

March 8, 2007
OM 07-03

Mr. Thomas C. DePatie

Re: **DePatie v. Charlestown Town Council**

Dear Mr. DePatie:

The investigation into your Open Meetings Act (“OMA”) complaint against the Charlestown Town Council (“Town Council”) is complete. The facts, as related by you, are set forth below.

You write that on November 12, 2006, three council members-elect – James M. Mageau, John O. Craig, Jr., and Bruce W. Picard – “held a public meeting without public notice, and without meeting in an open and public place.” Since the Department of Attorney General has long stated that the OMA applies to council members-elect, you assert that the Town Council, through the actions of the above three council members-elect, violated the OMA. In support of the above, you attach a copy of a November 12, 2006 press release, purportedly from the three above council members-elect, which indicated in relevant part:

“[a]t a political caucus held today by the majority coalition recently elected to the Charlestown Town Council, Mr. John Craig, Mr. Bruce Picard, and Mr. James Mageau agreed that at its organizational meeting scheduled for November 20, 2006, Mr. James Mageau will be elected Town Council President and Mr. John Craig will be elected Vice President.”

As indicated by the above press release, the three council members-elect apparently characterized their meeting as a political caucus, but since two of the members are from the Democratic Party, and one member is from the Independent Party, you assert that the party caucus exemption enunciated in McCaffrey v. Providence City Council, OM 97-18 is inapplicable.

In response to your complaint, we received a substantive response from then-Solicitor, Peter D. Ruggiero, Esquire, as well as present-Solicitor, Robert E. Craven, Esquire. Mr. Ruggiero relates that on November 7, 2006, voters from the Town of Charlestown elected five (5) members of the Town Council, three of which were the above named council members-elect. The following day, Mr. Ruggiero states that provisional and mail ballots were counted and that the results from the following evening “remained unchanged.” Thereupon, on November 8, 2006, Mr. Ruggiero related that the Town Clerk “declared the November 7, 2006 election results for the selection of Town Council members final.”

On November 12, 2006, five days after the election, Mr. Ruggiero represents that the above three council members-elect “met to discuss issues regarding governmental transition to the new Town Council.” Mr. Ruggiero added that when he “questioned the three individuals, they all confirmed their attendance at the November 12, 2006 meeting,” but that “[a]ll three individuals stated that they had collectively retained legal counsel to represent them and respond to this complaint.” Accordingly, Mr. Ruggiero states that the three above mentioned council members-elect “collectively declined to provide me any substantive details of the meeting.” Nonetheless, Mr. Ruggiero related that “[t]he three individuals did indicate to [him] that they had sought and been provided legal counsel from a private attorney that they could conduct the November 12, 2006 meeting without violating the OMA since the OMA did not apply to them as the election results were not yet official.” On November 14, 2006, two days after the above-acknowledged meeting, the Charlestown Board of Canvassers certified the Town Council election results.

Based upon his investigation, Mr. Ruggiero suggests that the operative legal issue is “whether the three councilors-elect were subject to the OMA at the time of their November 12, 2006 meeting.” Mr. Ruggiero observes that at the time of the November 12, 2006 meeting, the November 7, 2006 election results had already been announced, but certification of the vote (on November 14, 2006) had not yet occurred. Although Mr. Ruggiero cites various OMA findings that stand for the proposition that the OMA applies to members-elect, Mr. Ruggiero nonetheless suggests that based upon the above circumstances “an ambiguity exists” concerning when a successful candidate for local office attains the status of a member-elect and that “the issue of when a successful candidate in a local election attains the status of a member-elect subject to the OMA has not been addressed.” Since Mr. Ruggiero suggests that local election results are not “final official results” until the expiration of the seven (7) day appeal period pursuant to R.I. Gen. Laws § 17-7-5, Mr. Ruggiero concludes that the OMA cannot apply to members-elect until the passage of this time period.

In his response, Mr. Craven asks that his response be incorporated with Mr. Ruggiero’s response. Mr. Craven adds that in Cullen v. Lincoln Town Council, OM 06-03, the OMA was extended to counsel members-elect as the “election to public office loses his status as a private individual and acquires the position more akin to that of a public trustee.” Mr. Craven continues that:

“[t]he logic of the Cullen case is that the council members had won on Election Day and the election was certified as the ‘final results’ pursuant to R.I.G.L. 17-7-5. In the case at hand, Mr[.]. Picard, Mr. Mageau, and Mr. Craig met on November 12, 2006, two days before the election could be certified under state law. As a result, to presume their status as elected officials yet to be sworn in and thus extend the OMA to their activities would obviate the need for final certification of elections pending the seven (7) day appeal period. Such an interpretation of the OMA would lead to a perversion of its intent and to a ridiculous extension of the act to even election night activities and campaign joint meetings.”

Upon our request, Mr. Craven also provided affidavits from the council members-elect concerning the substance of the November 12, 2006 meeting. Mr. Mageau affirmed that:

“[o]ne [sic] November 12, 2006, I James Mageau telephone[d] Mr. Edward Barrett and asked him if he would be interested in being re-appointed as Charlestown’s Town Administrator. I subsequently arraigned a meeting between Mr. Barrett, Mr. John Craig, Mr. Bruce Picard and myself at Casey’s Grill in Wakefield, Rhode Island on 11:00 a.m. on November 12, 2006.

We then met at the agreed time and place for approximately one hour and discussed Mr. Barrett’s annual salary requirements. Mr. Craig, Mr. Picard, and I then reached a consensus that we would hire Mr. Barrett as acting Town Administrator as soon as the election results were certified and the three of us could be sworn in as council members. No subsequent meetings took place after the November 12, 2006 meeting at Casey’s Grill.”

Messrs Picard and Craig similarly affirmed:

“[o]n November 12, 2006 I received a telephone call from Mr. Mageau requesting that I attend a luncheon at Casey’s Grill and Bar in Wakefield, Rhode Island to meet Mr. Barrett. Those present were [the three council members-elect and Mr. Barrett].

During the meeting we discussed the possibility of Mr. Barrett accepting the position as Town Administrator of the Town of Charlestown. When the meeting ended, [the three

council members-elect] reached a consensus that we would appoint Mr. Barrett as acting Town Administrator at the town council meeting after we were sworn into office.”

Based upon these facts, we have little trouble determining that as discussed below the November 12, 2006 meeting violated the OMA.

The Department of Attorney General first considered the applicability of the OMA to members-elect in Offer v. Newport City Council, Official Opinion 95-12. In Offer, then-Attorney General Pine reviewed Hough v. Stemberge, 278 So.2d 288 (Fla. Ct. App. 1973) wherein members-elect convened a meeting without public notice one (1) day after their election. In rejecting the members-elect claim that the OMA did not apply because the members-elect had not been formally sworn into office, the Florida Court of Appeals noted:

“[w]e simply cannot accept this line of reasoning. To adopt this viewpoint would in effect permit . . . members-elect of a public board or commission to gather with impunity behind closed doors and discuss matters on which foreseeable action may be taken by that board or commission in clear violation of the purpose, intent, and spirit of the Government in the Sunshine Law.

We find the position untenable to hold on the one hand that [the Sunshine Law] is applicable to elected board or commission members who have been officially sworn in and on the other hand inapplicable to members-elect who as yet merely have not taken the oath of public office. An individual upon immediate election to public office loses his status as a private individual and acquires the position more akin to that of a public trustee.” Id. at 289 (emphasis added).

The above quotation was set forth verbatim in Offer whereupon then-Attorney General Pine found the reasoning of the Florida Court of Appeals “persuasive” and concluded that the “members-elect of the Newport City Council f[e]ll within the scope of, and are governed by, the Open Meetings Act.” This Department’s finding in Offer has been applied in subsequent cases. See Schanck v. Gloucester Town Council, OM 97-03 (“it is this Department[’s] position that members-elect of a public body are subject to and governed by the Open Meetings Act”); Cullen v. Lincoln Town Council, OM 06-03 (“This Department has consistently held that members-elect of a public body are subject to the provisions of the OMA”).

The above cases make clear that the OMA applies to members-elect following an election and, in this case, the Town Council does not dispute this conclusion. Instead, the Town Council attempts to distinguish the above cases by asserting that although the

OMA may apply to members-elect, for purposes of the OMA, an individual gains “member-elect” status only after the expiration of the seven (7) day period for contesting the election and not immediately after election. See R.I. Gen. Laws § 17-19-36. We have carefully reviewed our prior findings and find nothing within these decisions to support the Town Council’s argument that although elected, the OMA does not apply to members-elect until the expiration of the seven (7) day period. Indeed, the Town Council has provided no legal support on point for its position, and to recognize such a moratorium would simply allow individuals who have been elected to public office a window to meet and decide public policy before their actions would be entitled to review or observation by the very voters who had elected them only days earlier. Moreover, the Town Council makes no attempt to distinguish this Department’s statement in Offer that an individual upon “immediate election” to public office loses his status as a private individual. Here, the Town Council’s argument is geared toward applying the OMA seven (7) days after election and such a conclusion hardly comports with our past findings or public policy. See R.I. Gen. Laws § 42-46-1 (“It 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.”)

In its response, the Town Council submits that a position consistent with the conclusion set forth in this finding would represent an absurd interpretation of the OMA. We respectfully disagree and believe that the facts of this case make our conclusion even clearer. For instance, although we could easily envision post-election circumstances where council members-elect gathered without implicating the OMA since no public business was collectively discussed and/or no decisions affecting the public were taken, see e.g., In re Foster Town Council, OM 06-54, here the affidavits provided by the council-members elect leads to the conclusion that the council members-elect did meet to discuss public business and to plan action, which would be effectuated upon being sworn into office. Specifically, Mr. Mageau affirms that on November 12, 2006, the above council members-elect:

“met at the agreed time and place for approximately one hour and discussed Mr. Barrett’s annual salary requirements. Mr. Craig, Mr. Picard, and I then reached a consensus that we would hire Mr. Barrett as acting Town Administrator as soon as the election results were certified and the three of us could be sworn in as council members.”¹

¹ The Town does not make an argument that the November 12, 2006 meeting was exempt from the OMA pursuant to the political caucus exemption set forth in R.I. Gen. Laws § 42-46-2(c). Even if such argument were made, and even if we were to assume that the exemption applied to the selection of the Town Council President and Vice President, it seems beyond serious argument that the selection and hiring of a Town Administrator properly falls within the public’s business, as opposed to the political caucus exception. Indeed, the Town makes no argument to the contrary.

The above makes clear that the council members-elect met outside the public purview to discuss and plan public business.

Moreover, although we might feel differently if the November 2006 election held the prospect of being challenged or appealed, here, no evidence has been presented that the election results were in any doubt. Instead, based upon our review of the evidence in this case, it seems apparent, at least to us, that the council members-elect themselves believed that the November 7, 2006 election results, as declared final by the Town Clerk on November 8, 2006, were sufficiently final that they sought to convene the November 12, 2006 meeting and plan a course of action that would be executed “as soon as the election results were certified and the three of us could be sworn in as council members.” See Mr. Mageau affidavit. Indeed, if the council members-elect did not believe that the election results were final, albeit not certified, there would have been little reason for the council members-elect to meet with Mr. Barrett on November 12, 2006 and plan a course of action.

Upon a finding that a complaint brought pursuant to the OMA is meritorious, 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).

Here, we decline to pursue either remedy, although admittedly not without some hesitation. Although the Town Council submits that it relied upon legal counsel for support that the November 12, 2006 meeting was not governed by the OMA, in light of this Department’s past findings, we have concerns that the conduct described in this finding, at the very least, approaches the standard set forth in R.I. Gen. Laws § 42-46-8(d).² Nonetheless, we must acknowledge that the council members-elect were presented with legal advice concerning a legal issue – an issue that we now resolve through this finding. Furthermore, although the November 12, 2006 meeting deprived citizens of being “advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy,” see R.I. Gen. Laws § 42-46-1, in the end, the council members-elect took no action on November 12, 2006 that could be declared null and void.³ Instead, our review reveals that Mr. Barrett was appointed at a

² The council members-elect have asserted that they relied upon legal advice regarding the legality of the November 12, 2006 meeting, nonetheless the council members-elect have not expanded on the advice they received or the rationale. Although we must acknowledge that such advice may be governed by the attorney-client privilege, the OMA ultimately places the responsibility (and liability) for compliance on the members of the public body. See R.I. Gen. Laws § 42-46-14.

³ Although the Town Council did not formally vote to appoint Mr. Barrett at the November 12, 2006 meeting, under the OMA, a “meeting” is defined as “the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws § 42-46-2(a).

November 20, 2006 Town Council meeting. See November 20, 2006 Town Council minutes. For this reason, injunctive relief is not appropriate. This finding shall also serve as notice that future violations consistent with those described in this finding may be considered willful or knowing and this Department may seek civil penalties in Superior Court as authorized under law.

Although this Department will not pursue further action on your behalf in Superior Court, nothing within the OMA prohibits an individual from seeking injunctive or declaratory relief in the Superior Court. You may do so within (90) days of the Attorney General's closing of this 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 your 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,

Michael W. Field
Special Assistant Attorney General

MWF/cc

cc: Peter D. Ruggiero, Esq.
Robert E. Craven, Esq.

Accordingly, the Town Council violated the OMA when its members-elect discussed the appointment of Mr. Barrett as Town Administrator on November 12, 2006.