



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 14, 2017

OM 17-35

Mr. Michael Clifford

Mr. Michael Rapko

RE: Clifford, et al. v. North Smithfield Town Council

Dear Mr. Clifford and Mr. Rapko:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the North Smithfield Town Council (“Town Council”) is complete.

You allege that the Town Council violated the OMA when an agenda item for its July 17, 2017 meeting lacked sufficient specificity and did not fairly inform the public of the Town Council’s intended actions. Specifically, you allege, in relevant part:

“The agenda for the Town Council meeting held on July 17, 2017, contained the following agenda item under Old Business, A.: ‘Discussion by Town Council, Vote or Other Action on Adoption of 2017/2018 Budget – Mr. Ezovski.’ It is our contention that the description lacked sufficient specificity, did not fairly inform the public of the Town Council’s intended actions, and in fact misled the public as to those intended actions.

*** In accordance with the mandate of the Town Charter, the adoption of the FY2018 budget occurred at a Council meeting held on June 29, 2017. ***

The subsequent actions taken by the Town Council on July 17, 2017, included adding a new line item, on the general fund expenditure side, identified as ‘School Aid Replacement Contingency,’ with \$100,000 budgeted. This resulted in an increase of \$100,000 in ‘Total General Fund Expenditures.’ On the revenue side, the Council increased the ‘Current Year Taxes’ line by \$100,000 which resulted in an increase in the ‘Total General Fund Revenue’ line by \$100,000. The above actions caused an increase in tax levy dollars from the June 29, 2017 to the July 17, 2017 budget. ***

The actions described above effectively amended the FY2018 budget and constitute approval of a supplemental tax. ***

The description used on the July 17, 2017 agenda was vague, indefinite and confusing, especially to all those who knew the budget had already been adopted on June 29, 2017.

You will hear acknowledgements that [the Town Council] were well aware they had adopted the budget on June 29, 2017. All Town Council members understood the budget had already been adopted, can only be adopted once, and must be adopted in compliance with state law and the Town Charter. Councilors Zwolenski and McGee actually sat on the Town Council and approved 2014 ballot questions to be put before North Smithfield voters regarding other date changes which appear in the financial articles of the Charter. We believe this demonstrates that the Town Council acted willfully and knowingly in violating the OMA.”

Your complaint included numerous attachments, including links to videos of the June 29 and July 17, 2017 Town Council meetings.¹

The Town Council filed a substantive response through Town Solicitor David Igliazzi, Esquire. Attorney Igliazzi responded to your allegations, in pertinent part, as follows:

“In this case, the contents of the July 17, 2017 Agenda Statement clearly comports [sic] with RIGL [§] 42-46-6(b) and the Rhode Island Supreme Court holdings in *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784 (R.I. 2005) and *Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education*, 151 A.3d 301 (R.I. 2016). A simple reading of the language of the Agenda Statement confirms that the public was fairly informed that any Town Council action on the 2017/2018 budget and method of tax collection could be considered (including a budget amendment) because the Agenda Statement provided for ‘a discussion by council, vote or other action on the adoption of the 2017/2018 budget, municipal, sewer and water; and a discussion by council, vote or other action on method of tax collection.’ In addition, further evidence that the discussion, vote and other action by the Town Council (including a budget amendment) was relevant and consistent with the nature of the business describe[d]

¹ This Department inquired as to whether you had standing to bring this Complaint. In a subsequent submission, evidence was presented that Mr. Clifford attended a portion of the July 17, 2017 meeting and left before the allegedly insufficient agenda item precisely because he did not believe the budget would be amended. Mr. Rapko noted that he did not attend the meeting due to the lack of specificity in the notice. Pursuant to R.I. Gen. Laws § 42-46-8(a) and the standard established in *Graziano v. Rhode Island State Lottery Commission*, 810 A.2d 215 (R.I. 2002), we find that you have sufficiently articulated that you were “aggrieved” by the allegedly deficient notice and therefore have standing to bring this Complaint. We also note that the Town Council did not expressly argue to the contrary.

by the Agenda Statement is provided in the Town Council meeting minutes of July 17, 2017.”

You provided a rebuttal, stating, in relevant part:

“Town Solicitor Iglizzo suggests that amending a budget is akin to adopting a budget. We strongly disagree with his position for the following reasons. First, the municipality’s fiscal year budget is adopted only once. *** When and if a budget is to be amended, the agenda item should clearly state the nature of the budget amendment to be considered and also state than increase in the tax levy (if necessitated by the proposed amendment) will be discussed, considered and acted upon.”

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 the law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Town 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 requires all public bodies to provide supplemental public notice of all meetings at least forty-eight (48) hours in advance of the meeting. See R.I. Gen. Laws § 42-46-6(b). “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.” Id. (Emphasis added). The level of specificity that must be detailed for each agenda item depends on the facts and circumstances surrounding each item.

In Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), the Rhode Island Supreme Court examined this OMA provision. The Court determined that the agenda item “Interviews for Potential Boards and Commission Appointments” did not adequately apprise the public of the nature of the business to be discussed at a Town Council meeting. Specifically, after conducting interviews as indicated on the notice, the East Greenwich Town Council proceeded to vote to appoint various individuals to the planning and zoning boards for the Town.

The Court concluded that although the standard is “somewhat flexible,” the contents of the notice “reasonably must describe the purpose of the meeting or the action proposed to be taken.” Id. at 797-98. The Court added that a flexible “approach accounts for the range and assortment of meetings, votes, and actions covered under the OMA, and the realities of local government, while also safeguarding the public’s interest in knowing and observing the workings of its governmental bodies.” Id. at 797. Although the Court provided no bright line rule regarding the level of specificity of a posted notice, 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.

The Rhode Island Supreme Court re-examined this provision in Anolik v. Zoning Board of Review of the City of Newport, 64 A.3d 1171 (R.I. 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 1172. 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. at 1173. 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. 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 1175 (internal quotations omitted). 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. (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 1176.

The Rhode Island Supreme Court more recently addressed this issue in Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education et al., 151 A.3d 301 (R.I. 2016). The pertinent agenda item stated: “7.b. Approval of RIDE’s Executive Pay Plan and Organizations Chart.” Next to this agenda item was a description that noted “Enclosure 7b.” Id. at 303.

The Supreme Court analyzed the sufficiency of this agenda item as follows:

“After a careful review of the record and consideration of the undisputed facts before us, it is this Court's opinion that the agenda provided by defendants, as it relates to the September 8, 2014 meeting, falls short of satisfying the statutory requirements of notice set forth in § 42–46–6(a). Although the notice placed on the Secretary of State's website undeniably informed the public that ‘[a]pproval of RIDE's Executive Pay Plan’ was on the agenda for the council meeting, there was no indication that more than one pay plan would be considered. Moreover, there was also no indication that the additional pay plans (ultimately considered and decided by the council at the meeting) would relate to retrospective fiscal years dating back to 2012. Additionally, while the 7b enclosure that should have been

attached would have informed the public that the meeting would involve pay plans from fiscal year 2012 and forward, it is undisputed that the enclosure was not available on the Secretary of State's website as required by § 42-46-6.

It is our opinion that based on the totality of the circumstances of this case—including that the term ‘plan’ was in the singular and that the stated ‘Enclosure 7b’ was not actually available on the Secretary of State's website—adequate public notice was lacking. The public had the statutory right to receive a more complete notice of what would be discussed and decided at the council meeting; this is especially true where the matters relate to expenditures of taxpayer monies. The agenda did not provide the public with fair notice ‘of the nature of the business to be discussed’ where it completely omitted any information that one could construe to mean that more than one pay plan would be discussed.” Id. at 306.

Accordingly, the Supreme Court concluded that the agenda item violated the OMA. Id.

Here, the agenda item for the Town Council’s July 17, 2017 meeting stated:

“OLD BUSINESS

- A. Discussion by Council, Vote or Other Action on Adoption of 2017/2018 Budget – Mr. Ezovski
 - 1. Municipal, Sewer and Water
- B. Discussion by Council, Vote or Other Action on Method of Tax Collection – Mr. Ezovski[.]”

We reviewed the meeting minutes and video recording² and note that the Town Council first discussed the anticipated decline in state aid and the corresponding need for a contingency fund. After discussing the propriety of such a contingency fund, the Town Council voted and approved a motion to amend the method of tax collection, increasing it by \$100,000. The Town Council then voted and approved a motion to add a contingency line to the Town Council budget with an appropriation of \$100,000 as a potential replacement for state aid to education. This process took approximately twenty minutes.

Based on the totality of the circumstances, and consistent with the Rhode Island Supreme Court’s precedent, we find that the agenda item did not sufficiently specify the nature of the business to be discussed and therefore violated the OMA. See R.I. Gen. Laws § 42-46-6(b). Although we have previously noted that “an agenda need not include a verbatim list of every potential aspect that might be discussed in relation to a budget in order to comport with the OMA[.]” see Boss v. Woonsocket Budget Commission, OM 13-09, the instant agenda item is entirely inadequate. By stating that the purpose of the discussion was for “Adoption of 2017/2018 Budget” or “Method of Tax Collection,” the agenda item provided no indication that an amendment of the budget would be discussed, much less that a \$100,000 contingency fund would be considered and voted on. See Pontarelli, 151 A.2d at 306 (“The public had the statutory right to receive a more complete notice

² Provided to this Department as part of the Complaint.

of what would be discussed and decided at the council meeting; this is especially true where the matters relate to expenditures of taxpayer monies.”). Contrary to the Town Council’s argument, notice of “Adoption” and “Method of Tax Collection” do nothing to suggest that an additional tax would be levied. Indeed, similar to the agenda item in Anolik, the agenda item here contained “vague and indefinite notice to the public” and was “lacking in specificity[.]” Anolik, 64 A.3d at 1175; see also Fagnant v. Woonsocket City Council, OM 15-17. As such, “[t]he public had the statutory right to receive a more complete notice of what would be discussed and decided” at the Town Council meeting. Anolik, 64 A.3d at 1175. While this finding is limited to the specific facts before us, most notably an amendment to the already adopted budget, we find that the Town Council violated the OMA. See R.I. Gen. Laws § 42-46-6(b). We note that our conclusion comports with jurisprudential trends; each of the three times our Supreme Court considered this issue it found the agenda item at issue insufficient. See Tanner, 880 A.2d at 798; Anolik, 64 A.2d at 1175; Pontarelli, 151 A.2d at 1175.

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 are not persuaded at this time that the Town Council knowingly or willfully violated the OMA. We note that we are not aware of any prior similar OMA violations against the Town Council in recent years. While injunctive relief would be appropriate, we prefer that the Town Council remedy the violation on its own. The Town Council should, therefore, reconsider and re-vote on the matter discussed at its July 17, 2017 meeting at a properly posted future meeting. See Tanner, 880 A.2d at 802 (“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.’”). We express no opinion at this time whether other town or state laws may impact the Town Council’s ability to reconsider and revote on this budget matter at a future meeting. The Town Council shall notify this Department, and copy the complainants, within ten (10) business days of the date of this finding concerning whether it will remedy this violation on its own.

This finding serves as notice to the Town 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 a complaint in the Superior Court. The complainant may pursue an OMA complaint 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 right to reopen this matter in the event the Town Council fails to comply with this finding and the OMA.

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We 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 "Sean Lyness". The signature is written in a cursive, flowing style.

Sean Lyness
Special Assistant Attorney General

SL/kr

Cc: David Igliazzi, Esq.