State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

October 7, 2019
OM 19-26

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RE: Ahlquist v. Central Falls Detention Facility Corporation

Dear Mr. Ahlquist and Attorney McBurney:

We have completed our investigation into the Open Meetings Act ("OMA") complaint filed by Mr. Steve Ahlquist ("Complainant" or "Mr. Ahlquist"), against the Central Falls Detention Facility Corporation ("Corporation"). For the reasons set forth herein, we find that the Corporation violated the OMA.

Background

The Corporation operates the Donald W. Wyatt Detention Facility ("Wyatt") located in Central Falls, Rhode Island. The Complainant alleges that the Corporation violated the OMA in connection with an emergency meeting of the Corporation Board of Directors ("Board") on April 14, 2019. Before delving into the substantive arguments, it is necessary to set forth the background gleaned from the undisputed facts.

On or about April 10, 2019, a federal court action was filed against several defendants, including the Corporation and the Board, seeking a temporary restraining order and appointment of a receiver. All parties were directed to appear before United States District Court Chief Judge William E. Smith at 3:00 p.m. on April 11, 2019, at which time two subsequent conferences were scheduled before Magistrate Judge Patricia Sullivan on April 15, 2019 and April 18, 2019, respectively. Although we have not been provided with detailed information regarding the purpose of the follow-up court conferences scheduled for April 15 and April 18, we reasonably infer that the federal court scheduled the conferences to address issues pertaining to the federal action, which involved a request for a temporary restraining order.

At 1:26 p.m. on Friday, April 12, 2019, the Corporation posted public notice of an emergency meeting of the Board scheduled for 9:00 a.m. on Sunday, April 14, 2019. The agenda for the April 14, 2019 meeting provided to this Office contained, in pertinent part, the following item (reproduced below in its entirety with formatting slightly altered):

> "3. Executive session pursuant to R.I.G.L. § 42-46-5 for the following purpose:
> A. to discuss litigation pursuant to R.I.G.L. § 42-46-5(a)(2)"

At the April 14 meeting, the Board voted to "stay the suspension of the agreement between I.C.E. and the Central Falls Detention Facility Corporation that was voted on and approved at the Board meeting held on April 5, 2019."

Legal Arguments

The Complainant alleges that "this meeting was a complete surprise" and that he did not "see how having this meeting five hours later or better yet, on Monday morning instead of Sunday, with the public and reporters in attendance, would have hurt the meeting in any way."

Additionally, the Complainant alleges that the agenda item "to discuss litigation" "was not sufficient under the law" and that voting to stay the suspension of the Corporation's contract with I.C.E. violated the OMA because the agenda "simply spoke of discussing the litigation and gave no indication that they would be taking important votes." The Complainant also subsequently submitted an additional allegation that the agenda item should have referenced the specific court case that would be discussed.

The Corporation submitted a substantive response arguing that the April 14, 2019 meeting notice was "posted as soon as practicable, was necessary to address an unexpected occurrence, was called to preserve the autonomy of the [Corporation], and to address a directive from the Federal Court."

The Corporation also argued that the agenda was sufficient because the vote taken at the meeting was in response to developments discussed during the closed session of the meeting and related to the litigation that was the subject of the meeting. The Corporation contends that the "agenda item was sufficient to capture the potential for this vote." The Corporation argues that the Complainant lacks standing to assert his supplemental allegation that the agenda did not identify the specific litigation at issue because the Complainant stated that he was "informed" about this alleged violation and has not alleged facts to establish that he was aggrieved. The Corporation also notes that the Complainant acknowledged that "we all may have been able to figure out what 'litigation' the notice was referring to."

The Complainant did not submit a rebuttal. In Complainant's response to this Office's request for supplemental information dated May 9, 2019, the Complainant stated:

> "I heard about the April 14 meeting on the Monday after it took place. I did not attend. I did not attend because I did not know it was happening, and even if I knew,

> on Sunday morning I am usually helping my wife with here church [sic], though I certainly would have made an exception and attended if I needed to."

With that background in place, we turn to the relevant law and our findings.

Relevant Law and Findings

When we examine an OMA complaint, our authority is to determine whether a violation of the OMA has occurred. *See* R.I. Gen. Laws § 42-46-8. In doing so, we must begin with the plain language of the OMA and relevant caselaw interpreting this statute.

Here, we first examine whether the emergency meeting violated the OMA and then whether the agenda item for the emergency meeting provided sufficient notice.

1. Emergency Meeting

The OMA requires public bodies to provide written notice of their regularly scheduled meetings at the start of each calendar year, and to provide supplemental written notice within 48 hours of the meeting, excluding weekends and state holidays. *See* R.I. Gen. Laws § 42-46-6(a)-(b).

The OMA permits public bodies to forego the usual notice requirements and conduct emergency meetings subject to certain strict requirements. Pursuant to R.I. Gen. Laws § 42-46-6(c), an emergency meeting may occur:

> upon an affirmative vote of the majority of the members of the body when the meeting is deemed necessary to address an unexpected occurrence that requires immediate action to protect the public. If an emergency meeting is called, a meeting notice and agenda shall be posted as soon as practicable and shall be electronically filed with the secretary of state pursuant to subsection (f) and, upon meeting, the public body shall state for the record and minutes why the matter must be addressed in less than forty-eight (48) hours in accordance with subsection (b) of this section and only discuss the issue or issues that created the need for an emergency meeting. Nothing contained herein shall be used in the circumvention of the spirit and requirements of this chapter.

Here, the undisputed evidence is that a federal court action was instituted on Wednesday, April 10, 2019 against several entities, including the Corporation and the Board, requesting a temporary restraining order. It is undisputed that Chief Judge Smith ordered the parties to appear at a chambers conference on Thursday, April 11th, which lasted from approximately 3:00 p.m. to 5:00 p.m. It is also undisputed that during the April 11th conference, the Court scheduled another conference for April 15th. The Corporation posted notice that the Board would have an emergency meeting on the afternoon of April 12, which was less than twenty-four (24) hours after the April 11th court conference and approximately forty-four (44) hours before the April 14th emergency meeting. The draft minutes from the April 14th meeting indicate that posting the notice at 1:26 p.m. on April 12th "was the earliest possible time that this notice could be posted due to the necessity to consult legal counsel."

Based on the undisputed evidence, we conclude that the Corporation did not violate the OMA by the Board holding an emergency meeting on April 14, 2019. The Complainant did not dispute the Corporation's contention that the Board needed to meet prior to the April 15, 2019 conference with the court. We were not presented with evidence that it was unreasonable for the Board to need to meet prior to the April 15th court conference, especially given that the federal action involved the potential appointment of a receiver and a request for a temporary restraining order. Given that the Monday, April 15, conference was scheduled during the Thursday, April 11 court conference, which lasted until 5:00 p.m., it would not have been possible to provide the normal 48-hour notice (excluding weekends and holidays, *see* R.I. Gen. Laws § 42-46-6(b)) and have a meeting prior to the April 15th court conference. Given these circumstances, we do not find evidence that holding an emergency meeting was improper.

The Complainant alleges that the emergency meeting could have been held later in the day on Sunday or on Monday morning, which would have provided more time for the public to be informed about the meeting. The Complainant did not dispute the Corporation's contention that there were limited times during which the Board could meet prior to the Monday court conference and that it was necessary for the Board to meet prior to the conference to discuss important issues related to the Corporation's autonomy and addressing a directive from the federal court. Although it is always best to provide as much advanced notice as possible, we do not find it unreasonable for the Board to meet on the morning of the day before the next-scheduled court conference, in order to give itself time to decide and implement a course of action related to the litigation, rather than waiting to meet later in the day on Sunday or on the same day as the court conference. Both of these options risked being unprepared for the Court's conference the following day.

Based on the evidence presented, we also conclude that the Corporation did not fail to post notice of the emergency meeting as soon as reasonably practicable – within half a working day following its meeting with Chief Judge Smith, giving the public approximately forty-four (44) hours of advance notice. The Complainant did not dispute the contention recorded in the Board's meeting minutes that the notice was posted as soon as practicable given the need to consult with counsel concerning what developed during the prior day's court conference. We conclude that taking approximately half a business day to consult counsel and to schedule and post notice of the emergency meeting did not violate the OMA under the circumstances. Additionally, rather than scheduling the meeting for Friday or Saturday, the Corporation scheduled the meeting for Sunday, April 14th, which provided a longer notice period.

2. Content of Agenda

Now we turn to the Complainant's allegation that the meeting agenda did not adequately provide "a statement specifying the nature of the business to be discussed." R.I. Gen. Laws § 42-46-6(b). [1]

[1] The Corporation argued that Complainant lacked standing to raise this issue because he was not aggrieved and did not allege that he even viewed the notice. *See* R.I. Gen. Laws § 42-46-8(a). Complainant's admission that he did not know about the meeting until after it occurred may give

The OMA requires the "public body to provide fair notice to the public under the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon." *Anolik v. Zoning Board of Review of the City of Newport*, 64 A.3d 1171, 1173 (R.I. 2013). In *Tanner v. Town of East Greenwich*, the Rhode Island Supreme Court held that an agenda item was insufficient because it did not inform the public that an item was going to be voted upon. 880 A.2d 784, 797-98 (R.I. 2005).

Here, the pertinent agenda item stated "discuss litigation pursuant to R.I.G.L. § 42-46-5(a)(2)." The Corporation does not dispute that in addition to discussing the litigation, the Board also took *a vote* to stay the suspension of a contract related to the litigation. Based on the undisputed evidence, we find that the agenda item did not adequately inform the public that any votes would be taken on this item.

The Complainant also contended that the agenda item was insufficient because it did not cite the specific litigation. It is undisputed that the litigation discussed at the emergency meeting was public knowledge. Thus, the agenda item should have, at the very least, cited the name of the case to be discussed. *See Graziano v. Rhode Island Lottery Commission*, OM 99-06. The Corporation provided no substantive argument on this point, only asserting that the agenda item was sufficient because the Complainant indicated "we may have been able to figure out what 'litigation' the notice was referring to." Even if the public may be able to surmise the topic being discussed, agenda items still must provide sufficient notice.

Based on the totality of the circumstances, and consistent with the Rhode Island Supreme Court's precedent, we find that the agenda item cited by the Corporation did not sufficiently specify the nature of the business to be discussed and therefore the Corporation violated the OMA. *See* R.I. Gen. Laws § 42-46-6(b).

Conclusion

The OMA provides that the Office of the Attorney General may institute an action in Superior Court for violations of the OMA on behalf of a complainant or the public interest. *See* R.I. Gen. Laws § 42-46-8(a), (e). The Superior Court may issue injunctive relief and declare null and void any actions of the public body found to be in violation of the OMA. *See* R.I. Gen. Laws § 42-46-8(d). Additionally, the Superior Court may impose fines up to $5,000 against a public body found to have committed a willful or knowing violation of the OMA. *Id.* Nothing within the OMA prohibits an individual from retaining private counsel for the purpose of filing a complaint within the time specified in the OMA. *See* R.I. Gen. Laws § 42-46-8 (b).

This Office reviewed an Order entered by Chief Judge William E. Smith on April 26, 2019 in case number 1:19-cv-00182-WES-PAS, which ordered the Board to, *inter alia*, rescind the April 14th

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some credence to the Corporation's argument. Nonetheless, the Corporation did not assert lack of standing with regard to the other topics raised in the Complaint. For the sake of completeness and because this Office has authority to initiate a complaint on behalf of the public interest, *see* R.I. Gen. Laws § 42-46-8(e), we proceed to address this issue.

vote "staying for 30 days the aforesaid April 5, 2019, vote suspending the ICE Addendum." The Corporation represented to this Office that the Board complied with that Order. The Complainant did not dispute that the vote in question has been rescinded. As such, injunctive relief is not appropriate in this case because the vote taken at the April 14, 2019 meeting has already been declared null and void. The Complainant did not identify any other action taken at that meeting.

We also do not find evidence of a willful or knowing violation. The Corporation made the uncontested statement that the vote was the result of developments that occurred during the closed session portion of the emergency meeting. We recognize that the litigation presented a dynamic situation and it may have been difficult to fully anticipate what would be discussed regarding the litigation and what votes may be necessary. Additionally, even though the notice did not specify the litigation to be discussed, even the Complainant acknowledged that "we all may have been able to figure out what 'litigation' the notice was referring to." Although these circumstances do not excuse a violation, we find no evidence of an intent to provide inadequate notice.

Nonetheless, we are mindful that this is now the second time in the last several months the Corporation has been found to have violated the OMA by failing to provide sufficient notice in an agenda item. *See City of Central Falls v. Central Falls Detention Facility Corporation*, OM19-03. In *City of Central Falls*, we held that the Corporation violated the OMA because "the bare statement 'Amendment to Forbearance Agreement' was insufficient to provide notice that the Board would be voting to approve an agreement that would provide a $1.5 million loan to the Corporation and require the Corporation to assist with evaluating and sharing information with entities that may wish to invest in or buy the Corporation."

This Office released its decision in *City of Central Falls* by sending it to legal counsel via e-mail on Friday, April 12, 2019 at 12:06 p.m., which was the same day the Corporation posted the agenda for the meeting that is the subject of this current decision at 1:26 p.m. However, we are also mindful that the Corporation was embroiled in active litigation and that the events described in this finding quickly developed over a short period of time, including over a weekend. Within a matter of five (5) days, the Corporation was sued, had a lengthy court conference, received this Office's finding in *City of Central Falls* through its legal counsel (on April 12, 2019 at 12:06 p.m.), posted notice of the Sunday, April 14, 2019 emergency meeting (on April 12, 2019 at 1:26 p.m.), and held the emergency meeting. This Office's finding in *City of Central Falls* was issued to the parties (through the Corporation's legal counsel) less than two hours before the Corporation posted the agenda for the April 14, 2019 emergency meeting and it is unclear whether the Corporation had the benefit of reviewing this Office's decision in OM 19-03 before posting the agenda. While in the typical circumstance, a public body that receives notice of a deficient agenda prior to convening the meeting would be expected to cancel the improperly posted meeting, because of the undisputed emergency nature of the April 14, 2019 meeting, this was not a typical circumstance and for the reasons already explained, it would have defeated the emergency purpose of the meeting to cancel and postpone it. Moreover, while the Corporation could have and should have amended its agenda for the April 14, 2019 meeting, considering the totality of the circumstances, we do not find that this failure was willful or knowing under these circumstances. *See* R.I. Gen. Laws § 42-46-6(b) ("Such additional items shall be for information purposes only and may not be

voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public"). We also note that the vote itself occurred in open session and there is no indication that the possibility of a vote was deliberately not disclosed, as opposed to being something that developed as a result of the executive session discussion that may not have been anticipated. Although we do not find evidence of a knowing or willful violation in this case, this finding serves as notice to the Corporation that the conduct discussed herein violates the OMA and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court as specified in the OMA. The Complainant may 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. We consider this matter closed as of the date of this decision.

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

Sincerely,

Peter F. Neronha
Attorney General

By: */s/ Kayla E. O'Rourke*
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Special Assistant Attorney General

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