

April 26, 2007  
OM 07-07

Mr. Clifford Vanover

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

Dear Mr. Vanover:

The investigation into your Open Meetings Act [OMA] complaint against the Charlestown Town Council [Town Council] is complete. By letter dated January 22, 2007 you allege that the Town Council violated the OMA when a quorum of the Town Council met in private and “interviewed and decided to appoint Robert Craven as Charlestown’s new town solicitor.”<sup>1</sup>

After receiving your OMA complaint, this Department sent a letter dated February 1, 2007 to Robert E. Craven, Esq., Charlestown Town Solicitor, seeking a response to your OMA complaint against the Town Council. Our February 1<sup>st</sup> letter asked the Town Council to “kindly provide a substantive response in affidavit form...within ten (10) business days.” Further, we requested the Town Council provide other pertinent documents such as “the agenda and any open and/or closed session minutes to the meeting at issue...”

Upon receiving the complaint, Attorney Craven requested additional time to respond, which this Department allowed. After the additional time to respond lapsed, this Department sent another letter to the Town Solicitor dated March 7, 2007. Because the Town Council had already been given additional time to respond, we notified the Town Council that its “response in the above captioned matter [was] overdue” and should the Town Council not respond by March 21, 2007, “this Department’s investigation will proceed and a finding will be issued with an adverse inference drawn against the Charlestown Town Council. See Allen v. Claims Committee of the Lincoln Town Council, et al., OM 00-22.”

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<sup>1</sup> As evidence of the alleged violation, you enclosed a DVD recording of the January 11, 2007 Town Council meeting.

On the same day, March 7, 2007, this Department received a response, albeit not in affidavit form, from Attorney Craven via fax. Attorney Craven stated:

“Shortly after the November 2006 election James Mageau contacted me by phone and requested a meeting to discuss an OMA complaint filed against him and also Mr. Craig and Mr. Picard. (see *DePatie vs. Charlestown*). We met to discuss the matter and he requested my representation in the matter. He further stated that Mr. Craig and Mr. Picard also wanted representation in the matter. However, in light of the fact that at the time of their meeting in *DePatie* the three men had not yet received council-elect status, they felt that representation by the town solicitor would be inappropriate. During my second meeting with Mr. Mageau, he asked if I would be interested in representing the Town as solicitor in light of the fact that he and Mr. Picard were unhappy with the representation of certain assistant town solicitors. I told him I would be interested.”

“I then contacted Mr. Craig by telephone in regard to the *DePatie* OMA case and met him at a Dunkin Donuts in North Kingstown at a mutually convenient time the following Saturday morning. Mr. Craig and I discussed the facts of the *DePatie* matter and he requested my assistance in representing him in the matter. At that meeting I discussed the solicitor’s appointment with Mr. Craig and he stated he was interested in making a change in solicitors but wanted to keep Peter Ruggiero. Approximately a week or two later I met with Mr. Picard at the South County Commons Coffee Shop after a court session and we discussed the *DePatie* matter. At that meeting Mr. Picard asked questions about the OMA law as it related to the pending complaint and that he was unhappy that Solicitor Rugeiro had answered the complaint against his instruction. He asked me if I would be interested in being the town solicitor and I said I would be.”

“At both the Craig and Picard meetings with me I advised both men that any discussion of appointing a new solicitor could only take place at a meeting of a political party<sup>[2]</sup> or in public due to the fact that both were now officially councilmen elect. Both assured me that they would not engage in a series of ‘phone call meetings.’”

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<sup>2</sup> While this is not the instant issue, this Department has previously opined, “that the convening of members of a political organization may not be used to conduct business which is subject to the jurisdiction, control or advisory power of a unit of municipal or state government.” McCaffrey v. Providence City Council OM 97-18. See also Quinn, et al. v. Providence City Council, OM 06-56.

“Since I have been appointed town solicitor on January 11, 2007, I have discussed this matter with all three councilmen and they have assured me that they never met collectively to discuss my appointment, nor did they engage in a [series] of phone calls to discuss the appointment. Mr. Mageau however did indicate that he told both Mr. Picard and Mr. Craig that he would place my name in nomination before the Council.”

Attorney Craven contends that your OMA complaint should be dismissed because it “alleges an OMA violation by inference with absolutely no fact upon which to draw the inference.”<sup>3</sup> Attorney Craven concludes by stating “I look forward to your response and feel free to contact me at your convenience if I can be of further assistance.”

After reviewing the complaint and the subsequent response by Attorney Craven, this Department requested additional information from the Town Council. Specifically by letter dated March 21, 2007, this Department requested the Town Council provide the following information: 1.) “affidavits from Town Council members Mr. James M. Mageau, Mr. John O. Craig, Jr., and Mr. Bruce W. Picard. This Department requested that the three affidavits include the following: the date(s) and location(s) in which any discussion or interview took place (outside of a public meeting) involving the appointment of a new Town Solicitor, the individual(s) present during any discussion or interview concerning the appointment of a new Town Solicitor, the method and manner of the discussion or interview (i.e., one-on-one conversation between two Council members via telephone), the content of all conversations between [or among] the three Council members regarding the appointment of a new Town Solicitor prior to the January 11<sup>th</sup> appointment of the new Town Solicitor”; 2.) “clarify if the three Council members discussed the appointment of the new Town Solicitor prior to the election results being officially certified.” (Underline in original). This Department gave the Town Council an additional ten (10) business days to respond to this request, on or by April 4, 2007. To date, this Department is without a response.<sup>4</sup> Having provided ample opportunity (and fair warning) to respond, we now issue our finding based upon the record.<sup>5</sup>

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<sup>3</sup> We reiterate that R.I. Gen. Laws § 42-46-14 states, “the burden shall be on the public body to demonstrate that the meeting in dispute was properly closed pursuant to, or otherwise exempt from the terms of this chapter.”

<sup>4</sup> The undersigned spoke with Attorney Craven on April 9, 2007 concerning a number of different issues unrelated to the instant OMA complaint. However, during this conversation, the undersigned informed Attorney Craven that the Town Council’s response in the instant OMA complaint was overdue and that this Department intended to proceed without a substantive response from the Town Council. Although Attorney Craven expressed concern over this Department’s intention to proceed without a substantive response from the Town Council, he made no assurances that the Town Council would respond by a set date, and, as of the date of this finding, this Department still has not received a response.

As a starting point, in order for the provisions of the OMA to apply a “quorum” of a “public body” must convene for a “meeting.” See Fischer v. Zoning Board for the Town of Charlestown, 723 A.2d 294 (R.I. 1999). 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). A “quorum” is defined as “a simple majority of the membership of a public body.” R.I. Gen. Laws § 42-46-2(d).

Although the above definitions are seemingly straightforward, it is noteworthy that a quorum may be created, and a meeting “convened,” by unconventional means. In particular, this Department has previously recognized the “rolling” or “walking” quorum, where a majority of the members of a public body attain a quorum by a series of one-on-one conversations or interactions. See Mudge v. North Kingstown School Committee, OM 05-05 (School Committee violated the OMA when a vote was taken through use of e-mail communications); Pare v. Western Coventry Fire District, OM 01-06 (District violated the OMA when members conducted a meeting through a series of telephone conversations); Allen v. Claims Committee of the Lincoln Town Council or Town Council, OM 00-22 (Town Council violated the OMA through a series of telephone discussions); International Brotherhood of Police Officers v. Barrington Town Council, OM 96-01 (the OMA prohibited communication by facsimile to obtain the endorsement of Council members on a newspaper editorial); D’Andrea v. Newport School Committee, OM 98-11 (series of telephone conversations violated the OMA).

Here, we acknowledge that the individual meetings Mr. Mageau, Mr. Picard and Mr. Craig had with Attorney Craven were not a violation of the OMA, and in fact, did not even implicate the OMA. See Fischer supra. Nonetheless, upon review of the evidence before us, we have significant concerns as to how the three Council members arrived at the same understanding with respect to the appointment of a new town solicitor without engaging in a collective discussion outside of a public meeting. The Town Council did nothing to minimize these concerns when it did not respond to our March 21, 2007 letter. But even leaving to the side for the time being how (and if) the individual Town Council members arrived at the conclusion that each wanted Attorney Craven to be the solicitor, the evidence conclusively establishes that the three Town Council members did either collectively or through a series of communications discuss a matter over which the public body had supervision, control, jurisdiction, or advisory power. Specifically, in Attorney Craven’s response, he relays that Mr. Mageau informed him that Mr. Mageau “told both Mr. Picard and Mr. Craig that he would place my name in nomination before

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<sup>5</sup> Because the OMA provides time limits within which the Department of Attorney General may file a complaint in Superior Court alleging violations of the OMA by a public body, See R.I. Gen. Laws § 42-46-8(b), this Department must enforce the deadlines it gives to public bodies. If we did not, public bodies would simply be able to run out the clock.

the Council.” Based upon this candid admission, as well as a lack of a response to our March 21, 2007 letter, we must conclude that Mr. Mageau, Mr. Picard and Mr. Craig met or otherwise discussed outside of a properly noticed public meeting the appointment or nomination of a new town solicitor.<sup>6</sup> Therefore, based on the facts presented to this Department, we must conclude that the Charlestown Town Council violated the OMA in the instant case.

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 the instant case injunctive relief would not be appropriate. Although the discussions or series of discussions 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 took no action that could be declared null and void.<sup>7</sup> Instead, our review reveals that Attorney Craven was appointed at a January 11, 2007 Town Council meeting. Therefore, injunctive relief is not a proper remedy in this case.

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<sup>6</sup> One public body member communicating his/her intention to take certain action at the next meeting to other members of that public body does not always, by itself, violate the OMA so long as there is no collective discussion. See McFadden v. Exeter/West Greenwich Regional School Committee, OM 06-49. However, in this instance, because the Town Council was given ample opportunity to respond to our March 21, 2007 request for more information, but has not, we must conclude that a quorum of the Town Council collectively discussed the appointment or nomination of the new town solicitor outside of a public meeting. Clearly, based upon the evidence that has been presented, the Town Council members did discuss the nomination of a new solicitor, and as we have warned, the failure to respond to our request for more information leaves us with no other choice but to make an adverse inference. See Allen v. Claims Committee of the Lincoln Town Council, et al., OM 00-22. Further, as articulated in footnote 5, this Department is cognizant of the time limits within which the Department of Attorney General may file a complaint in Superior Court.

<sup>7</sup> Although the Town Council may not have formally voted to appoint Attorney Craven prior to the January 11, 2007 meeting, under the OMA, because 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), the Town Council violated the OMA when its members discussed the appointment or nomination of Attorney Craven as Town Solicitor outside of a public meeting.

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However, having concluded that the Charlestown Town Council violated the OMA, we must determine whether this violation should be considered a willful or knowing violation. Because a response to our March 21, 2007 letter remains outstanding, we will reserve our judgment as to whether this instant violation was willful or knowing. Therefore, the Town Council should address whether the instant violation was a willful or knowing violation under R.I. Gen. Laws § 42-46-8(d). At a minimum, the Town Council should provide affidavits from Town Council members as requested in this Department's March 21<sup>st</sup> letter. In addition to the above, this Department seeks from the three (3) Town Council members discussed in this finding information concerning the date and the number of times Attorney Craven's name was discussed with respect to him being nominated town solicitor, the subject-matter of those conversations and how long each conversation with Mr. Craig and Mr. Picard took place. In addition, the Town Council should feel free to present any mitigating factors as to why this violation should not be considered willful or knowing. This Department requests that the Town Council kindly respond to this request within ten (10) business days. Failure by the Town Council to respond within the allotted time will result in this Department making a decision based upon the evidence presented, and may result in this Department concluding that the instant violation was a willful or knowing violation.

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

Very Truly Yours,

Adam J. Sholes  
Special Assistant Attorney General  
Extension 2219

AJS/pl

Cc: Robert E. Craven, Esq.