



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

November 29, 2018
ADV OM 18-05

Dylan Conley, Esquire

In Re: Providence Board of Licenses

Dear Attorney Conley:

In your capacity as legal counsel to the Providence Board of Licenses (“Board”), you seek an Open Meetings Act (“OMA”) Advisory Opinion from this Department concerning whether the Board may meet in executive session for deliberation during or at the conclusion of the presentation of evidence in a show-cause hearing. You state, in pertinent part, that:

- The Board routinely sits in a quasi-judicial capacity presiding over show cause hearings.
- Show cause hearings are a bilateral, adversarial hearing between the licensee and the City of Providence’s Licensing Enforcement Unit (“Unit”) of a violation.
- Unlike every other vote taken by the Board, no public comment is permissible during a show cause hearing, only witness testimony is allowed.
- The Board’s decisions in these show cause matters are particular to the incident and the licensee and do not create any policy or regulative authority.
- The Board, during these hearings, is presented with evidence and witnesses’ testimony by the Unit of a violation.
- The licensee may also present evidence, or otherwise question the evidence, witnesses, and testimony the Unit puts forth.
- There are many legal questions at issue. There are questions of evidence and the weight evidence should be given. There are legal standards for the burden of proof placed on the

Unit. There are concerns regarding the nexus between the violation being heard and the legal duties of the licensee.

- During these hearings licensee's counsel routinely state that they will simply appeal any action taken by our Board because the Rhode Island Department of Business Regulation ('DBR') will overturn the Board's decision no matter what the Board does.
- The DBR has routinely overturned the Board's decisions.

You further state that "the Board is only seeking to enter into executive session to discuss legal issues with legal counsel because these are legal determinations and Board members are not necessarily attorneys. In the same way that Supreme Court Justices deliberate amongst themselves prior to issuing a full decision, it would serve justice if the Board was able to review case law and ask counsel questions regarding standards and burdens in executive session prior to issuing a decision." Your advisory request does not direct us to any enumerated exception that would permit a public body to convene into executive session.

The OMA mandates that all meetings of all public bodies be held in open session, unless otherwise exempt. R.I. Gen. Laws § 42-46-3. Among the enumerated exceptions is R.I. Gen. Laws § 42-46-5(a)(2), which permits a public body to convene into executive session for "[s]essions pertaining to collective bargaining or litigation, or work session pertaining to collective bargaining or litigation." Presumably, the Board is focused upon this exception.

As this Department has noted previously, we are cognizant that almost any matter could relate to litigation, and therefore, each executive session needs to be reviewed on a case-by-case basis to ensure that any executive session discussion properly falls within the purview of R.I. Gen. Laws § 42-46-5(a)(2). See The Barrington Times v. Barrington School Committee, OM 09-10; see also Scituate Democratic Town Committee v. Scituate Town Council, OM 08-50. In a case involving threatened litigation, this Department added that "holding a closed session is permitted where litigation is reasonably anticipated and the public body is receiving frank appraisals from its attorney or discussing strategy." Trafford v. Coventry Town Council, OM 97-19; see also Providence Retired Police & Firefighters Association v. Board of Investment Commissioners, OM 00-21; see also Cole et al. v. Westerly Town Council, OM 99-18.

We examined a near identical advisory request in In Re: Board of Regents for Elementary and Secondary Education Appeals Committee, ADV OM 13-01, where this Department was asked whether the Appeals Committee could convene into executive session to deliberate at the conclusion of the presentation by the parties. The evidence revealed that the Appeals Committee reviewed all appeals from the decision of the Commissioner of Education. Similar to this situation, the Appeals Committee acted in a quasi-judicial role and reviewed the record from the hearings before the Commissioner's designated hearing officer. The record typically included sworn testimony and the parties' oral argument and submitted written memoranda.

In In Re: Board of Regents for Elementary and Secondary Education Appeals Committee, ADV OM 13-01, we reviewed Fischer v. Zoning Board for the Town of Charlestown, 723 A.2d 294

(R.I. 1999), wherein the Superior Court had rendered a decision that affected the Charlestown Zoning Board. As a result of that decision, the Charlestown Solicitor prepared and distributed a memorandum to the Zoning Board members, and subsequently, met with one or two Zoning Board members to discuss the memorandum and to answer questions. Based upon legal counsel's consultations with the one or two Board members outside the public's purview, an OMA complaint was filed in the Rhode Island Superior Court. The OMA complaint was dismissed and the Court stated that:

"There was neither a convening of a public body nor a quorum. More importantly, this Court believes in the free and unhindered discussions between lawyer and client * * * and such discussion should not be, nor are they, subject to the requirements of the [OMA,] especially where there is no meeting of a public body." (Emphasis added).

Consistent with Fischer, we have concluded that under limited circumstances a "meeting," as defined by the OMA, will not convene when members of a public body address questions to legal counsel. See Bozyan v. Middletown Town Council, OM 11-17; Blecinski v. Warwick School Committee, OM 17-20. Notwithstanding this position, we have stressed that a public body cannot use discussions with legal counsel to address substantive issues concerning matters that are presently before them, nor may a public body have a substantive discussion concerning a matter using an attorney as a protective executive session shield. Id.

Here, your inquiry for the Board is substantially similar to the issue presented to this Office in In Re: Board of Regents for Elementary and Secondary Education Appeals Committee, ADV OM 13-01, and we conclude that our prior advisory opinion controls. Specifically, we previously explained:

[w]hile [our precedent] may allow members of a public body to address questions to legal counsel, we view your advisory request differently. Specifically, according to your advisory request, you question whether the "Appeals Committee [can] deliberate in executive session at the conclusion of the presentation by the parties." According to the Miriam-Webster's Online Dictionary, "deliberate" is defined as "to think about or discuss issues and decisions carefully." Accordingly, inherent in your question is that the Appeals Committee will "deliberate," or in other words, "collectively discuss," in contrast to one or more members seeking advice from legal counsel in a manner that does [not] constitute a "deliberation" or a "collective discussion." Consistent with R.I. Gen. Laws § 42-46-5 and this Department's findings, we believe that if a quorum of the Appeals Committee "deliberates" or "collectively discusses" matters over which it has supervision, control, jurisdiction, or advisory power, as your request implies, these deliberations must be held in open session unless otherwise exempt pursuant to R.I. Gen. Laws § 42-46-5. We similarly caution the Appeals Committee that if its members engage in a collective discussion, vote, or take

other action under the guise of asking questions to legal counsel, a “meeting,” as defined by the OMA, will convene and the requirements of the OMA will apply.

Id. Likewise, we find no authority for the Board to convene and deliberate in executive session solely based on the deliberative nature of the matters before it. See November 15, 2017 Letter (“The executive session would be an opportunity to discuss the merits of the evidence and any imposition of penalties among members and legal counsel to the Board.”). While our precedent might allow the Board to discuss and receive legal advice concerning specific matters, we have cautioned that if the “members engage in a collective discussion, vote, or take other action under the guise of asking questions to legal counsel, a ‘meeting,’ as defined by the OMA, will convene and the requirements of the OMA will apply.” In Re: Board of Regents for Elementary and Secondary Education Appeals Committee, ADV OM 13-01. Additionally, we wholly reject the Board’s suggestion that convening in executive session might be appropriate simply because an aggrieved party may seek or threaten to appeal a decision. To defend itself against any complaint concerning an improperly convened executive session, the Board’s executive session minutes should reflect that no collective discussion and/or action occurred and detail the communications that did take place. See In re: Providence School Board, ADV OM 99-08; Bleczynski v. Warwick School Committee, OM 17-20. Our advisory opinion is also consistent with Rhode Island Superior Court decision in Christopher Roberts, et al. v. Elyse M. Pare, et al., (PC-2017-2410), issued September 18, 2018.

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.

Additionally, this advisory opinion does not abrogate any rights that the Department of Attorney General is vested in 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 Board’s responsibilities under any other state law, rule, regulation, or ordinance, nor does it shield the Board 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,



Lisa A. Pinsonneault
Special Assistant Attorney General

LP/kr