



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

June 9, 2016
OM 16-10

Mr. Robert Cushman

Re: Cushman v. Warwick City Council

Dear Mr. Cushman:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Warwick City Council (“City Council”) is complete. By email correspondence dated July 20, 2015, you allege the City Council violated the OMA when a quorum of its members met at an unannounced meeting on or before June 15, 2015 and signed a correspondence addressed to members of the Warwick delegation to the Rhode Island General Assembly in violation of R.I. Gen. Laws § 42-46-6(b).¹

In response to your complaint, we received a response from the City Council’s legal counsel, John J. Harrington, Esquire, who provided a single affidavit signed by Councilwomen Donna

¹ Your complaint contains some vague references regarding the Mayor of Warwick, but no allegation implicates the OMA and a subsequent correspondence by you makes clear that the instant complaint was filed against the City Council and not against any other individual. See Cushman Letter dated December 21, 2015, p. 4 (“My July 20 Complaint was filed against the Public Body known as the Warwick City Council consisting of all nine (9) members.”). We received a response from the City Solicitor Peter D. Ruggiero, Esquire, on behalf of the Mayor. As we explained above, we do not view your complaint as articulating a cognizable OMA complaint against the Mayor. See e.g., R.I. Gen. Laws § 42-46-2(3)(defining “public body”). It should also be noted that your December 21, 2015 letter formed the basis of an independent OMA allegation against the City Council. By e-mail dated March 10, 2016, you were advised that the conduct alleged did not violate the OMA. You have subsequently sought “clarification” concerning various aspects of this Department’s March 10, 2016 e-mail. Respectfully, this Department’s decisions speaks for themselves and further clarification concerning how a finding will impact future situations must be gleaned from our past findings or determined through the complaint process where we can apply the OMA to a particular – and not a hypothetical – set of circumstances.

Travis, Camille Vella-Wilkinson, Kathleen Usler, as well as Councilmen Steven Colantuano, Thomas Chadronet, Ed Ladouceur, and Joseph Gallucci. The Affiants state, in pertinent part:

“The Warwick Sewer Authority was established by a special enabling act of the General Assembly many years ago. That special legislative act has been amended from time to time over the years.

About two years ago the City Council established an ad hoc Sewer Review Commission to, among other things, review the current form of the special enabling act for the Sewer Authority and propose possible amendments to the enabling act that should be made by the General Assembly. The Commission met many times. All meetings of the Commission were conducted in public and properly noticed in compliance with the Open Meetings Act (‘OMA’).

The Commission produced a draft comprehensive document about twenty (20) pages in length proposing many amendments to the special enabling act for the Sewer Authority.

That draft came before the City Council for consideration as an attachment to proposed Resolution PCR-24-15 at the City Council meeting on April 7, 2015. * * * As acknowledged in the Complaint, that consideration by the City Council was properly noticed under the OMA. Public comment was taken on the matter and a lengthy discussion of the proposed amended sewer enabling act for almost two hours took place among the City Council members. Based on the discussions by Council members, amendments to the Commission draft document of twenty pages were made to the City Council before it unanimously adopted proposed PCR 24-15 with the amended draft of the sewer enabling act attached. * * *

The proposed amendments to the Sewer Authority Enabling Act were many and comprehensive. Proposed deletions from the existing Act were marked with strikethrough; proposed deletions from the existing Act were marked with underling.

PCR-24-15 when adopted by the City Council became NO. R-15-38 and was signed by the Mayor. The Resolution expressly stated that the Warwick Sewer Authority desired to make improvements in the manner and methods used to provide wastewater treatment service especially with respect to sewer assessments for new sewer construction because the proposed changes to the enabling legislation were warranted to modernize and clarify language in the enabling act and address issues that the Sewer Authority was trying to resolve in a fair and equitable manner. The Resolution also expressly stated that

the City Council supported the proposed amendments to the enabling act in the document * * * and **Resolved that the City Council endorsed the amendments to the enabling legislation for the Warwick Sewer Authority** * * * The Resolution was sent to the Senators and Representatives from the City of Warwick. (Emphasis in original)

* * *

While the legislation was pending in the General Assembly, some amendments to the enabling act revisions adopted by the City Council were proposed by members of the General Assembly. In response to those proposed amendments a letter dated June 15, 2015 (the subject matter of the Complaint in this case) was drafted and circulated among members of the City Council to read and sign if the individual Council member desired to sign the letter, no meeting of a group of Council members occurred at a single point in time where they collectively discussed the letter.

The letter merely restated and reaffirmed the statements in Resolution NO. R-15-38 as adopted unanimously by the City Council that the form and substance of the proposed amendments to the Sewer Authority enabling act approved by the City Council were the only amendments that should be made to the enabling act. The letter was mere affirmation in furtherance of what the City Council had done previously in an open public meeting which was acknowledged in the complaint to have been properly noticed in conformity with the OMA. The letter was not a new act of the City Council that required notice and the convening of a public body.”

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 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 OMA explains 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. In order for the OMA to apply, a “quorum” of a “public body” must convene for a “meeting” as the OMA defines those terms.

Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). The OMA defines a “public body” to be “any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government or any library that funded at least twenty-five percent (25%) of its operational budget in the prior budget year with public funds, and shall include all authorities defined in § 42-35-1(b).” R.I. Gen. Laws § 42-46-2(c). A “quorum” is defined as “a simple majority of the membership of a public body.” R.I. Gen. Laws § 42-46-2(d). A “meeting” is defined as “the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws § 42-46-2(a).

It appears, based upon the evidence presented, that a letter dated June 15, 2015 was signed by nine (9) members of the eleven (11) member City Council. The letter, addressed to the members of the Warwick delegation indicated, inter alia, that the nine (9) members did not “support any enabling legislation for the Warwick Sewer Authority that contain[ed] changes and/or language in Senate Bill S864 Sub A2 Lines 24-26 on page 19. This language precludes the duly elected Legislative body and the Executive Branch to deliberate on the manner in which a waste water management district could be managed and administered.”

This Department faced a similar set of facts in International Brotherhood of Police Officers [the I.B.P.O.] v. Barrington Town Council, OM 96-01. In that finding, the I.B.P.O. alleged that the Barrington Town Council violated the OMA regarding a “Letter to the Editor,” which appeared in the Barrington Times and was signed by four of the five Council members. The evidence revealed that one Town Council member wrote the letter who then faxed the letter to the other Council members asking whether they would sign the letter. The evidence revealed that Council members had no discussions, either in person or by telephone, regarding the letter. Nonetheless, this Department concluded that the Town Council violated the OMA because, while there was no physical “convening,” the OMA specifically prohibits the use of electronic communications to circumvent the spirit or the requirements of the OMA. This provision precluded communicating via facsimile or telephone concerning matters over which a public body has supervision, control, jurisdiction or advisory power.

In Ryan v. Warren Housing Authority, OM 14-37, this Department confronted a similar situation when we found the Warren Housing Authority violated the OMA by communicating via correspondence concerning public business. In Ryan, the evidence revealed that a letter was written and signed by one of the Housing Authority members. Although it appeared no discussions occurred amongst a quorum of the Housing Authority members, the letter was circulated to two (2) other Housing Authority members who read and signed the letter. Since the Housing Authority was comprised of five (5) members, three (3) members would constitute a quorum, and accordingly, we found an OMA violation.

In the instant matter, it appears, based upon the evidence presented, that the June 15, 2015 subject correspondence was circulated amongst, at least, a quorum of City Council members. The City Council members were instructed to read and, if desired, sign the letter. The purpose of the letter seemed to arise because while the legislation to amend the Sewer Authority enabling act was pending, some additional amendments were proposed by members of the General

Assembly. The subject letter was drafted in response to these proposed amendments. Although the members of the City Council who signed the letter indicated that the letter was merely circulated amongst the members and that “no meeting of a group of Council members occurred at a single point in time where they collectively discussed the letter,” the City Council violated the OMA in another manner. Specifically, by passing around a correspondence concerning a matter over which the City Council had supervision, control, jurisdiction, or advisory power, and indicating support by signing their names to the June 15, 2015 letter. R.I. Gen. Laws § 42-46-2(1). While it may be true that the City Council members did not verbally communicate, the circulation and signing of the June 15, 2015 letter essentially accomplished through a written document what the Council acknowledges could not be accomplished through oral discussions or electronic communication. See R.I. Gen. Laws § 42-46-5(b)(1)(“discussions of a public body via electronic communication, including telephonic communication and telephone conferencing, shall be permitted only to schedule a meeting”). As such, consistent with our prior findings, the City Council violated the OMA by communicating amongst a quorum of members via written correspondence concerning public business.

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. Moreover, since the June 15, 2015 letter has already been received by Warwick’s General Assembly delegation over a month before you filed your complaint with this Department, injunctive relief would be inappropriate. It is also our general understanding that the June 15, 2015 letter concerned legislation pending during the General Assembly’s prior legislative session and that the legislation discussed in the June 15, 2015 letter was not enacted.

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 file a suit “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(c). 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

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LP/kr

Cc: Peter Ruggero, Esq.,