



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

February 2, 2016
OM 16-01

Michael J. Marcello, Esquire

RE: Marcello v. Scituate Town Council

Dear Attorney Marcello:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Scituate Town Council (“Council”) is complete. By correspondence dated July 5, 2015, you allege the Council violated the OMA when it entered into executive session at its January 8, 2015 meeting to discuss matters not appropriate for discussion under R.I. Gen. Laws § 42-46-5(a)(2) (also known as the litigation exception), and that the Council “failed to disclose votes regarding the acceptance or rejection of the ‘Proposal for Professional Services’ dated January 8, 2015.” At issue is the Council’s closed session discussion under R.I. Gen. Laws § 42-46-5(a)(2), which was advertised as:

“...title compliance matters to WRIHRP Program Close-Out and transition to Scituate Home Repair Program with New Program Administrator, NeighborWorks BRV and Legal Counsel. Also to discuss HUD Compliance Concerns for Receipt of CDBG Funding from the Federal Government and Legal Implications to the Town of Recent Rules and Regulations Changes from Affirmatively Furthering Fair House mandates.”

Specifically, you claim that “the reliance on the litigation exception to discuss these two items in closed session was misplaced, and violates the executive session requirements of the OMA.”

Legal counsel for the Council, David D’Agostino, Esquire, submitted a substantive response to your complaint. In pertinent part, Attorney D’Agostino states:

“[T]he Town avers that it was fully within the broad scope of the OMA’s litigation exception when it convened to discuss matters related to the former

Western RI Home Repair Program (WRIHRP) and the implications for accepting Community Development Block Grant (CDBG) funds through the US Department of Housing and Urban Development (HUD)...The Complainant's summary is far too brief to underpin the numerous legal issues facing the Town vis-à-vis the WRIHRP.

To being [sic], enclosed please find a news article that appeared in the *Valley Breeze Observer* in July 2013 where the Complainant was quoted:

Marcello told The Valley Breeze & Observer that he found the results of the audit¹ 'shocking' and, in his capacity as chairman of the state House Committee on Oversight, *may call for formal hearings before his committee* in the summer or fall to further probe the situation. 'This is something the voters in my district will want to know more about,' he said. He also mentioned referring the matter to the state attorney general. (Emphasis original to substantive response only).

...

What the Auditor General's Report does not cover in any depth is the extent to which the mortgage instruments issued by the WRIHRP and which inure to the Town (now that the program is closed) are replete with legal problems.

The Town of Scituate is entitled to approximately \$246,997.49 in proceeds from twenty-four (24) existing WRIHRP loans. This is a significant amount of money; however, there are several 'issues' related to these loans. First, there is – and was – no corporate entity known as the 'Western RI Home Repair Program'. Thus, an unincorporated consortium between Scituate, Foster, Glocester (and for a 2-year period, Burrillville), held mortgages with no legal status. The entire administration of the program, then, was based on the activities of an entity without any legal standing. Secondly, there is at least a question, based on a review of RI General Laws as to whether the WRIHRP (an unincorporated, unlicensed, multi-governmental consortium[]), could legally operate as a financial institution, issuing these loans, charging interest, and demanding repayment.) [sic] Furthermore, it is unknown, though suspected by this Solicitor's Office, that the WRIHRP did not operate in accordance with the good faith lending practices or truth-in-lending requirements that financial institutions must follow under State or Federal law(s).

¹ According to your complaint, you "requested that the Auditor General conduct a review of the [WRIHRP]." You indicate further that "[t]he Auditor General issued their report on June 26, 2013 and documented serious concerns and administrative irregularities regarding the management and oversight of it."

In addition, there were several cases in which mortgage documents were executed naming a deceased party...Late recording of mortgage documents, in at least one case, as much as a year, could result in chain-of-title problems rendering the mortgage void and several other 'irregularities' existed in the way the WRIHRP was administered.

Lastly, there were rental rehabilitation grants totally [sic] approximately \$47,873.40 that were administered through the WRIHRP. Although these funds are not repayable to the Town of Scituate, if the rental rehabilitation grants are not properly monitored and their respective provisions enforced, Scituate could be liable (as a member/former member of the consortium) for the repayment thereof to Rhode Island/US Department of Housing and Urban Development.

...

In this case, Complainant is aware of some, but clearly not all of these concerns related to the WRIHRP mortgage documents. Whether, and to what extent these concerns will continue to threaten the Town's interests remains to be seen; however, based on the totality of the circumstances described herein, the Town asserts there was (and perhaps still is) ample circumstances to warrant discussion of these issues in executive session...

The second allegation is that the Council convened the executive session essentially to discuss issues related to the acceptance of CDBG funds for Housing Rehabilitation in light of Rhode Map Rhode Island. This too, was properly convened under the litigation exception of the OMA. The Scituate Town Council expressed clearly that it did not support the *RhodeMapRI* economic development initiative, culminating in a Resolution 14-10 passed in early December 2014. There were reasons that went beyond the usual policy decisions inherent in a public body's prerogative in opposing *RhodeMapRI*. Those reasons were related to the potential legal liability associated with taking CDBG monies under 'new' HUD regulations. To outline the nature of the issue for you I have enclosed a Confidential Memorandum provided to the Council from the Solicitor's Office on the matter of CDBG funds and HUD regulations...

Again, the Town asserts that based on the totality of the circumstances, convening into executive session to discuss the implications of taking CDBG monies was proper under the litigation exception.

The Complainant's final allegation is related to what occurred following the executive session and the alleged failure to disclose a vote. A review of the open session meeting minutes is instructive...

What occurred following the executive session was the Council adopted the recommendations to take corrective action regarding the deficiencies in the

WRIHRP mortgage documents. That said, it made sense not to disclose the Council's strategy and decision in that regard until the tasks designed to correct those issues were completed, or at least were well under way. Thus, the Council voted to keep the vote to take corrective action(s) as discussed in executive session, confidential so that its disclosure would not otherwise jeopardize the Council's strategy in dealing with those myriad issues..."

We acknowledge your rebuttal and will address the pertinent points in our finding.

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 regarding 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. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The OMA mandates that all meetings of public bodies must be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5. See R.I. Gen. Laws § 42-46-3. Under R.I. Gen. Laws § 42-46-5(a)(2), a public body may hold a meeting closed for "[s]essions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation." This Department has addressed the litigation exception in prior findings and indicated that the OMA permits discussions not only of pending litigation, but also of litigation which has in fact been threatened or is imminent. Indeed, we found 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 legal strategy. See Trafford v. Coventry Town Council, OM 97-19. See also Cole et al v. Westerly Town Council, OM 99-18. Furthermore, when investigating an alleged violation of the litigation exception, we have noted "that almost any matter could relate to litigation," and therefore, each executive session must 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.

Based on the totality of the circumstances, we find that the Council's closed session meeting did not violate the OMA. Specifically, a review of all the evidence presented, including an in camera review of the closed session meeting minutes and the Confidential Memorandum, supports the Council's position that the matters discussed in closed session, i.e., title compliance matters related to the WRIHRP ("Home Repair Program") and HUD compliance, concerned legal implications to the Town and were matters appropriate for closed session under the litigation exemption. The January 8, 2015 agenda advertised the Home Repair Program and HUD matters as two separate discussions, however, the minutes reveal that both matters were largely one combined issue. While we acknowledge that some isolated statements, arguably, may have veered from the litigation exemption, the minutes are not a verbatim transcript and the discussion must be looked at as a whole.

While you argue that the “Town has not produced one shred of evidence that litigation was imminent, threatened, or in fact, reasonably likely,” the evidence presented by the Town, and provided to you, suggests litigation issues surrounded the topics discussed in closed session and that the Council was “receiving frank appraisals from its attorney or discussing strategy.” See Cole et al v. Westerly Town Council, OM 99-18. Respectfully, comments attributed to you and printed in The Valley Breeze & Observer undermine your argument. Indeed, on July 3, 2013, The Valley Breeze & Observer published an article entitled “Home Repair Program Audit Highlights ‘questionable’ Management,” which read, in pertinent part:

“Marcello told The Valley Breeze & Observer that he found the results of the audit ‘shocking’ and, in his capacity as chairman of the state House Committee on Oversight, may call for formal hearings before his committee in the summer or fall to further probe the situation. ‘This is something the voters in my district will want to know more about,’ he said. He also mentioned referring the matter to the state attorney general.

...

Although the audit indicates that problems arose due to sloppy record-keeping and a lack of knowledge regarding program guidelines and reporting requirements, Marcello said that’s no excuse. ‘This is shocking to any voter or taxpayer,’ he said. ‘Ignorance of program guidelines is not an excuse.’ He stressed that the funds involved are taxpayers’ money and added: ‘Sloppy management is just as bad as criminal malfeasance.’”

Although this article precedes the Council’s January 8, 2015 executive session, this article nonetheless highlights the litigious nature of the issues discussed. In fact, on August 2, 2013, Attorney D’Agostino sent you a letter, “at the behest” of the Council, responding to the comments made by you in the above-referenced article and providing you with information regarding the Home Repair Program. The letter indicated, in relevant part, that “[p]erhaps you might find some of this information useful to whatever review process that you undertake, provided you look into this matter as the Chairman of the Oversight Committee.” And, even though you contend that litigation was not imminent since the “Auditor General’s report was issued on June 26, 2013 and the actual Home Repair Program and its funding had been suspended by the State of Rhode Island,” no evidence has been provided to demonstrate that, as of January 8, 2015, the threat of litigation was any less “imminent or reasonably likely.” In fact, the Confidential Memorandum, which was written in January of 2015, leaves little doubt that the Council was “receiving frank appraisals from its attorney or discussing strategy,” during the timeframe in question.

You further argue that since a representative from Housing Works was present during closed session, “any claim of the litigation exception in this instance is misplaced since persons other than the Town Council were present and receive[d] said advice.” In Fitzmorris v. Portsmouth Town Council, OM 14-36, the Complainant similarly argued that since the Town Council went into executive session to discuss a possible settlement with the opposing parties to a pending

litigation matter, the litigation exemption did not apply. This Department concluded that the discussion was proper for executive session under the litigation exemption because the exemption did not apply solely to communications that were privileged in nature. We expressed that R.I. Gen. Laws § 42-46-5(a)(2) contains broad terms such as “litigation” and “work sessions pertaining to * * * litigation,” and that “if the General Assembly had intended to allow public bodies to enter into executive session under R.I. Gen. Laws § 42-46-5(a)(2) only for discussions that were of a privileged nature or involved attorney-client communications, the General Assembly clearly could have included such language.” Here, for the same reasons articulated in Fitzmorris, the fact that a representative from Housing Works was present during closed session did not bar the discussion from falling within the litigation exception.

Moreover, the Council did not abrogate its ability to discuss the Home Repair Program in closed session simply because the Council made available to the public a report and recommendation that discussed some of the legal matters at issue. Even assuming that the report detailed “many of the same ‘legal issues,’” which you suggest were discussed in closed session, the deliberations and decisions related to those legal issues were not part of the report and it is that information that is exempt from the public purview under R.I. Gen. Laws § 42-46-5(a)(2). While our in camera review and obligation to maintain the confidentiality of the executive session discussion makes it imprudent for us to disclose the substance of the closed session conversation or the Confidential Memorandum, it suffices to reiterate that the evidence demonstrates that the Council sought advice from, and discussed legal strategy with, its attorney regarding the possible litigation and legal implications associated with the Home Repair Program and the CDGB funding. See Trafford v. Coventry Town Council, OM 97-19. See also Cole et al v. Westerly Town Council, OM 99-18. Our review of the Confidential Memorandum is significant to our conclusion.

Finally, with respect to your allegation that the Council violated the OMA when it failed to disclose a record of the votes taken in closed session, we also find no violation. Rhode Island General Laws § 42-46-4(b) provides that “[a]ll votes taken in closed session shall be disclosed once the session is reopened; provided, however, a vote taken in a closed session need not be disclosed for the period of time during which its disclosure would jeopardize any strategy negotiation or investigation undertaken pursuant to discussions conducted under § 42-46-5(a).”

Here, the Council indicates that disclosing the vote would have “jeopardize[d] the Council’s strategy in dealing with those myriad of issues.” While you are correct that the Home Repair Program Report detailed a possible corrective action plan, we simply find insufficient evidence to conclude that the Council violated the OMA when it failed to disclose the executive session vote as of the date of your complaint.² We note, however, that since the Council revealed – in its substantive response to this complaint – what action the Council took during the January 8, 2015 closed session, whatever “jeopardy” may have previously existed may no longer be relevant. If the “jeopardy” no longer exists, the Council must disclose the record of the votes taken, in accordance with R.I. Gen. Laws §§ 42-46-4(b) and 42-46-7. Based upon the evidence presented,

² We have neither been provided nor discovered evidence indicating that the statute of limitations has expired. See R.I. Gen. Laws § 42-46-8.

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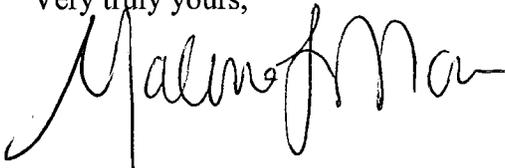
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since we cannot find that the "jeopardy" dissipated as of the date you filed the instant complaint, we find no violation.

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 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.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Malena Lopez Mora". The signature is fluid and cursive, with the first name being the most prominent.

Malena Lopez Mora
Special Assistant Attorney General
Ext. 2307

MLM/pl

Cc: David D'Agostino, Esquire