State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
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Peter F. Kilmartin, Attorney General

March 14, 2018
OM 18-06

RE: Westerly Residents for Thoughtful Development v. Westerly Town Council

Dear Ms. Moore:

The investigation into your August 17, 2017 Open Meetings Act ("OMA") complaint filed on behalf of the Westerly Residents for Thoughtful Development ("WRTD") against the Westerly Town Council ("Town Council") is complete.

You allege that the Town Council violated the OMA on the following two occasions: (1) when the Town Council changed an item on the agenda for its February 23, 2017 meeting with less than forty-eight hours' notice; and (2) when an item on the agenda for the Town Council's May 31, 2017 meeting was insufficient.[1] Specifically, you allege:

> "The afternoon before the Thursday, February 23, 2017 Special Meeting, Council President Sylvestri [sic] changed the item scheduled for Discussion on the Agenda from Airport Ordinance to Airport Advisory Committee.
> ***
> Around 2:30 PM, the day before the scheduled 5:30 PM Special Meeting, Council President Sylvestri [sic] telephoned Ms. Moore to inform her, [sic] he was changing the topic for Discussion from Airport Ordinance, to Airport Advisory Committee.
> A. Attorney Massad and Ms. Moore were NOT prepared to discuss the Airport Advisory Committee.
> B. Attorney Massad and Ms. Moore did NOT attend the meeting.
> ***

[1] Your Complaint alleged four violations of the OMA and the Access to Public Records Act ("APRA"). However, as detailed in our August 25, 2017 acknowledgment letter to you, two of the four allegations do not implicate either the OMA or the APRA and, accordingly, we lack jurisdiction to investigate them. See R.I. Gen. Laws §§ 38-2-8(b); 42-46-8(a).

> D. Residents who attended the meeting expecting a Discussion of the proposed Ordinance were denied discussion of that topic.
> E. Residents who did NOT attend the Meeting because of the Topic might have attended had they known the topic was changed to Airport Advisory Committee.
> ***
> Residents who thought they were going to hear about the latest proposal for the Airport Hazard Area Zoning Regulations were unprepared and extremely disappointed in the change of the item advertised for discussion.
> ***
> The May 31, 2017 Special Meeting Agenda might certainly be characterized as one you would not be faulted for not attending. I doubt whether it was one prospective replaced candidate or more than one prospective replacement candidates, you would have been lured to the Council Chambers to find out.
> ***
> If you were there, you might not even be able to find out how many candidates were going to be discussed. ***
> ***
> There weren't candidates. There was one candidate and his son, also an attorney who spent 45 minutes in open session describing their qualifications, pledging round the clock availability for legal assistance and priding themselves on their accessibility, among other things.
> ***
> In our opinion, the meeting was not as it was advertised, as an executive session. The public was denied the opportunity to have at prospective candidates for Town Solicitor." (Emphases omitted).

The Town Council filed a substantive response in affidavit form through its Solicitor, Matthew T. Oliverio, Esquire. Solicitor Oliverio's affidavit states, in pertinent part:

> "5. Based on my investigation, the agenda was never changed or modified. Rather, the topic was simply clarified in a telephone discussion between Ms. Moore and Council President James Silvestri. The original topic to be discussed was indeed the airport ordinance related to the creation of an advisory airport committee.
> ***
> 11. Since the selection and hiring of a new solicitor invokes a discussion of personnel and the qualifications of a particular candidate, such discussion may take place in closed session pursuant to R.I. Gen. Laws § 42-46-5(a)(1)[.] *** The agenda properly identified that a discussion was going to be held concerning the current solicitor and his intention to resign and reasons therefor, and that a prospective candidate and his qualifications was [sic] going to be discussed in closed session."

In this Department's August 25, 2017 acknowledgment letter to you, we outlined the procedure that would be followed including that after receiving the Town Council's response, you would have the opportunity to file a rebuttal. We noted as follows:

> **"Your rebuttal should include an explanation of why you or other members of your organization were 'aggrieved' by the alleged violations, in accordance with 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).**" (Emphases in original).

You did not provide a rebuttal or otherwise address the "aggrieved" issue.

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.

Before this Department can address the issues raised in your complaint, we must determine as a threshold matter whether you are an aggrieved party and have legal standing to bring this OMA complaint. See Grieb v. Aquidneck Island Planning Commission, OM 15-16. As discussed below, this conclusion is dictated by the Rhode Island Supreme Court.

The OMA provides that "[a]ny citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general." R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Rhode Island Supreme Court examined the "aggrieved" provision of the OMA. There, an OMA lawsuit was filed concerning notice for the Lottery Commission's March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission's March 25, 1996 meeting, Mr. Hawkins, as well as his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission's notice was deficient, the trial justice determined that the Lottery Commission violated the OMA and an appeal ensued.

On appeal, the Rhode Island Supreme Court found that it was unnecessary to address the merits of the OMA lawsuit because "the plaintiffs Graziano and Hawkins have no standing to raise this issue" since "both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice." Id. at 221. The Court continued that it:

> "has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice." Id. at 221–22.

Here, pursuant to R.I. Gen. Laws § 42-46-8(a), and the standard established in Graziano, you must demonstrate that you are "in some way disadvantaged or aggrieved" by the allegation raised in your complaint. Id. at 221. Importantly, the test is not whether the public is aggrieved, but whether you or other members of your organization are aggrieved. See Riggs v. East Bay Energy Consortium, PR 13-25, OM 13-30.

A review of the undisputed evidence indicates that you were not present at the February 23, 2017 meeting. It also appears that you did not attend the May 31, 2017 meeting. You have not presented any evidence that any of your organization's members attended or did not attend either of these meetings.

Importantly, you have not provided any indication that the alleged violations specifically prevented you or other members of your organization from attending the meetings. With respect to your first allegation, you note that you were individually provided advanced notice of the agenda topic and chose not to attend the meeting.[2] You further note that some residents "might have" wanted to attend but did not because of the insufficient notice. With respect to the second allegation, you provide no indication that the agenda's alleged insufficiency had any effect on your attendance, or members of the WRTD, at the meeting. Despite being given an opportunity to further explain how you were or WRTD members were aggrieved by these alleged violations, you did not do so. The fact that some members of your organization "might have" wanted to attend the meetings does not sufficiently articulate how they were aggrieved. As such, without any evidence indicating that you or members of your organization were disadvantaged by the alleged violations, we find that you have not met your burden under the Graziano standard. See Blais v. Burrillville Library Building Committee, OM 07-04 ("[You] did not attend the [] meeting . . . [and] [t]herefore we conclude that [you] do[] not have standing to allege that the Committee committed OMA violations[.]"); see also Bruckner v. Lincoln School Committee, OM 17-04 ("It is unclear how the discussion of this topic in executive session disadvantaged you because you were unable to attend the meeting for unrelated reasons."); see also Plunkett v. Westerly School Committee, OM 17-18 ("This failure to sufficiently articulate how the alleged deficient posting disadvantaged you individually is fatal to your claim."). Accordingly, this Department finds that you are not an "aggrieved" party and therefore have no standing to allege the OMA violations contained in your complaint. See Curt-Hoard v. Woonsocket School Board, OM 14-20. Our conclusion is compelled by our precedent and the specific facts here.

Notwithstanding, even assuming, arguendo, that you had standing to bring these allegations, we find no violations. With respect to your first allegation, based on the undisputed evidence, we find no evidence that the February 23, 2017 agenda was changed or modified. As averred by the Town Council in affidavit form, the agenda item was simply discussed and/or clarified during a telephone call between you (Ms. Moore), and Town Council President Silvestri. The agenda item itself was not altered. Importantly, you provide no evidence to contradict this account. As such, we do not find that the agenda was changed and, therefore, find no violation.

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[2] You also note that you were not prepared to discuss the Airport Advisory Committee. As explained infra, there is no evidence that the agenda item was changed less than forty-eight hours before the meeting. Accordingly, this lack of preparation does not alter our "aggrieved" analysis.

With respect to your second allegation, we note that the Town Council's May 31, 2017 meeting agenda stated:

> "EXECUTIVE SESSION
> 42-46-5(a)(1) Personnel – Town Solicitor Candidate
> 42-46-5(a)(3) Security – Public Safety
> Vote to go into executive session for discussion and/or action regarding those items of business exempt from open meetings under Rhode Island General Law § 42-46-4 and [§] 42-46-5(a)(1) Personnel – Discussion of Solicitor Resignation and Prospective Replacement Candidates and § 42-46-5(a)(3) Security – Public Safety and Security Concerns During Civic Events."

Your complaint appears to center around the fact that the agenda item listed "Replacement Candidates" when only one candidate was interviewed.[3] This implicates R.I. Gen. Laws § 42-46-6(b), which states, in pertinent part: "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

[3] To the extent that your Complaint questions the permissibility of the Town Council interviewing a prospective Town Solicitor in executive session, we note that our precedent clearly permits such a practice pursuant to R.I. Gen. Laws § 42-46-5(a)(1). See, e.g., The Westerly Sun v. Westerly Town Council, OM 94-01 (holding that interviews for Town Manager may be conducted in executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) since job performance, character, or physical or mental health was discussed).

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, we find no violation. Based on our review of the May 31, 2017 agenda, as well as our in camera review of the May 31, 2017 executive session minutes, we find nothing that indicates the agenda item provided "vague and indefinite notice to the public." Anolik, 64 A.3d at 1175; cf. Fagnant v. Woonsocket City Council, OM 15-17. Indeed, the Town Council did interview two attorneys – albeit both from the same law firm – for the position of Town Solicitor. Moreover, even your complaint acknowledges that you "doubt whether it was one prospective replacement candidate or more than one prospective replacement candidates, you would have been lured to the Council Chambers to find out." Respectfully, we believe this statement supports our conclusions. Based on the totality of the circumstances, we find that the agenda item "would fairly inform the public of the nature of the business to be discussed or acted upon[.]" Anolik, 64 A.3d at 1175. Therefore, we find no violation.

Although the Attorney General will not file suit in this matter, nothing within the OMA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 42-46-8(c). The complainant may do so 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. We are closing this file as of the date of this correspondence.

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

Very truly yours,

Sean Lyness
Special Assistant Attorney General

Cc: Matthew T. Oliverio, Esq.