



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

June 19, 2013  
OM 13-16

Mr. Glenn Gilkenson

**Re: Gilkenson v. Cranston City Council**

Dear Mr. Gilkenson:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Cranston City Council (“City Council”) is complete. By correspondence dated April 5, 2013, you allege the City Council violated the OMA when its agenda for the March 25, 2013 meeting did not contain a statement specifying the nature of the business to be discussed. More specifically, you allege ordinances were introduced under the topic heading “New Business,” yet there was no notice informing the public that any ordinances would be introduced.

In response to your complaint, we received a substantive response from the City Council’s legal counsel, Evan M. Kirshenbaum, Esquire. Attorney Kirshenbaum states, in pertinent part:

“The complainant, Mr. Gilkenson, alleges that the Cranston City Council violated R.I.G.L. Section 42-46-6(b) in that it failed to specify a written notice as the nature of the business to be discussed. \* \* \* [T]he roman numeral ‘twelve,’ Introduction of New Business, is just that, the introduction of new business. This procedure involves the clerk reading the proposed ordinances (their titles only) to the general public as to what has been drafted by various council members or the administration to be taken up for the up-coming month. In reading the last sentence of the referenced statute ‘such additional items shall be for informational purposes only and may not be voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public or to refer the matter to an appropriate committee or to another body or official.’ (Emphases in original).

\* \* \*

By its very terms and heading, the clerk is reading the title of ordinances for informational purposes only, the items are not discussed, nor were they voted on except for the council to refer the ordinances to the appropriate committee for hearing and public comment. \* \* \*

Following the clerk's reading of the ordinances to be introduced, the clerk then posts public notice in accordance with the statute, the agenda of each committee and noting which ordinance has been referred to which committee, is posted. \* \* \* It is then, and only then, that the new introduced ordinance is taken up and discussed by the elected body. Again, the public has a chance to discuss, at the committee meetings, the ordinances that have been introduced before it."

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, 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 is limited to determining whether the City Council violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The issue for this Department to decide is whether the agenda item for the March 25, 2013 meeting was sufficient to inform the public of the nature of the business to be discussed. The agenda item at issue for the March 25, 2013 meeting stated, in pertinent part:

"XII. Introduction of New Business."

The OMA requires that:

"Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. 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." R.I. Gen. Laws § 42-46-6(b).

The Rhode Island Supreme Court examined this requirement in Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), wherein the Court held that the agenda must provide sufficient information to the public so that the citizenry may be informed as to what matters will be addressed at a meeting and the agenda must not be misleading. Id. at 797-98. The Court determined the 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." Id. at 797.

The Rhode Island Supreme Court, on April 2, 2013, re-examined the Tanner standard in Anolik v. Zoning Board of Review of the City of Newport, 2012-76-APPEAL, 2013 WL 1314947 (R.I., Apr. 2, 2013). The relevant facts of that case are as follows. In November of 2008, defendants

received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel's property that had been approved by a previous zoning board decision. *Id.* at 2. That previous decision expressly contained a condition to the effect that there be substantial completion of the improvements within two years. *Id.* The agenda item for the February 23, 2009 meeting stated:

“IV. Communications:

Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel”

At the meeting, the board voted unanimously to approve the request for an extension of time which required that the “improvements must be started and [be] substantially complete [by] February 23, 2011.” *Id.* On August 21, 2009, the plaintiffs filed a complaint in Superior Court alleging that the agenda item violated the OMA because it was “a ‘vague and indefinite’ notice to the public and one lacking in specificity.” *Id.* The Superior Court granted defendants’ motion for summary judgment. *Id.* at 4. On appeal, the Supreme Court looked to Tanner and noted 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.” *Id.* at 6-7 *quoting Tanner*, 880 A.2d at 797. The Court held that the agenda item was “completely silent as to which specific property was at issue; the agenda item provided no information as to a street address, a parcel or lot numbers, or even an identifying petition or case number.” *Id.* at 7. (Emphasis in original). The agenda item “fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration.” *Id.* at 8.

Similarly, in the instant case, the agenda item for the City Council’s March 25, 2013 meeting was “completely silent” as to what would be discussed under the topic heading “New Business.”

Additionally, this Department has consistently found broad agenda items, such as “New Business” and “Old Business” to be insufficient. *See Beagan v. Albion Fire District*, OM 10-27B (civil lawsuit pending); *Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing*, OM 00-07; *Blanchard v. Glendale Board of Fire Wardens*, OM 97-13. In each of these cases, the agendas only stated “Old Business” or “New Business,” contained no further information concerning what business would be discussed or acted upon, and the public body nonetheless engaged in a non-agenda discussion. The agenda item for the City Council’s March 25, 2013 meeting lacked any identifying information. Similar to the agenda item in Anolik, the City Council’s March 25, 2013 meeting agenda contained “vague and indefinite notice to the public” and “one lacking in specificity,” yet a review of the March 25, 2013 meeting minutes reveals that numerous items were introduced under the agenda item “New Business” and referred to City committees such as the Public Works Committee, Ordinance Committee, Finance Committee and the Claims Committee with accompanying hearing dates.

Furthermore, the OMA expressly allows a public body to amend its agenda. *See* R.I. Gen. Laws § 42-46-6(b) (“Nothing contained [in the OMA] shall prevent a public body ... from adding additional items to the agenda by majority vote of the members.”). With respect to any amended

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matter, however, “[s]uch additional items shall be for informational purposes only and may not be voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public or to refer the matter to an appropriate committee or to another body or official.” Id.

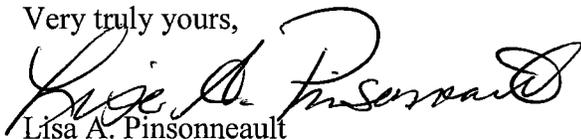
The City Council, in its response, cites R.I. Gen. Laws § 42-46-6(b) to support its position. Although this provision would have allowed the City Council to amend its March 25, 2013 meeting agenda to add additional items to be referred to other “appropriate committees,” there is no evidence before us that the City Council did in fact amend its agenda to add and refer items to other committees. For this reason, the fact that the City Council considered these items and because these items were not on the agenda either originally or through an amendment, that action violated the OMA.

Upon a finding of an OMA violation, the Attorney General “may file a complaint on behalf of the complainant in the superior court against the public body.” R.I. Gen. Laws § 42-46-8(a). “The court may issue injunctive relief” and/or “may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members” for a willful or knowing violation. R.I. Gen. Laws § 42-46-8(d). In this instance, we find no evidence that the City Council knowingly or willfully violated the OMA. We also conclude that under the facts of this case injunctive relief is not appropriate since it appears no substantive vote was taken at the March 25, 2013 meeting, rather ordinances were introduced and referred to “appropriate committee[s].” See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) (“By scheduling, re-noticing, and re-voting on the challenged appointment, the town council, albeit belatedly, was acting in conformity with both the letter and spirit of the avowed purpose of the OMA – to ensure that ‘public business be performed in an open and public manner.’”). This finding serves as notice to the City Council that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit 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 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.

Very truly yours,



Lisa A. Pinsonneault

Special Assistant Attorney General

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Cc: Christopher M. Rawson, Esquire