



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

July 25, 2014
OM 14-27

Mr. Ethan Shorey
The Valley Breeze
6 Blackstone Valley Place
Lincoln, Rhode Island 02865

Re: The Valley Breeze v. Pawtucket School Committee

Dear Mr. Shorey:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Pawtucket School Committee (“School Committee”) is complete. By email correspondence dated February 18, 2014, you allege the School Committee violated the OMA during its February 11, 2014 meeting when it convened into executive session for an improper purpose. More specifically, you allege the agenda item “discussion of interim superintendent” was not an allowable purpose for an executive session under R.I. Gen. Laws § 42-46-5 and that the executive session discussion was inappropriate.¹ You further allege the agenda item was “far too vague.”

¹ In your correspondence dated February 23, 2014, you attempted to file a second OMA complaint, alleging two (2) School Committee members discussed and decided School Committee business outside the public purview, prior to the February 11, 2014 meeting. By correspondence dated February 26, 2014, this Department informed you that the OMA applies to “meetings” of a “quorum” of a “public body.” See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294, 295 (R.I. 1999). The OMA is not applicable when one or more of the elements – a quorum, a meeting, or a public body – are absent. See Warfel v. New Shoreham Shellfish Commission, OM 13-05. Since you alleged that only two (2) of the School Committee’s seven (7) members met outside the public purview, we requested that you provide evidence within five (5) business days that a quorum of the School Committee met to collectively discuss public business outside the purview of the public. We received no response within five (5) business days. In your March 18, 2014 rebuttal to the instant complaint, you similarly alleged “three other school board members received a call from [the School Committee Chairman].” Consistent with our prior precedent, since this allegation was not raised in your original complaint (it is unclear to us why this allegation could not have been raised in the

In response to your complaint, we received a substantive response from the School Committee's legal counsel, Stephen M. Robinson, Esquire. Attorney Robinson states, in pertinent part:

“the agenda states that the executive session convened in order for the School Committee to discuss ‘... legal advice and litigation/collective bargaining’ regarding not only the interim superintendent, but also interpretation of the superintendent's contract. With respect to the interim superintendent, the School Committee was advised that if the current Superintendent were to cease performing her duties, an interim would need to be appointed because [] Title 16 of the General Law of Rhode Island requires a superintendent. The failure to appoint one would have left the School Department unable to perform numerous functions, and could potentially subject the School Department to legal action by the Commissioner of Education, including but not limited to summary withholding of state aid. R.I.G.L. § 16-5-30.

Your office has consistently taken the position that public bodies are entitled to convene into executive session to receive legal advice. *Bozyan v. Middletown Town Council*, OM 11-18 citing *Fischer v. Zoning Board of the Town of Charlestown*, 1997 R.I. Super. LEXIS 58, aff'd 723 A.2d 294 (R.I. 1999). See also *In re Board of Regents for Elementary and Secondary Education Appeals Committee*, ADV OM 13-01. The propriety of the School Committee's convening into executive session for purpose of discussion of the requirement for an interim superintendent is bolstered by the fact that there was no collective discussion regarding that legal requirement. * * * Further bolstering the propriety of convening into executive session for this purpose is the probability that the failure to appoint an interim superintendent could have resulted in actual litigation regarding violation of state law.”²

We acknowledge your reply dated March 25, 2014.

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 regarding whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General

original complaint) and since the School Committee did not have an opportunity to respond to this allegation, respectfully, this allegation is not addressed in this finding since it is not properly before us. See *Costantino v. Smithfield School Committee*, PR 13-22. Moreover, the allegation that three (3) School Committee members received a telephone call from the Chairman, without more, fails to demonstrate that a collective discussion or action was taken amongst a quorum of School Committee members. Accordingly, this allegation, without more, does not violate the OMA.

² On March 28, 2014, we received a copy of the School Committee's February 11, 2014 executive session meeting minutes for this Department's in camera review.

Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

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). 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 at R.I. Gen. Laws § 42-46-5.

In Fischer, a justice of the Rhode Island Superior Court rendered a decision affecting the Zoning Board of Review for the Town of Charlestown. As a result of this decision, the Charlestown Solicitor prepared and distributed a memorandum to the Zoning Board of Review members, and subsequently, met with one or two Zoning Board of Review members to discuss the memorandum and to answer questions. Based upon legal counsel’s consultations with the one or two Board members outside the public’s purview, an OMA complaint was filed in the Rhode Island Superior Court.

In a written decision delivered by the Honorable Frank J. Williams, the OMA complaint was dismissed. Of particular significance to the instant matter, Justice Williams stated that:

“this Court does not believe that such discussions fall within the spirit or requirements of our Open Meetings Act. There was neither a convening of a public body nor a quorum. More importantly, this Court believes in the free and unhindered discussions between lawyer and client. Quite simply, that is what occurred in this case, and such discussions should not be, nor are they, subject to the requirements of the Open Meetings Act, especially where there is no meeting of a public body.” Fischer v. Zoning Board for the Town of Charlestown, WC No. 93-0624, aff’d on other grounds, 723 A.2d 294 (R.I. 1999) (Emphasis added).

Consistent with the holding in Fischer, this Department has concluded that under limited circumstances a “meeting,” as defined by the OMA, will not convene when members of a public body address questions to legal counsel. This Department has previously issued findings consistent with this principle. In Mudge v. North Kingstown School Committee, OM 11-18, the Complainant alleged the agenda topic “Jamestown contract matter” was improperly discussed in executive session. This Department’s in camera review of the sealed minutes from the executive session revealed that the specific terms of the contract were never discussed. Rather, as advertised, legal advice from the School Committee’s legal counsel concerning legal issues and amendments to the contract was given to the School Committee in executive session. Arguably, discussions may have begun to stray outside the legal council’s advice, but those discussions appeared to be limited in instances and duration. As such, we found no violation.

In Kerwin v. Rhode Island Higher Education Assistance Authority, OM 13-10, based upon the evidence presented, this Department concluded that the Rhode Island Higher Education Assistance Authority (“RIHEAA”) did not violate the OMA when it convened into executive session to discuss with its legal counsel legal issues concerning the Complainant’s termination.

It was significant to our conclusion that the evidence demonstrated that the RIHEAA did not discuss the substantive reasons for the termination during the executive session and instead discussed legal issues regarding the termination. As such, we found no violation. See also Bozyan v. Middletown Town Council, OM 11-17 (the Town Council did not violate the OMA when it convened into executive session for the sole purpose of receiving a report from its legal counsel. The evidence demonstrated that the Town Council did not discuss the report, and in fact, discussed and voted on the contents of the report at a subsequent open session meeting); Brien v. North Smithfield Town Council, OM 13-32 (the Town Council did not violate the OMA when it convened into executive session to discuss with its Special Counsel legal issues concerning the proposed agreement involving DV Wind LLC).

We now turn to the notice for the February 11, 2014 meeting, which contained the following agenda item:

V Possible recess to executive session in accordance with provisions under Title 42, Chapter 46, Subsection (a)(2) (legal advice and litigation/collective bargaining) of the General Laws of the State of Rhode Island for the purpose of discussing and/or acting upon the following:

1. Legal advice on Personnel Contract Interpretation
2. Discussion of Interim Superintendent
3. Seal Executive Session Minutes

Legal counsel contends the School Committee convened into executive session to obtain legal advice concerning the requirement for an interim superintendent and interpreting a personnel contract. The open session minutes reveal that the School Committee convened into executive session from 6:29 p.m. until 7:22 p.m. Our review of the executive session minutes reveals that most of the approximately fifty minutes did not involve the seeking or obtaining legal advice on either the interim superintendent or the interpretation of a personnel contract. Arguably, limited parts of the discussion involved frank discussions with legal counsel regarding the legal requirements of having a Superintendent in place; however, taken as a whole, we conclude that the discussion was inappropriate for executive session. In fact, for part of the executive session, Attorney Richard Ackerman, who was not representing the School Committee, was present in executive session. The presence of a third party such as Attorney Ackerman provides a strong indication the School Committee was not obtaining privileged legal communications from its attorney while Mr. Ackerman was present. Even though the advertised topic may have been appropriate for executive session, in our opinion much of the actual discussion was not appropriate for executive session. While we are hindered somewhat in our further discussion of this subject matter by our representation to keep the executive session meeting minutes sealed, with limited exceptions, in our opinion, the discussion did not concern either the legal requirements of having a Superintendent or a contract interpretation issue.

Regarding your allegation that the agenda topic was vague, 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.’”

Although we have concluded that the discussion was largely inappropriate for executive session, we do not conclude that the agenda item itself was inappropriate or otherwise vague. In your complaint, you even mention that there was no indication prior to the meeting that Ms. DiCenso was a candidate for the interim superintendent position or that the current superintendent was stepping down. Under these circumstances, consistent with Graziano, we find no violation.

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).

After review of the evidence presented, we find that there was no willful or knowing violation. You indicate that this Department should find a willful or knowing violation because this is the second violation in approximately seven months. Respectfully, the two violations are not related and the prior violation alone does nothing to suggest that the instant violation is willful or knowing. See Valley Breeze v. Pawtucket School Committee, OM 13-29 (the School Committee violated the OMA during its August 6, 2013 open meeting because the front door to the building was locked). You also aver that you warned the Chairman of the School Committee of this potential violation prior to the meeting. While in the appropriate case such a factor could potentially serve as evidence of a willful or knowing violation, here, we are not persuaded. Among other considerations, as discussed herein, you “warned” the School Committee that its noticed discussion was not appropriate for executive session, but as discussed, the noticed agenda could very well have been appropriate for executive session. Notwithstanding the published notice, the actual discussion veered from the published notice and certainly you provided no warning with respect to this aspect.

Regarding injunctive relief, the School Committee took no action in executive session so there is nothing to declare null and void. Because we conclude that the discussion was largely not appropriate for executive session, however, we require that the School Committee release the February 11, 2014 executive session meeting minutes. The School Committee may, however, redact those limited portions of the minutes where Attorneys Robinson and Bejma are recorded, except where Attorney Ackerman was present. The School Committee may also redact on page four, Mr. Spooner’s last comment since we conclude that this comment was appropriate for executive session as advertised. All other portions we deem to fall outside the scope of a proper executive session discussion. Lastly, we recognize that the meeting minutes are not a verbatim

recording of the executive session. This finding serves as notice to the School Committee that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation. The School Committee must release the February 11, 2014 executive session meeting minutes within ten (10) business days and a copy should be provided to this Department.

Although the Attorney General will not file suit in this matter at this time, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may file a suit "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(c). Please be advised that we are closing our file as of the date of this letter, but reserve the right to reopen this matter should the circumstances require such action.

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

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lisa Pinsonneault".

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Stephen M. Robinson, Esquire