



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 6, 2014
OM 14-04

Ms. Judi Staven
51 Long Meadow Road
Portsmouth, Rhode Island 02871
Joeys31@juno.com

Re: Staven v. Portsmouth Town Council

Dear Ms. Staven:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Portsmouth Town Council (“Town Council”) is complete. By correspondence dated October 19, 2013, you allege the Town Council violated the OMA when its October 15, 2013 meeting agenda item “Prudence Island Ferry Update” did not adequately inform the public of the nature of the business to be discussed.

In response to your complaint, we received a substantive response from the Town Council’s legal counsel, Kevin P. Gavin, Esquire. Attorney Gavin states, in pertinent part:

“On April 23, 2013, [Mr.] Bruce Medley of Prudence Ferry, Inc (‘PFI’), the current operator of the only ferry service to and from Prudence Island, sent an email to [Mr.] John Klimm, the Portsmouth Town Administrator, stating that PFI would cease all operations as of the last ferry on Sunday December 1, 2013. The Prudence Island ferry provides a ‘lifeline’ service to Prudence Island residents and visitors, and is the only means of transportation to and from Prudence. The ferry runs between dock facilities located on Prudence and in Bristol. Mr. Medley’s announcement created huge concern on the part of Prudence residents and Town officials. As a result, Town Administrator Klimm and Portsmouth’s Town Planner, [Mr.] Gary Crosby, have spent a great deal of their time over the past several months attempting to address this problem and ensure that necessary and appropriate ferry service will continue, uninterrupted, to and from Prudence Island on a long-term basis.

The 'Prudence Island Ferry' matter has, therefore, been before the Town Council on a number of occasions since April when Mr. Medley announced PFI's planned closure. For instance, on May 13, 2013, the matter was on the Council agenda under an item of 'New Business' posted as 'Prudence Island Ferry Service: Request Permission to Draft and Publish RFP to Solicit Bids to Provide Ferry Service.' At that meeting, the Council approved the Town Planner's request, and on June 11, 2013, the Town issued a Request for Information ('RFI') soliciting responses from parties who might be interested in operating a ferry service to Prudence Island, and applying to the Division of Public Utilities and Carriers ('DPUC') for a Certificate of Public Convenience and Necessity ('CPCN') to operate such a ferry service. The Town Administrator and Town Planner have attended a number of meetings with various interested parties including members of the Prudence Island Planning Commission, officials of the DPUC and the Town of Bristol, and persons responding to the Town's RFI. The Prudence Island Ferry matter was the subject of the 'Town Administrator's Report' at the Town Council meetings of June 10 and July 8, where the Council approved budget authority of \$20,000 to retain engineering expertise, as necessary, to assess the suitability of Town-owned land on Prudence for an alternative docking facility.

On Saturday July 20, 2013, the Town Council held a special meeting over on Prudence Island, where the primary item, of business was the 'Prudence Island Ferry Service.' At the meeting on Prudence, [Mr.] Bruce Medley indicated to those assembled that, contrary to his earlier public statements, he intended to continue operating PFI's ferry service indefinitely into the future. By this time, however, it had been reported that Mr. Medley had sold his dock facility in Bristol to the Town of Bristol, entering into a short-term lease that expires in June 2014 or earlier if he ceased operating his ferry service. Mr. Medley also stated on social media that he was considering abandoning the Bristol facility altogether and operating his ferry service between Prudence and a ferry terminal in Fall River, Massachusetts. Despite Mr. Medley's assurances at the July 20 Town Council meeting on Prudence, Town officials and many Prudence residents remained very concerned over the long-term viability of the current Prudence Island ferry service.

It was against this backdrop that the Town Planner asked for the agenda item for the October 15, 2013 Town Council meeting, which he entitled 'Prudence Island Ferry Update.'

As part of the update, Mr. Crosby briefed the Town Council on an application for a CPCN that had been filed with the DPCU [sic] by A&R Marine, one of the companies that had responded to the Town's RFI. Mr. Crosby reported to the Council that the DPUC had issued a notice for a public hearing on A&R's application to be held on October 29, 2013. The Council, essentially, directed the town administration to continue the ongoing efforts to address the Town's

concerns over the need to maintain a viable, stable, and long-term ferry service for the Town's citizens on Prudence Island.

* * *

Ms. Staven has alleged in her complaint that the meeting involved 'a recommendation from the Town Planner that the Town, through the Council, make a case against Prudence Ferry (the current ferry operator) at the PUC hearing.' This is not an accurate statement. Mr. Crosby's update included no such recommendation, and the Town Council took no such action.

* * *

The Town would submit that, under 'the totality of the circumstances' presented here (including the history of several Council meetings over the past several months where the 'Prudence Island Ferry' and related issues had been a recurring item of business), the notice of the agenda item specifying 'Prudence Island Ferry Update' was sufficient to 'fairly inform the public of the nature of the business to be discussed or acted upon' at the Town Council meeting of October 15, 2013. Mr. Crosby could not reasonably have predicted, in advance, each and every possible area of discussion or every possible action or vote that might be taken at this meeting, and include a comprehensive list in the posted agenda item."

We acknowledge your reply dated November 23, 2013.

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 determine whether this Department believes that an infraction has occurred or to examine the wisdom of a given statute, 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 OMA requires all public bodies 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.

The issue for this Department is whether the agenda item for the October 15, 2013 meeting was sufficient to inform the public of the nature of the business to be discussed. The agenda item at issue for the October 15, 2013 meeting stated, in pertinent part:

"Prudence Island ferry update"

In Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), the Rhode Island Supreme Court examined the OMA's requirement that a public notice contain "a statement specifying the nature of the business to be discussed." 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 reasoned 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. Although the Court provided no bright line rule regarding the specificity of a posted notice, the Court viewed the "totality of the circumstances" and found that the notice was misleading since it implied that merely "interviews" would be conducted, and that a vote or other action would not take place. The Court also observed "that the OMA places an affirmative duty on the public body to provide adequate notice of meetings." Id. at 799.

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 the Tanner standard 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 quoting *Tanner*, 880 A.2d at 797. 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.

Similarly, in the instant case, we conclude that the agenda item for the Town Council’s October 15, 2013 meeting was “completely silent” as to what was to be discussed and possibly voted upon. The agenda item lacked any identifying information concerning the nature of the Prudence Island ferry update. Indeed, the Town Council failed to disclose anything about this “update.” Similar to the agenda item in *Anolik*, the Town Council’s October 15, 2013 meeting agenda contained “vague and indefinite notice to the public” and “one lacking in specificity.” It provided the barest of information.¹ Yet a review of the meeting video reveals approximately seventy (70) minutes of discussion regarding, among other things, the current ferry service and the potential competing ferry service. An individual from the competing ferry service was in attendance and addressed the Town Council, as did the Chairperson of the Prudence Island Planning Commission (“PIPC”). The Town Planner recommended that the Town Council present a case to the Public Utilities Commission (“PUC”) that the current ferry service was inadequate. It appears a motion was made to task the PIPC with obtaining a community consensus regarding ferry service and to report back to the Town Council with the name of the ferry service the PIPC would endorse and the reasons supporting this endorsement. It appears the PIPC scheduled a meeting for October 19, 2013 and notice was posted on October 16, 2013. A motion was also made to direct Town Administrator Klimm, Town Planner Crosby and Town Solicitor Gavin to appear before the PUC hearing to present the facts as each knew them. *See also Pinning/ Reilly v. Providence Board of Park Commissioners*, OM 07-08 (This Department considered the agenda item “Superintendent’s Report.” In that matter, legal counsel represented that the “report” was simply an opportunity to make the Commissioners aware of various developments in the Parks Department. This Department found that a member of the public would not be fairly informed of the nature of the business to be discussed based only upon the statement, “Superintendent’s Report”).

Furthermore, the OMA expressly allows a public body to amend its agenda. *See* R.I. Gen. Laws § 42-46-6(b) (“Nothing contained [in the OMA] shall prevent a public body ... from adding additional items to the agenda by majority vote of the members.”). With respect to any amended matter, however, “[s]uch additional items shall be for informational purposes only and may not be voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public or to refer the matter to an appropriate committee or to another body

¹ *See also Block v. Rhode Island Board of Elections*, OM 13-14 (The Board violated the OMA when its agenda item, “[d]iscussion and possible vote in regards to election legislation in the R.I. General Assembly,” lacked any identifying information concerning the election legislation other than it involved legislation pending in the Rhode Island General Assembly).

or official.” Id. There is no evidence that the Town Council amended its agenda. For the reasons stated above, the Town Council violated the OMA by failing to provide on its agenda a statement specifying the nature of the business to be discussed. See R.I. Gen. Laws § 42-46-6(b).²

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 Town Council knowingly or willfully violated the OMA. We also conclude that under the facts of this case injunctive relief is not appropriate. The Town Council did not take any affirmative action during the meeting that could be declared null and void. While we realize that the Town Council requested that the PIPC obtain community input regarding the ferry issues and that certain individuals attend the PUC hearing, these actions, in and of themselves, are not actions that can be nullified based upon the facts of this case. It is also worthy to note that this Department has not received any complaints that the meeting held by the PIPC pursuant to the Town Council’s October 15, 2013 directive or the PUC hearing attended by three Town officials, were improper under the OMA. 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 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

² We would be remiss if we did not address two points in the Town Council’s response. Legal counsel for the Town Council indicated that “under ‘the totality of the circumstances’ presented here (including the history of several Council meetings over the past several months where the ‘Prudence Island Ferry’ and related issues had been a recurring item of business), * * * the agenda item * * * was sufficient to ‘fairly inform the public of the nature of the business to be discussed or acted upon’ at the Town Council meeting of October 15, 2013. Mr. Crosby could not reasonably have predicted, in advance, each and every possible area of discussion or every possible action or vote that might have been taken at this meeting.” (Emphasis added). Respectfully, the fact that the Prudence Island ferry had been a recurring item of business at public meetings is of no moment to our analysis. A public body’s notice must be sufficient so as to “fairly inform the public of the nature of the business to be discussed or acted upon,” Tanner, 880 A.2d at 797, regardless of whether it is a recurring topic at public meetings. Every meeting agenda must be sufficient. Additionally, the fact that legal counsel for the Town Council avers that “each and every possible area of discussion or every possible action or vote” could not have been predicted only bolsters the fact that the agenda item was not sufficient. If the Town Council could not predict what could have been discussed and/or voted upon during its meeting and therefore relied upon a generic topic heading, members of the public would have no way to know the nature of the business to be discussed and/or voted upon. In these circumstances, we have little trouble concluding the agenda item violated the OMA.

Staven v. Portsmouth Town Council

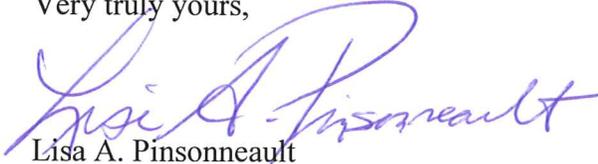
OM 14-04

Page 7

eighty (180) days of the alleged violation, whichever occurs later.” R.I. Gen Laws § 42-46-8.
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
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Kevin P. Gavin, Esquire
kpgavin@aol.com