



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

December 21, 2016

ADV OM 16-03

Attorney Ralph M. Kinder

**In Re: Prudence Island Volunteer Fire Department**

Dear Attorney Kinder:

In your capacity as legal counsel for the Prudence Island Volunteer Fire Department (“PIVFD”), you have requested an Open Meetings Act (“OMA”) advisory opinion from this Department. You sought this Department’s advice concerning the applicability of the OMA to the PIVFD in light of the circumstances described below. More specifically, you submit, in relevant part:

“The undersigned represents the PIVFD, a Rhode Island non-profit, membership controlled, corporation that is also tax exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. By letter dated November 4, 2013, [the Department of Attorney General] advised the PIVFD of a recent amendment to the Rhode Island General Laws Section 42-46-7(b)(2), which requires volunteer fire departments to post unofficial minutes of their meetings on the Rhode Island Secretary of State website.

This is to request an advisory opinion from you as to the applicability of this statute to the PIV[F]D based upon the following facts:

1. The PIVFD provides certain fire and emergency rescue services to Prudence Island residents pursuant to a certain Fire Service Agreement with the Town of Portsmouth, which is a public body subject to the Open Meetings Act;
2. The PIVFD has no taxing authority over residents of the Town of Portsmouth and the Prudence Island area that it serves;
3. In the absence of taxing authority, the PIVFD derives its support from the payments made by the Town of Portsmouth under the above-referenced service agreement, private donations, and federal and state grants; and

4. The PIVFD is a tax exempt charity duly registered with your office, whereby it files a copy of its federal, Form 990 tax return.

We are hopeful that you will agree that the legislature did not intend that this statute apply to organizations such as the PIVFD which has no taxing authority and whose services are subject to the open meetings process of the applicable taxing authority, in this case the Town of Portsmouth.”

You later supplemented your Advisory Opinion request with additional information detailed below.

At the outset, we note that in examining whether an entity is subject to the OMA, or a specific provision thereof, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an entity falls within the purview of 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 and this advisory opinion are limited to determining whether the PIVFD is subject to the OMA, and more specifically according to your request, Rhode Island General Laws § 42-46-7(b)(2). See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

We initially observe the purpose of the OMA is that:

“[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy.” R.I. Gen. Laws § 42-46-1.

Rhode Island General Laws § 42-46-7(b)(2), which was enacted on July 15, 2003, states:

“[i]n addition to the provisions of subdivision (b)(1),<sup>1</sup> all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards, whether it is incorporated or not, and whether it is a paid department or not, shall post unofficial

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<sup>1</sup> Subdivision (b)(1) states:

“A record of all votes taken at all meetings of public bodies, listing how each member voted on each issue, shall be a public record and shall be available, to the public at the office of the public body, within two (2) weeks of the date of the vote. The minutes shall be public records and unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier, except where the disclosure would be inconsistent with §§ 42-46-4 and 42-46-5 or where the public body by majority vote extends the time period for the filing of the minutes and publicly states the reason.”

minutes of their meetings within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state's website."

In your request you reference a letter dated November 4, 2013 from Attorney General Peter F. Kilmartin. This letter was mailed to all Rhode Island fire-related entities advising of the 2013 amendment to R.I. Gen. Laws § 42-46-7. The correspondence did not make a determination as to whether individual fire-related entities were or were not public bodies under the OMA, but rather advised, in pertinent part:

"During the past legislative session, the General Assembly amended the Open Meetings Act ('OMA'), R.I. Gen. Laws § 42-46-1 et seq., to require that all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards, post unofficial minutes of its meetings on the Secretary of State's website within twenty-one (21) days of the meeting. Prior to this amendment, there was no legislative requirement that fire-related entities post or electronically file minutes on the Secretary of State's website. The entire legislative amendment is included within this letter, but in pertinent part reads:

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Since this 2013 amendment pertains only to fire-related entities, I wanted to take this opportunity to notify you of this change and to ensure future compliance. I ask that you also notify any other appropriate personnel within your Department or District of this change. If you have any questions regarding this amendment, please be sure to consult with your legal counsel, or contact this Department."

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). For purposes of the OMA, a "public body" is defined as "any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government." R.I. Gen. Laws § 42-46-2(c). The 2013 amendment to R.I. Gen. Laws § 42-46-7(b)(2) did not amend or otherwise alter the OMA's existing "public body" definition.

This Department previously addressed the 2013 amendment in In Re: R.I. Gen. Laws § 42-46-7(b)(2), ADV OM 14-01. There, we determined that although R.I. Gen. Laws § 42-46-7(b)(2), as amended, added a requirement that certain fire-related entities file minutes on the Secretary of State's website, this amendment did nothing to change the definition of a "public body." As noted in Fischer, as well as the OMA, as a prerequisite to any entity being required to comply with the OMA, including R.I. Gen. Laws § 42-46-7(b)(2), that entity must be a "public body" as defined by R.I. Gen. Laws § 42-46-2(3). In In Re: R.I. Gen. Laws § 42-46-7(b)(2), we made clear that "if a fire-related entity was not a public body for purposes of the OMA prior to the amendment, absent

a determination made by this Department to the contrary, it remains so.”<sup>2</sup> Id. “Likewise, if a fire-related entity was not a public body for purposes of the OMA prior to the amendment, absent a determination made by this Department to the contrary, it remains so.” Id. Accordingly, here we must determine whether the Prudence Island Volunteer Fire Department is a “public body” under the OMA.

We have previously noted that determining whether a particular entity is or is not a “public body” is “a fact-intensive question not subject to ‘bright line’ rules.” See Oliveira v. Independent Review Committee, OM 04-10. In order to seek clarity on whether an entity is or is not a “public body,” the following factors about an entity are frequently considered: (1) the text under which it is established; (2) the scope and type of authority within its control; (3) the nature of public business delegated to it; and (4) its membership and composition. See id.

The most thorough examination of this issue by the Rhode Island Supreme Court came in Solas v. Emergency Hiring Council, 774 A.2d 820 (R.I. 2001), which considered the application of the OMA to an entity formed by two executive orders of then-Governor Lincoln Almond to “manage and control the state’s hiring practices and its fiscal resources.” The Emergency Hiring Council consisted of five senior executive branch staff members who met on a biweekly basis “to determine whether creating a new position in state government or filling a vacancy is absolutely necessary.” Id. at 824. It was the Governor’s intent that “no person or persons other than the Council shall have the authority to make any determinations in this regard.” Id. (internal quotation omitted). Based on these facts the Supreme Court concluded the Council was subject to the OMA:

“[T]he EHC [Emergency Hiring Council] is composed of a group of high level state officials that convenes to discuss and/or act upon matters of great interest to the citizens of this state. In addition, our reading of the executive orders creating the council persuades us that the EHC possesses significant supervisory and executive veto power over creating or filling state employment positions. At the very least the council functions in an advisory capacity in state hirings. Whether supervisory or advisory, both functions are regulated by the act. As the plain language of the statute provides, a council’s exercise of advisory power is enough to bring it under the act’s umbrella.” Id. at 825.

Solas serves as an important starting point for our analysis for two reasons. First, it restates the basic principle that the OMA “should be construed broadly and interpreted in a light favorable to public access.” Id. at 824. Second, it affirms the use of several factors we have considered relevant in our previous findings. The Court in Solas examined the text of the executive orders under which

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<sup>2</sup> We have previously rejected any suggestion that the 2013 amendment was intended to bring all volunteer fire departments within the purview of the OMA. We noted, “[g]iven the language of the broad amendment, a contrary opinion would lead to an absurd result where a fire-related entity is not governed by the OMA – including the requirement to have a public meeting and maintain minutes – yet was governed by R.I. Gen. Laws § 42-46-6(b)(2)’s requirement to post minutes on the Secretary of State’s website.” See In re R.I. Gen. Laws § 42-46-7(b)(2).

the Emergency Hiring Council was established, the scope of its stated authority, its actual authority, the nature of the public business delegated to it, and its membership and composition. We have found each of these factors relevant, to varying degrees, in findings issued by this Department.

For example, in Finnegan v. Scituate Town Council, OM 97-05, we concluded a committee with three “citizen members” appointed by the Town Council President to conduct oral interviews of finalists for the police chief position was a public body under the OMA. The interviews were conducted in conjunction with a private search firm retained by the Town to assist with the search process. The Town was responsible for any honorarium paid to the citizen members of the committee, and provided them with lunch and an evening meal. In keeping with prior findings that citizen advisory committees are subject to the OMA, we found the OMA applied because the committee was formed by the Town Council President and charged to “perform public business over which the Council had jurisdiction and control.”

Three of our prior findings relied upon the entity's membership to conclude it was not subject to the OMA. In Schmidt v. Ashaway Volunteer Fire Association, OM 98-33, this Department examined whether the Ashaway Volunteer Fire Association (“Fire Association”) constituted a “public body” in accordance with the OMA. In reviewing that organization's composition, we noted that the Fire Association was a “non-business, nonprofit corporation duly incorporated in 1937.” In addition, the members of the Fire Association did not receive a salary, medical benefits, or a pension for their services; and the officers were not elected by the public, or appointed by a subdivision of state or municipal government, but instead, were elected by the members of the Fire Association itself. Based upon these facts, we concluded the Fire Association was not a “public body” pursuant to the OMA. See also Lataille v. Primrose Volunteer Fire Association, OM 99-21 (noting Fire Association was not a “public body” since Board members are elected by members of the Fire Department and do not receive a salary, benefits, or pension).

In Montiero v. Providence School Board Nominating Commission, OM 02-25, we concluded the nominating commission for the Providence School Board was not subject to the OMA because it was not a subdivision of state or municipal government. Our conclusion rested upon factors common in our analyses: (1) the commission was formed as a result of recommendations made by a private, non-profit group studying the Providence Public Schools; (2) its five members were nominated by private, non-profit sponsoring organizations who were not subject to a governmental or public approval process; (3) no public money was spent on the commission; and (4) neither city ordinances, the Home Rule Charter, nor any Mayoral executive order, referenced the commission.

Here, you have submitted various documents to assist our analysis. Again, it bears noting that the relevant inquiry is whether the PIVFD is a “public body” as defined by the OMA. See R.I. Gen. Laws § 42-46-2(c) (“public body” is defined as “any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government”).

The submitted documents establish that the PIVFD was founded as a non-business nonprofit charitable organization, described as an organization “within the meaning of Section 501(c)(3) of

the federal tax code” in its Articles of Incorporation. The Articles of Incorporation also provide that upon dissolution of the PIVFD, any remaining assets shall be distributed not to the Town, but “exclusively to the Portsmouth (Rhode Island) Volunteer Fire Department, so long as it is a charitable organization within the meaning of Section 501(c)(3).” Through a Fire Service Agreement with the Town of Portsmouth, the PIVFD is tasked with providing “typical fire department services.” The Fire Service Agreement also notes that it can be terminated by either party upon six months’ notice. The PIVFD does not have any taxing authority and obtains revenue from the Town of Portsmouth, private donations, and federal and state grants. There are no stated salaries, medical benefits, or pensions for members of the PIVFD; instead, members are compensated on a per call basis, with the exception of the PIVFD Chief who receives an annual stipend of \$6,300. Positions within the PIVFD, including the Board of Control and the Chief, are elected by members of the PIVFD as enumerated in the PIVFD Corporate Bylaws. There is no indication that any members of the PIVFD are elected by the public or appointed by the Town of Portsmouth. Rather, the Bylaws limit membership (and voting rights) to designated categories, such as those who are active members, life members, auxiliary members, and exempt members.

Based on these specific facts, we find that the PIVFD is not a “public body” within the meaning of the OMA. Our decision is controlled in large part through our precedent. Much like the Ashaway Volunteer Fire Association in Schmidt and the Primrose Volunteer Fire Association in Lataille, the PIVFD is a nonprofit organization that selects its own members who receive no salaries (with the exception of the PIVFD chief), no medical benefits, and no pensions. More importantly, the PIVFD was not created by the Town and remains a separate entity from the Town of Portsmouth. Like the nominating commission in Montiero, membership in the PIVFD is not subject to a governmental or public approval process and there is no evidence that any ordinances or mayoral executive orders reference the PIVFD. While the PIVFD does receive some financial support from the Town, among other entities, we have previously observed “that fact alone does not render them subject to the Act.” Schmidt v. Ashaway Fire District & Volunteer Fire Assoc., PR 97-09. We also observe that the PIVFD provides fire services pursuant to the Fire Service Agreement, that this agreement is terminable by either party, and that this agreement expressly provides that nothing within it shall be construed to create a partnership or employment relationship between the parties or permit either party to act on behalf of the other. Based on these specific facts, as well as our precedent, we conclude that the PIVFD is not a “public body” under the OMA.

This advisory opinion is based upon the specific facts as you related. If the facts should differ in any respect, it may affect this Department’s interpretation and ultimate opinion regarding whether such action would result in a violation of the OMA.

Additionally, this advisory opinion does not abrogate any rights that the Department of the Attorney General is vested with pursuant to R.I. Gen. Laws § 42-46-8, and is strictly limited to this Department’s interpretation of the OMA. This opinion does not address the PIVFD’s responsibilities under any other state law, rule, regulation, or ordinance, nor does it shield the

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PIVFD or its members from a complaint filed in the Superior Court by a citizen or entity pursuant to R.I. Gen. Laws § 42-46-8.

We hope that this advisory opinion is of assistance as this Department is committed to ensuring that public bodies comply with the OMA.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Sean Lyness".

Sean Lyness

Special Assistant Attorney General

SL/kr