conducted in conjunction with a private search firm retained by the Town to assist with the search process. The Town was responsible for any honorarium paid to the citizen members of the committee, and provided them with lunch and an evening meal. In keeping with prior findings that citizen advisory committees are subject to the OMA, we found the OMA applied because the committee was formed by the Town Council President and charged to "perform public business over which the Council had jurisdiction and control."

In Schmidt v. Ashaway Volunteer Fire Association, OM 98-33, this Department examined whether the Ashaway Volunteer Fire Association ("Fire Association") constituted a "public body" in accordance with the OMA. In reviewing that organization's composition, we noted that the Fire

Association was a "non-business, nonprofit corporation duly incorporated in 1937." In addition, the members of the Fire Association did not receive a salary, medical benefits, or a pension for their services; and the officers were not elected by the public, or appointed by a subdivision of state or municipal government, but instead, were elected by the members of the Fire Association itself. Based upon these facts, we concluded the Fire Association was not a "public body" pursuant to the OMA. See also Lataille v. Primrose Volunteer Fire Association, OM 99-21 (noting Fire Association was not a "public body" since Board members are elected by members of the Fire Department and do not receive a salary, benefits, or pension).

In In re: Prudence Island Volunteer Fire Department, ADV OM 16-03, we found that the Prudence Island Volunteer Fire Department ("PIVFD") was not a "public body" because it was a non-profit corporation, it did not have any taxing authority, and it did not provide salaries, medical benefits, or pensions for its members. Although it obtained some revenue from the Town of Portsmouth, we noted that it also received private donations and federal and state grants. Additionally, we observed that positions within the PIVFD, including the Board of Control and the Chief, are elected by members of the PIVFD. Id. For these reasons, we concluded that the PIVFD was not a "public body" under the OMA.

The Rhode Island Supreme Court more recently considered this issue in Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education, 151 A.3d 301 (R.I. 2016). There, the Rhode Island Board Council on Elementary and Secondary Education ("RIDE") created a Compensation Review Committee ("CRC"), which was tasked with reviewing requested and proposed salary adjustments to RIDE employees. Id. at 302–03. The CRC was described as an "'informal, ad hoc working group with a strictly advisory role' and with no legal status or authority[,]" and which did not have regular meetings. Id. at 303. The Rhode Island Supreme Court held that the CRC was not a public body, stating:

> "Unlike the EHC in Solas, the CRC in this case does not meet on a regular basis, nor was the CRC created by an executive order. Instead, the undisputed evidence in this case is that the CRC acted as an informal, strictly advisory committee. Although the CRC was composed of a group of high-level state officials and operated under a charter, these two factors alone are insufficient to place them into the 'public body' umbrella. Importantly, the CRC's sole function is to advise the commissioner of RIDE, who in turn has to make a recommendation to the council. At this point in the process, if the commissioner decided to present any proposal to the council for the council's required approval, the public would have an opportunity to be informed of and object to such proposal." Id. at 308 (emphasis added).

Here, you have submitted various documents to assist our analysis, including the SFVFC's federal income tax forms from 2012–2016, the SFVFC's Articles of Incorporation, and the SFVFC's By-Laws. Based on these specific facts, we find that the SFVFC is not a "public body" within the meaning of the OMA. Our decision is controlled in large part through our precedent. The submitted documents establish that the SFVFC shares numerous characteristics with other fire entities we have previously found not to be "public bod[ies]" under the OMA. Like the PIVFD, the SFVFC

was founded as a non-business nonprofit charitable organization under Section 501(c)(3) of the federal tax code. See Articles of Incorporation Amendment 2; see also In re: Prudence Island Volunteer Fire Department, ADV OM 16-03. While the SFVFC does receive some financial support from the Town of Foster, among other entities, we have previously observed "that fact alone does not render them subject to the Act." Schmidt v. Ashaway Fire District & Volunteer Fire Assoc., PR 97-09. The SFVFC also receives private donations and state and federal grants. Critically, like the PIVFD, the SFVFC does not have any taxing authority. See In re: Prudence Island Volunteer Fire Department, ADV OM 16-03. Additionally, there is no indication that the Town of Foster retains any control over the SFVFC. Indeed, the SFVFC does not have any fire service agreement with the Town. Much like the Ashaway Volunteer Fire Association in Schmidt and the Primrose Volunteer Fire Association in Lataille, the SFVFC is "membership controlled" and thus membership is not subject to a governmental or public approval process. See By-Laws, Article IV. Finally, as you maintained in response to an inquiry from this Department, "[t]he SFVFC does not provide salaries, medical benefits, or pensions." See In re: Prudence Island Volunteer Fire Department, ADV OM 16-03 (same). For these reasons, and consistent with our precedent, we conclude that the SFVFC is not a "public body" under the OMA.

This advisory opinion is based upon the specific facts as you related. If the facts should differ in any respect, it may affect this Department's interpretation and ultimate opinion regarding whether the SFVFC is a "public body" subject to the OMA.

Additionally, this advisory opinion does not abrogate any rights that the Department of the Attorney General is vested with pursuant to R.I. Gen. Laws § 42-46-8, and is strictly limited to this Department's interpretation of the OMA. This opinion does not address the SFVFC's responsibilities under any other state law, rule, regulation, or ordinance, nor does it shield the SFVFC or its members from a complaint filed in the Superior Court by a citizen or entity pursuant to R.I. Gen. Laws § 42-46-8.

We hope that this advisory opinion is of assistance as this Department is committed to ensuring that public bodies comply with the OMA.

Very truly yours,

Sean Lyness
Special Assistant Attorney General

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