



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 6, 2014
OM 14-17

Mr. Yaohua Zhang

Re: Zhang v. East Greenwich School Committee

Dear Mr. Zhang:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the East Greenwich School Committee (“School Committee”) is complete. By email correspondence dated March 18, 2014, you allege the School Committee violated the OMA on November 5, 2013 when you were asked to leave the room during an executive session and yet the Superintendent was allowed to stay and address the School Committee. While for privacy reasons we decline to discuss the nature of the executive session, it suffices that this executive session fell within the purview of R.I. Gen. Laws § 42-46-5(a)(8) and that you had an interest in the subject matter. You further allege the School Committee violated the Access to Public Records Act (“APRA”) when it improperly denied your request for the November 5, 2013 executive session meeting minutes.

In response to your complaint, we received a substantive response in affidavit form from the School Committee’s legal counsel, Matthew T. Oliverio, Esquire. Attorney Oliverio states, in pertinent part:

“Mr. Zhang never informed the Superintendent that he desired to have [the hearing]¹ heard in open session, and thus the matter was posted for and heard in executive session. * * *

¹ For privacy reasons, we decline to state the specific nature of the hearing. It also has no bearing on this Department’s finding.

It is true that Mr. and Mrs. Zhang were excused from the executive session at 6:44 pm after they had a full and fair opportunity to be heard. The purpose was to enable the Committee to deliberate the merits of the appeal and to receive confidential legal advice from its counsel[.] The Zhangs were invited back to the executive session to receive the determination of the Committee and to engage in further discussion. Following the executive session, the minutes of the meeting were properly sealed by vote of the Committee.

In or about March 17, 2014, Dr. Mercurio received a request for production of the sealed executive session minutes. On advice of counsel, the request was denied as such minutes were sealed and are protected by the attorney/client privilege, and thus not subject to disclosure under the Access to Public Records Act.”

We acknowledge your reply dated April 13, 2014.²

At the outset, we note that in examining whether a violation of the OMA or the APRA 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 and the APRA 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 School Committee violated the OMA or the APRA. See R.I. Gen. Laws §§ 42-46-8; 38-2-8. In other words, we do not write on a blank slate. It is also worth noting that although you have an increased interest in the executive session subject matter, generally speaking the OMA and the APRA both consider the public’s interest, and not a particular person’s interest. Accordingly, while you contend that you should have had a right to attend the entire executive session and had access to the executive session minutes, under the OMA and the APRA we must consider whether the general public would be entitled to access.

The OMA provides that all meetings of a public body shall be convened in an open session, unless specifically exempt by R.I. Gen. Laws § 42-46-5(a). Among the ten enumerated exceptions is R.I. Gen. Laws § 42-46-5(a)(8), which permits a school committee to go into executive session:

² In your reply, you further allege that the School Committee violated the OMA and/or the APRA in ways not included in your original complaint, such as when it did not include the procedures for appealing its denial. See R.I. Gen. Laws § 38-2-8. In this Department’s acknowledgment letter to you dated March 25, 2014, we advised that your rebuttal could address issues already raised or issues raised by the School Committee, but could not raise new issues. Since this allegation was not raised in your 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. See Mudge v. North Kingstown School Committee, OM 12-35.

“exclusively for the purposes (a) of conducting student disciplinary hearings or (b) of reviewing other matters which relate to the privacy of students and their records, provided, however, that any affected student shall have been notified in advance in writing and advised that he or she may require that the discussion be held in an open meeting.”

It appears you were allowed into a portion of the School Committee’s November 5, 2013 executive session. The sealed executive session minutes provided to this Department for an in camera review indicate that you and your wife were in executive session when it commenced at 6:02 p.m. You and your wife stayed in executive session until 6:44 p.m., at which point the School Committee deliberated on the matter it heard in executive session. You both then returned to executive session at 7:13 p.m. to hear the School Committee’s decision, where you remained until 7:18 p.m. It appears the executive session adjourned at 7:18 p.m. Not only do you take issue with your exclusion from a portion of the executive session, but you take issue with the Superintendent’s and Attorney Oliverio’s inclusion in a portion of the executive session. Based upon the plain language of the OMA, this Department previously opined that:

“[the OMA] does not govern who may attend closed sessions. However, permitting a public body to selectively permit some members to attend a closed session, while precluding others from doing so, would certainly appear to violate the intent of the [OMA].” See e.g., Schmidt v. Ashaway Volunteer Fire Association, OM 97-27.

Additionally, we observe that the option to extend an invitation to an individual to attend an executive session is held by the public body, and not the individual seeking to attend the executive session. See Vargas v. Providence School Board, OM 94-26 (OMA not violated where third party not allowed to attend executive session). Respectfully, as indicated supra, the OMA does not expressly govern who may attend executive or closed sessions and we find nothing within the OMA, nor are we directed to any provision, that would enable us to conclude that the School Committee violated the OMA by excluding you from the portion of the executive session where the School Committee deliberated.

In your reply, you further state that the Superintendent and Attorney Oliverio should have been treated as members of the public. In Finnegan v. Scituate Town Council, OM 96-13, this Department examined an executive session convened to discuss the job performance of the Scituate Police Chief. Based upon this Department’s investigation, it became clear that the Scituate Police Chief “asked that Lt. Charles Collins be allowed to be present to assist him . . . in responding to the issues, as Lt. Collins as the Chief Administrative Officer of the Department and second in command to the Chief, had special knowledge of certain aspects of the job performance issues.” This Department found no violation and stated that “Lt. Collins had information relevant to the closed session discussions and was present to assist [the Scituate Police Chief] and the [Town Council] in their discussions.” In particular, this Department recognized that “Lt. Collins was not attending as a ‘member of the public,’” but instead, “was attending as a town employee who had information relevant to the Chief’s job performance.”

See also Quinlan v. Warwick School Committee, OM 95-01 (attorney “attended the executive session not as a member of the public, but in his capacity as legal counsel for the Committee”).

Similarly, in the instant case, the Superintendent was attending the executive session as a School Department employee with information relevant to your matter. The Superintendent was involved in the appeal process and Attorney Oliverio was the School Committee’s attorney. As such, we have little trouble concluding that both the Superintendent and Attorney Oliverio were not acting as members of the public and were acting in their official capacity. As stated supra, the option to extend an invitation to an individual to attend an executive session is held by the public body, not the individual seeking to attend the executive session. Accordingly, we conclude that the Superintendent’s and Attorney Oliverio’s attendance and your exclusion at a properly closed executive session did not violate the OMA.

You further allege that the School Committee violated the APRA when it refused to provide you with a copy of the “meeting notes for our hearing session.” The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). The APRA exempts from public disclosure “[a]ny minutes of a meeting of a public body which are not required to be disclosed pursuant to [the OMA].” R.I. Gen. Laws § 38-2-2(4)(J). We observe that the OMA provides that “[t]he minutes of a closed session shall be made available at the next regularly scheduled meeting unless the majority of the body votes to keep the minutes closed pursuant to §§ 42-46-4 and 42-46-5.” R.I. Gen. Laws § 42-46-7(c)(emphasis added). Other OMA provisions contain similar language. See R.I. Gen. Laws § 42-46-7(b)(“The minutes shall be public records and unofficial minutes shall be available * * * except where the disclosure would be inconsistent with §§ 42-46-4 and 42-46-5.”).

The November 5, 2013 executive session meeting minutes reveal that the School Committee unanimously voted to seal the minutes of the executive session. Based on the factual observation that the executive session minutes you requested were sealed, we must conclude that the School Committee did not violate the APRA by denying you access to these records on those grounds. Clearly, under the APRA, properly sealed executive session minutes are not public. See R.I. Gen. Laws § 38-2-2(4)(J). Moreover, there is no doubt that the executive session properly fell within the purview of R.I. Gen. Laws § 42-46-5(a)(8). We therefore find that the School Committee did not violate the APRA when it did not provide you with the sealed executive session meeting minutes of November 5, 2013.³

Although the Attorney General will not file suit in this matter, nothing in the OMA or the APRA precludes an individual from pursuing a complaint in the Superior Court. The complainant may

³ Respectfully, even though the records concern you, you do not have any greater interest in gaining access to the record under the APRA than any member of the general public. Indeed, if we determined that such records were available to you under the APRA, as a matter of law, we would necessarily conclude that the same records are available to anyone upon request. For this reason the fact that the requested records concern you is of no moment to our APRA analysis. See McQuade v. Rhode Island State Police, PR 13-03.

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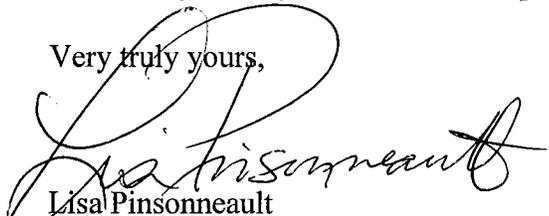
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pursue an OMA complaint within “ninety (90) days of the attorney general’s closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later.” R.I. Gen. Laws § 42-46-8. Please be advised that we are closing 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,

A handwritten signature in cursive script, appearing to read "Lisa Pinsonneault". The signature is written in black ink and is positioned above the typed name.

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Matthew T. Oliverio, Esq.
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