

June 6, 2007
OM 07-09

Ms. Harriet A. Allen

Ms. Katherine H. Waterman

Re: Allen and Waterman v. Charlestown Town Council (2)

Dear Ms. Allen and Ms. Waterman:

The investigation into your Open Meetings Act [OMA] complaint(s) against the Charlestown Town Council [Town Council], of which you are members¹, is complete. By individual letters dated January 5, 2007, you each allege that the Town Council violated R.I. Gen. Laws § 42-46-6(b) when it failed to adequately advertise the matters addressed in executive session held at the January 4, 2007 Town Council meeting. Specifically, you contend that the agenda for the meeting, which listed the executive session topic as “RIGL § 42-46-4 & 5(a)(2) Pending Litigation and Personnel,” did not adequately inform the public of the nature of the business to be discussed during executive session on that evening.

You provided this office the following information based upon your complaint, the minutes, the agenda and a cassette tape:

On January 4, 2007, during a regularly scheduled Town Council meeting, Councilors Mageau, Craig and Picard entered into executive session to discuss (as Councilor Mageau described it in open session at the time) a “personnel incident.” This occurred after a discussion had ensued between the council members in open session concerning whether or not the matter was appropriate for executive session. In short, Councilors Allen and Waterman in particular, expressed concern that the only “personnel” matter planned for the meeting would be the work hours of the then-Town Solicitor, Mr. Ruggiero, to be addressed in open session, and that any other “unspecified and undisclosed matter” may not be appropriate for executive session and/or may not have been properly advertised in

¹ Ms. Waterman is the President of the Town Council and Ms. Allen is Vice-President of the Town Council.

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advance.² For this reason, it appears both complainants abstained from participating in the executive session.³ When the meeting reconvened in open session, Ms. Waterman and Ms. Allen likewise abstained from voting when a motion passed to seal the minutes of that closed meeting. The remainder of the meeting, held in open session, primarily consisted of updates from then-Solicitor Ruggiero on his work hours and a briefing of the cases he was working on. Additionally, a discussion ensued among the Councilors regarding the appointment and/or review of the solicitors, and a January 11, 2007 date was set for a special meeting on the matter.

In response to your complaint, we received a substantive response from Robert E. Craven, Solicitor for the Town of Charlestown. He denies that the agenda was inaccurate and states that “a review of the executive session minutes indicates that the agenda notice was accurate and the meeting was conducted in accordance with the OMA.” Additionally, he states that “solicitor work hours and pending cases were discussed [in executive session] but no decision or votes were taken. A discussion was deferred to a January 11, 2007 Special Town Council Meeting which was held in open session.”

Attorney Craven initially provided this office the open session minutes and, at a later date, the sealed executive session minutes of the January 4th meeting.⁴ Based on our review of all minutes from the meeting, we believe Attorney Craven’s representations – that solicitor work hours and pending cases were discussed in executive session -- to be in error.⁵ Contrarily, we find that then-Solicitor Ruggiero updated the Council on his

² Both Councilor Waterman and Councilor Allen informed this office that prior to the January 4th meeting, each individually contacted Solicitor Ruggiero to inquire about the “Personnel” matter listed on the agenda. Each understood, based on their conversations with Attorney Ruggiero, that the agenda matter pertained only to a discussion of his work hours, and that he was prepared to and preferred to remain in open session during said discussion. Councilor Allen indicated that she also contacted the Town Clerk and Town Administrator, both of whom confirmed their understanding that the only personnel matter planned was to discuss solicitor hours.

³ In her complaint, and in response to a comment made in open session by Mr. Mageau that the executive session pertained to an “Incident,” Councilor Waterman wrote, “Since there was nothing on the agenda in reference to an incident, nor any individual, Ms. Allen and I both refused to go into Executive Session with the other councilors.”

⁴ Because this office respects the confidentiality of the sealed minutes, we conducted an *in camera* review of the executive session minutes and will not disclose information about what occurred in executive session.

⁵ We note that Attorney Craven was not present for any portions of this meeting, nor was he Solicitor at the time of the meeting, and that he may have based his representations on

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work hours and the town's pending cases in open session immediately following the executive session. In fact, the open session and executive session minutes confirm this conclusion. The executive session addressed an unrelated personnel matter. The three Council members present in executive session took no formal action or votes.

The OMA mandates that all meetings of all public bodies be held in open session, unless otherwise exempt. R.I. Gen. Laws § 42-46-3. Among the enumerated exceptions is R.I. Gen. Laws § 42-46-5(a)(1) (often referred to as the "Personnel" exception), which permits a public body to convene into executive session for "[a]ny discussions of the job performance, character, or physical or mental health of a person or persons...[.]" and R.I. Gen. Laws § 42-46-5(a)(2) (the so-called "Litigation" exception), for "[s]essions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation."

Additionally, the OMA requires that notice of all meetings be given "a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed." R.I. Gen. Laws § 42-46-6(b). As such, mention of all items to be addressed at a meeting, including the closed portions of the meeting, must be referenced in the advance notice provided to the public. However, the level of specificity that must be detailed for each item on the notice/agenda greatly depends on the facts and circumstances surrounding each meeting or item. See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784 (R.I. 2005); see also Brackett v. Coventry Town Council, OM 06-65; Mudge v. North Kingstown School Committee, OM 06-34; Langseth v. Rhode Island Airport Corporation, OM 06-46.

This Department has previously addressed the issue of sufficiency of notice for matters scheduled for executive session. First, as a general rule, as relates to matters announced for executive session, this office has opined 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." See Graziano v. R.I. Lottery Commission, OM 99-06 (discussing the procedure of open call prior to convening into executive session). If the matter is not yet public, the public body may indicate only the nature of the matter, such as "litigation" or "personnel." Id.; see also Blais v. Burrillville Town Council, OM 07-05; Cole et al. v. Westerly Town Council, OM 99-18, n.1.

In the instant case, we find that the matter addressed in private was appropriate for executive session. This conclusion is based upon our understanding of the topic of discussion held in executive session and the summary provided by the sealed executive

an initial erroneous belief that the open meeting minutes were the executive session minutes.

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minutes. Nevertheless, we find that the executive session was inadequately advertised. Specifically, the agenda for the January 4th meeting states “2. The Town Council may vote to move into Executive Session pursuant to RIGL § 42-46-4 & 5(a)(2) Pending Litigation and Personnel.” Although it appears that the subject-matter of the executive session was not otherwise publicly known, and therefore, pursuant to Graziano would properly be advertised by reference to only the proper subsection of R.I. Gen. Laws § 42-46-5(a)(1)-(10), here the Town Council improperly cited to such a subsection. For instance, although the executive session did concern a “Personnel” matter as stated on the notice, the notice did not reference R.I. Gen. Laws § 42-46-5(a)(1), the subsection pertaining to personnel matters. See R.I. Gen. Laws § 42-46-4 (“The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting.” (Emphasis added)). Similarly, although the Town Council did cite to R.I. Gen. Laws § 42-46-5(a)(2), the subsection pertaining to litigation matters, the executive session did not concern litigation. See Nielson v. Charlestown Town Council, OM 99-23 (recognizing that “a rule permitting a public body to discuss legal strategy in executive session in order to prevent threatened litigation has the potential to encompass almost any discussion, and therefore possibly circumvent the OMA.”).

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, we find neither remedy to be appropriate and conclude that court action is unwarranted. In particular, we acknowledge that the Council took no action in executive session, and therefore, injunctive relief would be inapplicable. On the question of whether or not this violation was willful or knowing, we recognize that in this particular case the subject matter was appropriate for executive session and we recognize that the agenda did reference “Personnel.” We do not believe a fine is appropriate in this case. However, we caution the Charlestown Town Council members that the actions taken on January 4, 2007 violated the OMA and that this finding may serve as notice that future similar violations may be considered willful and knowing.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainants may do so 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. Please be advised that we are closing our file as of the date of this letter.

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

Very Truly Yours,

Christy Hetherington
Special Assistant Attorney General
Extension 2425

CH/pl

cc: Robert E. Craven, Esq.