



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

April 15, 2016

OM 16-07

L W

Re: Nova v. The Compass School

Dear L W:

The investigation into your Open Meetings Act (“OMA”) complaint filed against The Compass School (“School”) is complete. You allege the School violated the OMA when it held a February 7, 2015 strategic planning session meeting, yet failed to keep written minutes in violation of R.I. Gen. Laws § 42-46-7. You further allege the School violated the OMA during its March 25, 2015 and April 1, 2015 meetings when the agenda item for executive session was pursuant to “RIGL 42-46-5(a)(1) director, as relates to director search.” You allege that the discussion should have occurred in open session and that the School did not state in its open call the “vote in the affirmative to then go into closed session citing the reason nor did the Compass School BOD in ‘open call’ reconvene to disclose if any votes were taken.”¹

¹ Rhode Island General Law § 42-46-5(a)(1) permits a public body to hold a meeting closed to the public for “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 discussions be held at an open meeting. * * * Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any persons to be discussed have been so notified and this statement shall be noted in the minutes of the meeting.” In your rebuttal, you further allege that the School violated the OMA when it failed to state in its written minutes that “such person or persons affected shall have been notified in advance in writing, advised that they may require that the discussions be held at an open meeting.” R.I. Gen. Laws § 42-46-5(a)(1). Since this allegation was not raised in your original complaint and since the School did not have an opportunity to respond to this allegation, respectfully, this allegation is not addressed in this finding. See Mudge v. North Kingstown School Committee, OM 12-35; Costantino v. Smithfield School Committee, PR 13-22. Notwithstanding the foregoing, we have serious concerns whether you have legal standing to raise this issue. See Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing, OM 00-07 (“we observe that R.I. Gen. Laws § 42-46-5(a)(1) requires that the public body notify in writing only the affected[ed] person(s), and not the public-at-large.”).

In response to your complaint, we received a substantive response from the School's legal counsel, Matthew R. Plain, Esquire. Attorney Plain states, in pertinent part,

"The School did not believe that the February 7, 2015 strategic planning session was a 'meeting' under R.I. Gen. Laws § 42-46-2 because the Council did not convene to discuss and/or act upon a specific matter, but rather, to meet with a consultant it had hired to develop a strategic plan for the school. Because it was not sure if the planning session was a meeting, as defined in the OMA, the school posted an agenda on February 5, 2015, giving the public notice that it would be holding a 'Strategic Planning Session' on February 7, 2015. The planning session was open to the public. The Council discussed three-year goals for the school, annual objectives, strategies and key performance indicators, but no votes were taken. The Compass School later prepared written minutes of the strategic planning session and filed them with the Secretary of State on May 6, 2015.

* * *

The Council entered into executive session on March 25, 2015 and April 1, 2015 by open call and upon an affirmative vote of a majority of its members. According to the sealed executive session minutes from March 25th, no votes were taken during the executive session. The votes taken during the executive session on April 1st were properly recorded in the open session minutes. * * * Thus, there were no procedural deficiencies. [The Complainant] alleges that the discussion held in executive session on March 25, 2015 and April 1, 2015 which was identified on each meeting agenda as 'Executive session per RIGL 42-46-5(a)(1) director, as related to director search,' should have been held in open session. The Council believed that it was required to hold the director search discussion in executive session because the outgoing director was asked to attend and provide input, based upon his own experience in having served as director for the past year, as to how the director's duties and responsibilities should change moving forward. Because the outgoing director and the Council's discussion centered around the director's performance over the prior year, his 'job performance' was inextricably intertwined with the discussion regarding the search for a new director."²

We acknowledge your rebuttal.

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

² The School attached copies of the minutes for the February 7, 2015, March 25, 2015, and April 1, 2015 meetings. The School also attached copies of the sealed executive session minutes for the March 25, 2015 and April 1, 2015 meetings for this Department's in camera review.

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

You allege the School violated the OMA when it held a February 7, 2015 strategic planning session meeting, yet failed to keep written minutes in violation of R.I. Gen. Laws § 42-46-7. Rhode Island General Laws § 42-46-7(b)(1) states, in pertinent part “[the] 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.” By its own admission, the School, in a May 3, 2015 email to you, states that “the meeting on February 7 was a Strategic Planning Session; [the Council Secretary] did not keep minutes for this.” Accordingly, it is clear that as of May 3, 2015, the School did not have written minutes of the February 7, 2015 Strategic Planning Session. Since the unofficial meeting minutes were not available within thirty five days of the meeting or at the next regularly scheduled meeting, whichever was earlier, we conclude that the School violated the OMA with respect to this allegation.

You next allege that the agenda item for the March 25, 2015 and April 1, 2015 executive session meetings was pursuant to “RIGL 42-46-5(a)(1) director, as relates to director search,” and accordingly, should have occurred in open session. This Department has been faced with similar situation throughout the years. Rhode Island General Laws § 42-46-5(a)(1), states:

“Any 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 in an open meeting.”

In In re: Town of Charlestown, ADV OM 11-02 the Town Council inquired whether they could meet in executive session under R.I. Gen. Laws § 42-46-5(a)(1) with the Town Administrator to discuss the Administrator’s performance and evaluation goals for his upcoming annual review. Specifically, we assumed “that setting the Town Administrator’s performance and evaluation goals will involve a discussion of the Town Administrator’s past performance, character, physical and/or mental health when discussing and setting his performance and evaluation goals for his upcoming review.” We concluded that the Town Council “would be permitted to convene into executive session for this discussion provided that it adhere to the provisions for closed meetings as stated in R.I. Gen. Laws § 42-46-4.”

Another finding is The Westerly Sun v. Westerly Town Council, OM 94-01. In seeking to hire a Town Manager, the Town advertised and accepted applications for the position. The Town Council reviewed the applications and, by majority vote of the Town Council, selected certain individuals for an interview. The purpose of the interview was to determine the qualifications of the applicant to serve as Town Manager. This Department determined that “[i]ndeed, the primary goal of job interviews is for both the interviewers and interviewees to discuss job performance, character, or physical or mental health of the applicants.” As such, this Department concluded that the Town Council’s discussions with the applicants concerning their

employment qualifications were appropriate for closed session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) and no violation of the OMA occurred. See also Friend v. East Greenwich Town Council, OM 13-31 (The Town Council's interview of candidates for the position of Town Manager could appropriately be held in a closed session pursuant to R.I. Gen. Laws § 42-46-5(a)(1)).

The School submits that:

“the outgoing director was asked to attend and provide input, based upon his own experience in having served as director for the past year, as to how that director's duties and responsibilities should change moving forward. Because the outgoing director and the Council's discussion centered around the director's performance over the prior year, his 'job performance' was inextricably intertwined with the discussion regarding the search for a new director.”

While such discussions may have been appropriate for executive session, this Department's in camera review of the March 25, 2015 and April 1, 2015 executive session meeting minutes reveals insufficient evidence that what was in fact discussed was appropriate under R.I. Gen. Laws § 42-46-5(a)(1). Rather, it appears that the School generally discussed the position and requirements for a new director. While we appreciate the fact that meeting minutes are not a verbatim transcript, the content of the executive session meeting minutes for both meetings contain too little information for us to affirmatively conclude the discussions were appropriate for the cited purpose. See Medeiros v. Tiverton Town Council, OM 00-14 (the Town Council violated the OMA by discussing the formation of potential interview questions in executive session since these discussions fall outside R.I. Gen. Laws § 42-46-5(a)(1)). Thus, we find that the subject-matter of the March 25, 2015 and April 1, 2015 meetings was not appropriate for executive session.

With respect to your allegation that the School did not state in its open call the affirmative vote of its members to convene into executive session at either the March 25, 2015 or April 1, 2015 meetings, we find no violation. A review of the open session minutes for both meetings reveals the open call to convene into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) to discuss the Director search. The motion passed by unanimous vote at both meetings and was recorded in the open session minutes. As such, we find no violation.

Finally, you allege that the School did not disclose the vote taken in executive session upon reconvening into open session at both the March 25, 2015 and April 1, 2015 meetings. Rhode Island General Laws § 42-46-4(b) states that:

“[a]ll votes taken in closed sessions 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).”

A review of the executive session minutes for the March 25, 2015 meeting reveals no votes were taken. The School therefore did not violate the OMA with respect to this allegation. With respect to the April 1, 2015 meeting, the School states “[t]he votes taken during the executive session on April 1st were properly recorded in the open session minutes.” This Department’s review of the executive session meeting minutes reveals three (3) votes taken and our review of the open session meeting minutes reveals three (3) votes disclosed. We find no violation with respect to this allegation.

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).

Here, we do not conclude that the School willfully or knowingly violated the OMA. While injunctive relief may be appropriate, we prefer to allow the School the opportunity to remedy the violation on its own. 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.’”). Specifically, since we have determined that the School should have conducted its March 25, 2015 and April 1, 2015 executive sessions in open session, the School must disclose its March 25, 2015 and April 1, 2015 executive session minutes. It is our understanding that the School has already made its February 7, 2015 minutes publicly available. This finding serves as notice to the School 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, although we reserve the right to reopen this matter should the School not remedy this violation on its own.

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

Very truly yours,



Lisa A. Pinsonneault
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Cc: Matthew R. Plain Esq.