



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

November 14, 2016

OM 16-12

Mr. Larry Anderson

Re: Anderson v. Little Compton School Committee

Dear Mr. Anderson:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Little Compton School Committee (“School Committee”) is complete. By correspondence dated October 1, 2015, you allege the School Committee violated the OMA during its July 20, 2015 meeting when: (1) it convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) and took two (2) votes in executive session relating to the appointment/non-appointment of a Superintendent as opposed to discussion only; (2) it failed to state for the record and include in the open session minutes that the individuals discussed in executive session were provided advanced written notice that the discussion could take place in open session; (3) it failed to record into its open session minutes the “reason for holding a closed meeting, by a citation to a subdivision of R.I. Gen. Laws § 42-46-5(a), and a statement specifying the nature of the business to be discussed;” and (4) it failed to properly and fully disclose in open session the votes taken in its preceding executive session, specifically by failing to disclose how each member voted.

In response to your complaint, we received a substantive response from the School Committee’s legal counsel, Kevin J. McAllister, Esquire, who also provided an affidavit from Mr. Thomas Allder, Chairperson of the School Committee. Mr. Allder states, in pertinent part:

“[I]t is true that at the July 20, 2015 School Committee meeting, while in closed session pursuant to RIGL sec. 42-46-5(a)(1) as reflected on its posted Agenda, * * * the School Committee conducted in closed session interviews with the three (3) finalist candidates for appointment as Superintendent for the Little Compton Public School District for the 2015-2016 academic year. Following the three interviews and while in closed session and as advertised on the posted Agenda, the School Committee engaged in discussion concerning all three finalists. Following that discussion and while still in closed session and as advertised on the posted Agenda, the School Committee entertained two motions and conducted two votes concerning two of the three finalists. The

first motion to appoint and vote failed on a 2-3 vote to appoint one finalist who ultimately was not selected as Superintendent. The second motion and vote passed by a 3-2 margin, to re-appoint incumbent Superintendent, Kathryn Crowley, as Superintendent. (No motion to appoint the third interviewed finalist was ever made.)

At the time of the preparation of the Agenda * * * neither I personally, nor the Little Compton School Committee collectively, were aware of the * * * opinion by the Department of Attorney General entitled *Graziano v. RI Lottery Commission* * * * which includes a statement addressing votes in closed session under RIGL sec. 42-4[6]-5(a)(1) 'personnel.' 'This Department has previously held that under sec. 42-46-5(a)(1) that the public body must limit itself to 'discussions; and any votes must be taken in open session.' * * *

On November 18, 2015, and consistent with its timely posted Agenda * * * for the Special Meeting * * * the Little Compton School Committee voted unanimously and in open session to consider and vote on a Motion to Affirm the Superintendent's appointment for the 2015-2016 academic year, with retroactive effect from the date of appointment. * * *

[G]oing forward, I will rule out of order any attempt to conduct a vote while in closed session pursuant to RIGL sec. 42-46-5(a)(1) unless the statement contained in *Graziano v. RI Lottery Commission* * * * is further clarified or overruled.

With regard to the second allegation * * * concerning the issue of whether the July 20, 2015 meeting's open session minutes reflect the fact that the three applicants being interviewed for consideration and appointment as Superintendent were given written notice, as set forth in RIGL 42-46-5(a)(1), concerning their respective right to have the discussions related to their individual candidacy held in open session. It is conceded that the current open session meeting minutes for July 20, 2015, do not contain such a statement. * * * It is my intention to place on the next regular meeting * * * of the School Committee a motion to amend the July 20, 2015 open session minutes to reflect that the two non-incumbent Superintendent applicants * * * were, in fact, notified in advance and in writing of their respective right to have the discussions concerning their candidacy held in open session. * * *

The third issue raised by Mr. Anderson is that the Little Compton School Committee allegedly failed to record and enter into its *minutes* the 'reason for holding a closed meeting, by a citation to a subdivision of RIGL sec. 42-46-5(a)' and failing to record in its *minutes*, 'a statement specifying the nature of the business to be discussed.' (Emphases in original). The Agenda for the July 20, 2015 Little Compton School Committee meeting clearly sets forth the statutory provisions within RIGL sec. 42-46-5(a)(1) ('Personnel') and (a)(8) ('Student Privacy') under which the closed session was to be held. * * *

The fourth issue and allegation * * * is that the Little Compton School Committee violated the OMA on July 20, 2015 by failing ‘to properly and fully disclose in open session the votes taken in its preceding executive session, specifically by failing to disclose how each member voted on each issue’ in executive session that evening. * * * [T]he most recent amended version of the July 20, 2015 minutes * * * does reflect the fact that it was disclosed in open session what motions were voted upon in executive session, and what the voting margin was that disposed on each motion voted upon in executive session.”

We acknowledge your rebuttal dated January 22, 2016.

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

With respect to the allegation that the School Committee not only discussed the appointment of a Superintendent while in executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1), but also twice voted upon this issue, we find that the School Committee violated the OMA.¹ Rhode Island General Laws § 42-46-5(a)(1) states that “[a]ny discussions of the job performance, character, or physical or mental health of a person or persons” may be held in executive session. (Emphasis added). The plain language of the OMA and our previous findings have held that when a public body chooses to convene into executive session under this exemption, it must discuss only and not take a vote while in executive session. The vote, if any, must be conducted upon re-convening into open session. See In re: Health Services Council, ADV OM 99-12 (“[u]nder § 42-46-5(a)(1) ...the public body must limit itself to ‘discussion’ and any votes must be taken in open session.”) (quoting Graziano v. R.I. Lottery Commission, OM 99-06). For this reason, we conclude that the School Committee violated the OMA when it voted in executive session.

With respect to the allegation that the School Committee failed to articulate and record in its open session minutes the open call for its July 20, 2015 meeting, and that advanced written

¹ You did not attend the July 20, 2015 meeting, and your non-attendance raises the specter that you are not aggrieved by this alleged violation. See Graziano v. Rhode Island Lottery Commission, 810 A.2d 215 (R.I. 2002). Your complaint references that based upon the School Committee’s agenda, which indicated it would vote on this issue while in executive session, you decided not to attend the July 20, 2015 meeting. With respect to this issue, since the agenda indicated that it would vote in executive session, and since you contend that you did not attend the July 20, 2015 meeting based upon the agenda, we conclude that you are aggrieved and reach the merits of this issue.

notice was provided to the three (3) applicants being interviewed for consideration and appointment for Superintendent, we find that to the extent that the open session minutes did not contain these items, the School Committee violated the OMA. Specifically, pursuant to R.I. Gen. Laws § 42-46-5(a)(1), discussions of the job performance, character, or physical or mental health of a person or persons, may occur in executive session, “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.”² The OMA also provides that “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.” R.I. Gen. Laws § 42-46-5(a)(1). Based upon the evidence presented, and the fact that the School Committee concedes that no such statement exists in the open session minutes, we conclude that the School Committee failed to comply with the requirements of R.I. Gen. Laws § 42-46-5(a)(1) when it failed to record in its open session meeting minutes that the required advance notice was provided.

You further allege that the School Committee violated the OMA when it failed to record and enter into its open session minutes for the July 20, 2015 meeting, the reason for holding a closed meeting, by a citation to a subdivision of R.I. Gen. Laws § 42-46-5(a), and a statement specifying the nature of the business to be discussed. Here, we find that the School Committee violated the OMA with respect to this allegation. Pursuant to R.I. Gen. Laws § 42-46-4(a), by open call, a public body may hold a meeting closed to the public upon an affirmative vote of the majority of its members. The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the open session minutes of the meeting. *Id.* This omission, i.e., recording the open call in the open session minutes, violated the OMA.

Finally, you allege that the School Committee violated the OMA when the minutes of the July 20, 2015 meeting did not list a “record by individual members of any vote taken” in violation of R.I. Gen. Laws § 42-46-7(a)(3). Based on this omission, you contend that the School Committee also violated R.I. Gen. Laws §§ 42-46-4(b) and 42-46-7(b)(1). As you observe in your complaint, these three (3) allegations are “effectively inter-related.”

² The OMA provides that only “aggrieved” citizens may file a complaint regarding an alleged OMA violation. See R.I. Gen. Laws § 42-46-8(a); Graziano v. Rhode Island Lottery Commission, 810 A.2d 215 (R.I. 2002). To the extent that you contend that the School Committee violated the OMA because it failed to articulate in open session that the affected persons had received advanced written notice pursuant to R.I. Gen. Laws § 42-46-5(a)(1), and that the School Committee failed to articulate in open session the open call pursuant to R.I. Gen. Laws § 42-46-4, we find that you are not “aggrieved,” and therefore we need not address the merits of these allegations. Specifically, you acknowledge that you did not attend the July 20, 2015 meeting, and as such, any failure of the School Committee to articulate these notices in open session would not have affected you. It is also worth noting that since you did not attend the July 20, 2015 meeting, your allegations cannot be based on your personal knowledge.

Here, you take issue with the two School Committee votes taken in executive session relating to the appointment of a Superintendent. With respect to the two (2) executive session votes, one vote was 2-3 in favor of not appointing a particular candidate, while the other vote was 3-2, in favor of appointing a particular candidate. While you allege that the School Committee violated the OMA when it failed to disclose in its minutes, as well as in the July 20, 2015 open session, a “record by individual members of any vote taken,” we fail to see how you are aggrieved by this allegation.

For example, you contend that the School Committee violated R.I. Gen. Laws § 42-46-4(b), and in particular the provision that provides that “[a]ll votes taken in closed sessions shall be disclosed once the session is reopened.” Even assuming that this provision would require the disclosure of each vote, by individual member as opposed to the disclosure of the vote total, for the reasons described in footnote 2, you are not aggrieved. In particular, you did not attend the July 20, 2015 meeting, and accordingly, even assuming that the School Committee did not disclose the vote by individual member upon reconvening into open session, with respect to you, this omission would have had no affect because you were not in attendance.

We also fail to see how you were aggrieved by the School Committee’s alleged failure to include in its open session minutes “[a] record by individual members of any vote taken.” R.I. Gen. Laws § 42-46-7(a)(3). In this respect, it is significant that you acknowledge that the School Committee made available to the public “a record of all votes taken at [the July 20 closed session], listing how each member voted on each issue . . . within two (2) weeks of the date of the vote.” (Alteration and ellipsis in original). According to your complaint, this “record” was “subsequently provided to [you].” Despite your actual knowledge and receipt of a record listing how each member voted on the July 20, 2015 closed session Superintendent appointment issue, you contend that the School Committee violated the OMA because the open session minutes failed to contain “[a] record by individual members of any vote taken.” Because the evidence demonstrates that you were already aware of the individual member vote, and had already obtained a record from the School Committee concerning the individual member votes, we fail to see how you are aggrieved by this allegation.

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies in suits filed under the OMA: (1) “[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];” or (2) “[t]he court may impose a civil fine not exceeding five thousand (\$5,000) dollars against a public body or any of its members found to have committed a willful or knowing violation of [the OMA].” R.I. Gen. Laws § 42-46-8(d).

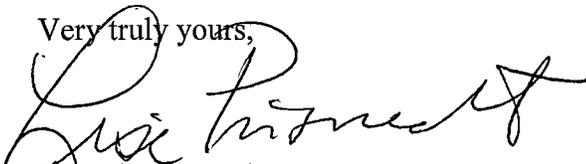
Here, we conclude that neither remedy is appropriate. Based upon our review of the totality of the evidence, we simply find no facts or evidence that suggest that the School Committee willfully or knowingly violated the OMA. It bears noting that although the School Committee should have voted in open session, upon reconvening into open session, the School Committee immediately disclosed its executive session vote and no allegation has been made that the executive session discussion was improper. Moreover, the School Committee has amended its July 20, 2015 minutes to evince that the affected persons had received written notice and the

School Committee re-affirmed its vote to appoint a Superintendent. While your rebuttal appears to take some issue that the School Committee did not reaffirm its vote not to appoint the unsuccessful candidate, considering the School Committee's unanimous affirmance of its vote to appoint a Superintendent, the failure to affirm the non-appointment vote is hardly necessary. 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.'"). Our review of the amended July 20, 2015 minutes, however, finds that the School Committee's open session minutes do not contain "the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed," R.I. Gen. Laws § 42-46-4(a), and the School Committee should correct its July 20, 2015 minutes to remedy this remaining issue. The School Committee has already represented to this Department that such an amendment could be accomplished if determined by this Department. This finding serves as notice to the School Committee that its actions violated the OMA and may serve as evidence of a willful or knowing violation in any future similar case. The School Committee should notify this Department when the remaining issue has been remedied.

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. We are closing our file as of the date of this finding, although we reserve the option to reopen this matter should the School Committee fail to remedy this remaining matter.

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

Very truly yours,



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LP/kr

Cc: Benjamin M. Scungio, Esquire