State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

January 12, 2018
OM 18-02

Ms. Pamela Aveyard

Ms. Sharon Kitchin

RE: Aveyard v. East Greenwich Town Council
Kitchin v. East Greenwich Town Council

Dear Mses. Aveyard and Kitchin:

The investigation into your Open Meetings Act ("OMA") complaints filed against the East Greenwich Town Council ("Town Council") are complete. Since both complaints were submitted against the East Greenwich Town Council ("Town Council"), and contained similar allegations, this Department will address both complaints in a single finding. By email correspondences dated July 14, 2017, and July 20, 2017, you both allege that the Town Council violated the OMA when it voted to terminate your positions at its June 26, 2017 executive session meeting, yet the agenda was not specific enough to adequately inform the public of the nature of the business to be discussed, including, but not limited to, that a vote would be taken. You also allege the Town Council did not provide either of you advanced written notice that your job performance would be discussed in executive session, and thus, you contend that neither of you had been provided notice that the executive session discussion could be convened in open session. You further allege that a quorum of the Town Council met outside the purview of a properly noticed public meeting on June 5, 2017, and again on June 19, 2017.[1]

In response to your complaint, we received a substantive response from the Town Council's legal counsel, David M. D'Agostino, Esquire. Attorney D'Agostino states, in pertinent part:

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[1] Ms. Kitchin does not raise this quorum allegation with respect to the June 19, 2017 meeting, only the June 5, 2017 meeting. In addition, both Complainants contend that the Town Council violated the OMA when it failed to disclose the June 26, 2017 executive session vote upon reconvening into open session.

"To be sure, the Complainant[s'] job performance, character or physical or mental health [were] **not** a subject of the Council's discussion during that meeting. * * * The Council discussed the implementation of 'One Town' which is a consolidated administration plan to drive cost-savings and job sharing between the municipal and school sides of the Town budget. Implementing One Town required positions be consolidated and eliminated. One of these positions was the Executive Assistant to the Town Manager, a position held by Complainant. [Another position was the Human Resource Director position held by the Complainant.] The Complainant[s'] work performance or ability as the Executive Assistant to the Town Manager [and the Human Resource Director] was not (never) in question and was not the subject of Council discussion. * * * The Complainant[s'] positions [were] not Union position[s] and [were]'at will' position[s]. However, the Council was required to discuss the potential liability surrounding the elimination of [their] positions and consequently ending the Complainant[s'] employment with the Town. These are not and were not decisions taken lightly or arbitrarily.

* * *

A cornerstone of the Town's FY2018 budget was One Town, including position consolidations to achieve cost-savings. The public budget information included reductions in certain departments reflecting the implementation of One Town consolidations. The Complainant[s'] **positions** [were] eliminated on June 26th, [their] job performance[s were] not a subject of discussion and played no role in the determination of eliminating the position[s]. There are obvious legal implications associated with consolidation and restructuring * * * A frank discussion needed to be had between and among the Councilors, (Acting) Town Manager and the Solicitor to ensure that the Town was not exposed to a claim of unlawful/wrong termination in implementing the consolidation(s).

* * *

Because the Complainant[s'] job performance[s were] not the subject of the Council's discussion and deliberations on June 26, 2017, there was no requirement that the Complainant[s] receive [advanced written] notice * * * pursuant to RIGL § 42-46-5(a)(1). Discussion of the position[s] and whether the Town chooses to have a particular position or not is a management decision and not a decision that involves consideration of one's performance.

> The Complainant[s] allege that a quorum of Councilors (President Cienki, Vice President Todd and Councilor Schwager) met with the (former) Town Manager after a council meeting on June 5, 2017. * * * The Complainants also allege that the 'Council' continued their meeting at one of their cars. The undersigned queried each of the Councilors alleged to have engaged in the meeting with the former Town Manager.[2] Each has acknowledged having met with him; however, while that was indeed a quorum of the public body, they did not meet with him to discuss a matter over which the Council has supervision, control, jurisdiction or advisory power. * * * They acknowledged meeting with the former Town Manager **to discuss his well-being**. * * * [T]he former Manager had fallen earlier in the day and hit his head requiring a hospital visit, stitches and medical treatment. The Councilors talked to him about his well-being and not about Town business. * * *
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> As for the alleged continued meeting of the 'Council' at one of the 'Councilor's car,' no one queried recalled such a meeting taking place outside of the building; therefore, it is difficult to respond to this allegation. * * *
>
> The Town Council denies that a meeting of the Council took place on June 19, 2017 involving [me], Council President Cienki, Council Vice President Todd and Councilor Deutsch, which lasted 'for hours.' Some clarity about what happened June 19th is warranted. That morning, the former Manager, through his personal legal counsel, informed the Council that he separated from his employment with the Town. There was a Special Council meeting held on June 19th that was convened at 8:00 AM that morning to meet with the former Manager's attorney and continue to negotiate a separation agreement. * * *
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> During the day, and throughout the remainder of the day, there was a lot of activity around the Town Manager's Office. Many Town employees were coming and going, as needed, to facilitate the transfer of administration. During that time, [I] remained nearly constantly in the Town Manager's Office. At times, [I] acknowledge that when there were up to two (2) Councilors in the Manager's Office, a third Councilor came into the room

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[2] Attorney D'Agostino indicates that at the time the Town Council provided its response to your OMA complaint, only two of the three Councilors provided a response to him. Attorney D'Agostino expected, upon information and belief, that the third Councilor would concur with the representations made herein. The Town Council subsequently submitted affidavits from Councilors Cienki, Todd, Schwager and Deutsch proffering that none of the Councilors discussed public business – either with Mr. Coyle or amongst themselves - outside the purview of a public meeting.

> on several occasions (it was not the same third Councilor coming into the room each time). The Councilors present (in and around Town Hall) throughout the day were concerned with calming employees and assuring them of a smooth transition. [ ]
>
> When it occurred that three (3) Councilors happened to be in the Manager's Office [ ] at the same time, [I] reminded them of the OMA regulations prohibiting a quorum of the Council being present outside of a noticed Council meeting. In every instance that this occurred, one or another of the Councilors exited the room. [I] affirmatively state that there was never a **meeting** of the Council on June 19, 2017.
>
> The fact that a quorum * * * [was] moving in and out of a single office suite while a number of administrative tasks were being performed, does not mean that a 'meeting' of the public body occurred. [I] was especially cognizant of the optics of this matter given the sheer number of various Town employees that were also coming in and out of the Manager's Office during the day." (Emphases in original).

We acknowledge both your rebuttals.

At the outset, we note that in examining whether an entity has violated the OMA we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an activity or omission violated the OMA, 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 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 Town Council agenda for the June 26, 2017 meeting indicated, in pertinent part:

> "(Any matter listed on this agenda is subject to a vote by the Town Council.)
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> (14) Executive Session
>
> (b) Closed pursuant to RIGL 42-46-5(a)(2), sessions pertaining to collective bargaining or litigation, specifically to discuss legal implications related to municipal collective bargaining agreement obligations and common-law/statutory obligations of the Town."

The OMA states that, unless exempt, all public bodies shall hold open meetings. See R.I. Gen. Laws § 42-46-3. A public body may hold a meeting closed to the public for one of the ten purposes enumerated under R.I. Gen. Laws § 42-46-5(a). While multiple OMA exemptions may

allow a public body to convene into a single executive session, a public body need only cite or reference one OMA exemption to properly convene into an executive session. See Anderson v. Foster/Glocester Regional Building Committee, OM 06-21; R.I. Gen. Laws § 42-46-5(a)("[a] public body may hold a meeting closed to the public pursuant to § 42-46-4 for one or more of the following purposes"). Here, according to the stated agenda and the Town Council's response, the Town Council did not convene into executive session under R.I. Gen. Laws § 42-46-5(a)(1) to discuss "the job performance, character, or physical or mental health of a person or persons." Since the Town Council admits that it did not convene into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1), the provisions of this exemption – including but not limited to the personal notice to you and the option to have the executive session held in open session – have no application in this matter. Instead, the Town Council proffers – and the June 26, 2017 agenda indicates – that the Town Council convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2), "[s]essions pertaining to collective bargaining or litigation, or work session pertaining to collective bargaining or litigation." We examine your complaints in this light.

As Attorney D'Agostino relays, and our in camera review of the executive session meeting minutes reveals, the discussion during the June 26, 2017 meeting concerned a Town restructuring plan that included layoffs of municipal employees and the consolidation of department level positions in a merged school-town administration roll-out. The Town submits that this topic was proper for executive session since Attorney D'Agostino advised the Town Council members of any legal implications in terminating Town employees and this situation was further complicated since the Town asserts that both Complainants were intermittently out of work pursuant to the Family Medical Leave Act.[3]

In Wardwell v. Narragansett School Committee, OM 97-15, this Department examined an executive session convened to discuss "threatened litigation and strategy with respect to said threatened litigation." After reviewing the executive session minutes this Department found that the executive session had been properly convened. Specifically, we stated that the OMA "permit[s] discussions not only of pending litigation, but also of litigation, which has in fact been threatened or is imminent." Id. In a subsequent case involving threatened litigation, this Department added 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 strategy." Trafford v. Coventry Town Council, OM 97-19. See also Providence Retired Police & Firefighters Association v. Board of Investment Commissioners, OM 00-21; Cole et al. v. Westerly Town Council, OM 99-18. The OMA permits closed session discussion not only to discuss pending litigation, but also to discuss reasonably anticipated litigation and strategy. Greig v. Jamestown Town Council; Jamestown Board of Water & Sewer Assessment, OM 97-06.

Although the OMA permits discussions related to "reasonably anticipated litigation and strategy," this Department is "cognizant that almost any matter could relate to litigation," see Scituate Democratic Town Committee v. Scituate Town Council, OM 08-50 (emphasis in

[3] Ms. Kitchin denies this assertion.

original), and therefore, each executive session must be reviewed on 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). In this case, both Complainants focus our attention on the portions of the executive session wherein they were terminated. As such, considering our scope of review, after reviewing the evidence presented, and assuming for the sake of argument that portions of the executive session discussion were appropriate topics and sufficiently noticed pursuant to R.I. Gen. Laws § 42-46-5(a)(2), we still find an OMA violation.

With respect to an executive session notice, this Department indicated in Graziano v. Lottery Commission, OM 99-06 that:

> "[i]f the matter to be discussed is one of public record, such as a pending court case or the well publicized negotiation of a principal or executive director's contract, the public body should cite the name of the case or reference that it will discuss the contract. However, where the matter to be discussed in executive session is not yet public, the public body may limit its open call to the nature of the matter, such as 'litigation' or 'personnel.'"

Assuming for the sake of argument that the Town Council's discussion of its consolidation plan, which would lead to your termination, was a topic that the Town Council may have been permitted to "receiv[e] frank appraisals from its attorney," Trafford, OM 97-19, we view the actual implementation of this plan (as well as your termination) as a distinct event requiring a separate "statement specifying the nature of the business to be discussed." R.I. Gen. Laws § 42-46-6(b).

For example, in The Barrington Times v. Barrington School Committee, OM 09-10, where the School Committee convened into executive session to discuss a letter received from the American Civil Liberties Union ("ACLU"), which criticized the School Committee's extension of an alcohol testing policy to students attending school dances. Based upon the receipt of this letter, the School Committee convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2). After reviewing the pertinent evidence, we concluded that this executive session did not violate the OMA and noted that the School Committee convened into executive session only after what had been described as "a lengthy public discussion." The Barrington Times, 09-10, p. 2. Later we noted that the "executive session concerned the subject-matter of the ACLU's letter, as opposed to a general policy discussion of the implementation of mandatory breathalyzer testing." Id. at p. 5.

Here, we do not view your complaints as challenging the Town Council's decision to discuss legal issues concerning the consolidation of Town services. According to the Town, these legal issues included that both Complainants were "out on intermittent family medical leave." But see, supra, footnote 3. But even crediting these assertions, we know of no authority that would permit a public body to continue a discussion concerning litigation matters into "a general policy discussion of the implementation of [a particular subject matter]." The Barrington Times, OM 09-10, p. 5. To be sure, the line between discussing litigation matters and discussing the

implementation (or execution) of general policy is not a clear one and we make no attempt in this finding to draw such a line.

In this case, however, it is our finding that after the Town Council discussed and satisfied itself concerning the litigation issues that could have surrounded your termination and/or the implementation of its plan, the discussion and/or vote to implement its plan (and by extension your termination) did not relate to "litigation."[4] Stated differently, we conclude that the Town Council did not provide a "statement specifying the nature of the business to be discussed," see R.I. Gen. Laws § 42-46-6(b), when it advertised its June 26, 2017 executive session as: "Closed pursuant to RIGL 42-46-5(a)(2), sessions pertaining to collective bargaining or litigation, specifically to discuss legal implications related to municipal collective bargaining agreement obligations and common-law/statutory obligations of the Town." See Tanner v. Town Council of East Greenwich, 880 A.2d 784, 797 (R.I. 2005)("public body [must] provide fair notice to the public under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public body the nature of the business to be discussed or acted upon"). In reaching our conclusion, we are also cognizant that the Rhode Island Superior Court has already determined that the Town Council violated the OMA with regard to the June 26, 2017 executive session notice described above, albeit related to a different topic than the subject-matter of your termination. See East Greenwich Firefighters Association v. Corrigan et. al., KC 2017-0898, slip. op. 57 (filed, November 8, 2017) (McGuirl, J.).[5]

We now turn to a consideration of whether the Town Council convened a "meeting" on June 5, 2017 outside the public purview. In order for the OMA to apply, a "quorum" of a "public body" must convene for a "meeting" as these terms are defined by the OMA. See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). Here, we focus on the "meeting" requirement. 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(1). Several cases from this Department have reviewed the "meeting" requirement and determined that either "action" or a "collective discussion" by a quorum of the public body on matters over which the public body have "supervision, control, jurisdiction, or advisory power" is required to satisfy the "meeting" element, and thus, trigger the OMA and its attendant requirements. See, e.g., The Valley Breeze v. Cumberland Fire Committee, OM 15-04. See also Caldwell v. East Greenwich Town Council, OM 18-01. Conversely, if a "quorum" of a "public body" convenes, but do not collectively discuss and/or

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[4] The Town Council makes no assertion that your termination related to collective bargaining, and indeed, the Town acknowledges that both Complainants are non-union employees.

[5] In the Town's response to Ms. Kitchin's complaint, Mr. D'Agostino writes that "the OMA does not require a vote taken in Closed/Executive Session be disclosed when the body reconvenes to open session." This is not a correct statement of the law and we would direct the Town Council to R.I. Gen. Laws § 42-46-4(b)("All votes taken in closed sessions shall be disclosed once the session is reopened; provided, however, a vote taken in 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))."

act upon matters over which they have "supervision, control, jurisdiction, or advisory power," a "meeting" has not convened. Id. Respectfully, the evidence presented falls short of an OMA violation.

With respect to the June 5, 2017 allegation, Ms. Aveyard alleges that after the conclusion of the Town Council meeting, three Town Council members met at or near the Swift dining room with then-Town Manager Coyle while Ms. Aveyard remained in the entranceway with two members of the Fire Department. Ms. Aveyard indicated that "we kept checking our watches as we stood in the doorway and it was clear when the Council and Town Manager Coyle all walked towards us that the topic of discussion was not Town Manager Coyle's welfare." Despite this assertion, you present no evidence that the discussion concerned a matter over which the public body had supervision, control, jurisdiction, or advisory power, nor do you present any evidence concerning the nature of what you describe as a one hour meeting prior to the participants walking toward you. Indeed, the Town Council's response avers that the subject-matter of this discussion (at least prior to approaching you) concerned Mr. Coyle's well-being after sustaining a work-place injury earlier in the day. R.I. Gen. Laws § 42-46-2(1). We have no evidence to contradict this assertion.[6]

Ms. Aveyard also alleges that the June 5, 2017 rolling quorum continued after the selected Council members left the venue and into the parking lot where Ms. Aveyard's represents that the Town Council members were all standing around a car that was parked "almost in front of [hers] but since it was dark at this time of night (somewhere around 11pm), [she] couldn't see the make of the car to know whose car it was however [she is] 100% certain that this meeting at the car happened." This aspect of your complaint suffers from the same infirmity as described above, specifically despite the reference to a "meeting," you make clear that you do not know the context of any discussion. Your complaint candidly acknowledges that you "obviously got in [your] car because standing outside and trying to listen to them would have looked rather obvious." In the absence of evidence of a collective discussion and/or action concerning a subject matter over which a quorum of the Town Council had supervision, control, jurisdiction, or advisory power, we must find no violation.

Similarly, Ms. Kitchin indicated that she witnessed "a direct violation of open meetings on 6/5/17 when 3 Town Council members met with the former Town Manager Tom Coyle [and Town Solicitor D'Agostino] behind closed doors well after a Town Council meeting." Respectfully, this allegation – concerning the same events as described above – suffers from the same infirmity. In doing so, we note that Ms. Kitchin later withdrew her allegation that the Town Solicitor was involved in this discussion as erroneous and explained that six individuals witnessed the "June 5th meeting violation," but because these persons where current employees she would "not ask them to be witnesses." These persons have never been identified to this

[6] You provided no information from Mr. Coyle concerning his version of events and/or the nature of discussion. Realizing the potential significance of this evidence, this Department reached out to Mr. Coyle by telephone and letter seeking his recollection of this June 5, 2017 discussion. No substantive response was received.

Office. Again, no evidence has been presented indicating the nature of this discussion or contradicting the Town Council's version of events. Because the evidence fails to establish that a quorum of Town Council members collectively discussed any matter within their supervision, jurisdiction, control, or advisory power, we find no violation.

Lastly, we reach a similar conclusion with respect to the allegation that a quorum of the Town Council met outside the purview of a properly noticed public meeting on June 19, 2017. As indicated in the Town Council's response, the former Town Manager, on the morning of June 19, 2017, through his legal counsel, informed the Town Council that he separated from his employment with the Town. Attorney D'Agostino stated that there was a lot of activity in the Town Manager's Office and that it was an "emotional event." While Attorney D'Agostino acknowledged that, at times, there was a quorum of the Town Council present, he remained nearly constantly in the Town Manager's Office and whenever it occurred that three (3) Town Council members were present, he reminded the Town Council members of the OMA and one Town Council member exited the room. As such, Attorney D'Agostino submitted that there was never a meeting of the Town Council on June 19, 2017, and that no collective discussion occurred amongst a quorum of Town Council members concerning a matter over which the Town Council had supervision, control, jurisdiction, or advisory power. Mr. D'Agostino adds that because of the change in Town Managers, numerous people were coming into and out of the Town Manager's Office on June 19, 2017 for a variety of reasons. Respectfully, we have been presented no evidence to contradict these assertions, and moreover, because you were located in a different room, you present no evidence concerning the nature of any discussions or activities that occurred in the Town Manager's Office. Because the evidence fails to establish that a quorum of Town Council members collectively discussed or acted upon any matter within their supervision, jurisdiction, control, or advisory power, we find no violation.[7]

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).

In the instant case, insufficient evidence has been presented that the Town Council knowingly or willfully violated the OMA in this circumstance. We are also cognizant that even if such an

[7] Based upon our review of the walking or rolling quorum allegations in these two complaints, it appears that the Complainants may be under the impression that the existence of a quorum of public body members outside the public purview constitutes an OMA violation. As described, supra, this Department has long held that a public body does not violate the OMA where a quorum of its members gather, but no collective discussion or action is taken. See e.g., In re Pawtucket City Council, ADV OM 05-01 (no OMA violation for a social event).

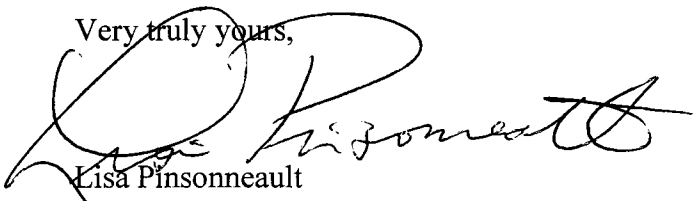
argument could be made, the issue of the June 26, 2017 agenda was already before the Superior Court and we see little utility in bringing this issue before the Superior Court once again in an attempt to seek additional civil fines. See East Greenwich Firefighters Association v. Corrigan et. al., KC 2017-0898, (filed, November 8, 2017) (McGuirl, J.).

While injunctive relief would be appropriate, we prefer to allow the Town Council the opportunity to remedy the violations 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.'"). Since we have found that the discussion and vote regarding your terminations violated the OMA, the Town Council shall declare such previous actions null and void. Nothing within the OMA prohibits the Town Council from re-affirming its June 26, 2017 action at a properly noticed subsequent meeting, if it so chooses. The Town Council should notify this Department within ten (10) business days of the date of this finding whether it will voluntarily correct the violations cited in this finding and must accomplish these remedial measures within thirty (30) days of this finding. This finding shall serve as notice that future similar violations committed may be considered willful or knowing and this Department may seek civil penalties in Superior Court as authorized under law.

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

Very truly yours,



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LP/kr

Cc: David M. D'Agostino, Esq.