State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

September 23, 2014
OM 14-31

Ms. Deborah Carney
151 Auburn Drive
Charlestown, Rhode Island 02813
carneygdj@aol.com

Re: Carney v. Charlestown Planning Commission

Dear Mr. Carney:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Charlestown Planning Commission ("Commission") is complete. By email correspondence dated June 8, 2014, you allege the Commission violated the OMA during its May 7, 2014 meeting when it took a secret "preliminary" paper vote and when the minutes failed to include a record by individual members of any votes taken regarding this "preliminary" vote or the Commission's subsequent oral vote.

In response to your complaint, we have received a substantive response from the Commission's legal counsel, Peter D. Ruggiero, Esquire, who also provided an affidavit from the Charlestown Town Planner, Ms. Jane Weidman. Attorney Ruggiero states, in pertinent part:

> "[a]t their May 7, 2014 meeting, the Planning Commission met in open session to interview the two finalist consultant candidates who had sought to be awarded a contract to re-write the Town's comprehensive community plan. This open meeting, which was broadcast by live video, involved over two and one-half hours for the consultant interviews and discussions by the Commissioners regarding the merits of each consultant. * * * At the conclusion of their discussions, the Commissioners decided to take a paper poll to determine whether a consensus existed among the Commissioners for one of the finalist candidates. * * * The video of the meeting clearly evidences that the Chair stated on three occasions that the poll was not intended to be or constitute a formal vote or decision but was being used to determine whether one candidate was favored. * * * The poll result indicated a preference for one candidate – Mason and Associates. At [this] juncture, a motion was made by Commissioner Baker to recommend Mason and Associates as the preferred

> consultant to the Town Council for award of the contract to re-write the Town's comprehensive community plan. That motion was seconded by Commissioner Dr. O'Connor. * * * The Planning Commission held a discussion following the motion and deliberated in open session as to the merits of the preferred consultant. At the conclusion of this deliberation, the Planning Commission voted on the motion. The result of the vote was four in favor and one opposed to recommend Mason and Associates as the preferred consultant for selection by the Town Council. The video clearly shows the vote and dissent by Commissioner Herstein. In fact, Commissioner Herstein provided a brief explanation for his dissent and made suggestions on the term of the letter transmitting the recommendation to the Town Council. * * * The Planning Commission minutes indicate the result of the vote as 4 to 1 – but do not indicate how each member voted. The minutes mistakenly omitted the vote by each member which was clearly made in open session. As such, the minutes do not accurately reflect the action taken on the vote. Upon this discovery, I directed the Town Planner to submit revised minutes to the Planning Commission for their adoption to comport with the video record which properly documents how each member voted on the advisory recommendation.
>
> * * *
>
> It is clear that the Chair states on several occasions that the poll <u>was not</u> intended as a vote. (Emphasis in original). The Chair stated that a formal vote would be necessary after the poll to properly act on this recommendation. * * * Therefore, the poll was not intended or meant to constitute a vote. If the poll in this case does not constitute a vote, then no OMA violation occurred. Hypothetically, if the poll is deemed to constitute a vote, the Commission nevertheless acted continuously in open session, disclosed the poll results in open session[ ], made a motion to recommend a particular consultant in open session, cast their vote by member and recorded their votes in open session."

Ms. Weidman states, in pertinent part:

> "a paper poll, one from each Commissioner in attendance indicating their consultant preference, was taken by the Planning Commission to determine whether a consensus existed concerning a preferred consultant. At numerous times during the discussion prior to the poll and even after the poll, the Chair indicated that this action was not a 'vote' but a method to gauge consultant preference.
>
> It was announced that Mason & Associates was the preferred vendor from the poll. I submitted a draft motion in blank form to recommend the preferred consultant to the Town Council for selection. Eventually, Commissioner Baker made a motion to recommend Mason & Associates as the preferred

> consultant for selection to the Town Council. This motion was seconded by Commissioner Dr. O'Connor. A discussion was held that resulted in a vote of 4 in favor and 1 opposed."

We acknowledge your reply dated June 27, 2014.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, 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 is limited to determining whether the Commission violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The OMA explains 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.

This Department addressed the issue of secret ballot votes in In Re: Health Services Council, ADV OM 99-12. In this advisory opinion, the Department of Health sought our input concerning whether the Health Services Council's By-Laws violated the OMA when the By-Laws mandated that elections for board officers shall be conducted by secret written ballot. After observing that the OMA does not expressly address secret balloting in open session, we reviewed the OMA as a whole in order to "glean the intent and purpose of the Legislature." Id. See also RIH Medical Foundation, Inc. v. Nolan, 723 A.2d 1123, 1126 (R.I. 1999). In doing so, we observed that:

> "R.I. Gen. Laws § 42-46-7(b) mandates that within two (2) weeks of a vote (in open or closed session), a record of all votes taken, listing how each member voted on each issue, must be made available to the public at the office of the public body. Moreover, the OMA requires that all votes cast in an executive session 'shall be disclosed once the session is reopened.' R.I. Gen. Laws § 42-46-4. Despite these provisions mandating disclosure of votes within certain time frames, the OMA does not contemplate a time frame for disclosing votes that are cast in open session. The absence of such a provision leads us to the inescapable conclusion that the General Assembly intended that all votes that are cast in open session be disclosed to the public as they are cast, thereby precluding a secret ballot vote.
>
> In addition, if this Department were to construe the OMA to permit secret ballot voting during open session meetings, this would create an anomalous result whereby votes cast in executive session would 'be disclosed once the session is reopened,' R.I. Gen. Laws § 42-46-4, yet votes cast in open session via a secret ballot, would not be subject to disclosure for possibly two (2) weeks. See R.I.

> Gen. Laws § 42-46-7(b). This, we believe, would create an absurd result not intended by the General Assembly."

In Re: Health Services Council, ADV OM 99-12. See also Carney v. Charlestown Town Council, OM 13-19.

Counsel for the Commission states that "the Commissioners decided to take a paper poll to determine whether a consensus existed among the Commissioners for one of the finalist candidates," and for this reason, a "vote" did not occur. Because the terms "vote," "decision" and "consensus" are not defined within the OMA, we look at outside sources for guidance. According to the Miriam-Webster's Online Dictionary, "decision" is defined as "the act or process of deciding; a determination arrived at after consideration." "Consensus" is defined as "general agreement; the judgment arrived at by most of those concerned." Lastly, "vote" is defined as "the collective opinion or verdict of a body of persons expressed by voting."

Because both a "consensus" and a "vote" fall under the broader umbrella of decision-making, and because it is clear that the purpose of the OMA is to allow citizens the opportunity to become aware of the decisions made by public body members, we conclude that regardless of how the action is described, a vote was taken by the Commission during its May 7, 2014 meeting. See Clarke v. North Cumberland Fire District, OM 10-21. We conclude that the Commission's "consensus" was tantamount to a "vote" under the OMA. See Booth Newspapers, Inc. v. University of Michigan Board of Regents, 507 N.W.2d 422 (MI 1993). To conclude otherwise would circumvent the OMA and deny the public the ability to know how each member of a public body voted on a particular matter. See R.I. Gen. Laws §§ 42-46-7(a)(3), 42-46-7(b). See Carlin v. East Providence School Committee, OM 09-12 (recognizing that a "consensus" was a "vote" and should be treated accordingly under the OMA).

Here, after reviewing the May 7, 2014 meeting minutes, as well as the submitted evidence, we agree that an OMA violation occurred. It is undisputed that at the May 7, 2014 Commission meeting, the Commission conducted a secret ballot vote. Accordingly, for the reasons discussed in In Re: Health Services Council, voting by secret ballot in open session violates the OMA, and we therefore find that the Commission violated the OMA.

You further allege the minutes of the May 7, 2014 meeting failed to include a record by individual members of any vote taken, either for the Commission's "preliminary" secret ballot vote, or for the Commission's subsequent oral vote. The OMA requires that all public bodies "keep written minutes of all their meetings" and that these written minutes include, among other things, "[a] record by individual members of any vote taken[.]" R.I. Gen. Laws § 42-46-7(a)(3). In its response to your complaint, the Commission admitted that the meeting minutes of May 7, 2014 did not contain a listing of how each individual member voted on the consultant selection recommendation.

Here, we also find the Commission violated the OMA. With respect to the secret ballot vote, no evidence has been presented that the Commission's minutes contain "[a] record by individual members of any vote taken." R.I. Gen. Laws § 42-46-7(a)(3). Our review of the minutes finds

no record by individual member of any vote taken. Moreover, although the Commission has since amended its open session minutes to include "[a] record by individual members of any vote taken," id., it is undisputed that the Commission's original minutes did not contain this record. While the Commission argues that a record of this vote by individual member was available by viewing the video recording of the May 7, 2014 meeting, R.I. Gen. Laws § 42-46-7 requires the "record by individual members of any vote taken" to be recorded in a public body's "written minutes." R.I. Gen. Laws § 42-46-7(a).

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).

Here, you contend a willful and knowing violation occurred because during the May 7, 2014 Commission meeting, a Town Council member was present serving as the Town Council liaison during the meeting. You assert that this individual was on the Town Council when this Department found that the Town Council violated the OMA when it voted using a secret ballot vote. See Carney v. Charlestown Town Council, OM 13-19. You indicated that the Town Council, and through this member's attendance at the May 7, 2014 meeting the Commission, was put on notice that voting by secret ballot vote was a violation of the OMA. Respectfully, even assuming that this Town Council member had the requisite knowledge, we are not aware of any authority, nor have you provided us with any, that the purported knowledge of a non-Commission member, i.e., the Town Council member, could impute liability and knowledge upon the Commission during a meeting. The fact that this Town Council member had prior knowledge of this Department's finding that a secret ballot vote violated the OMA is insufficient to impute liability onto an entirely separate legal entity, the Planning Commission.

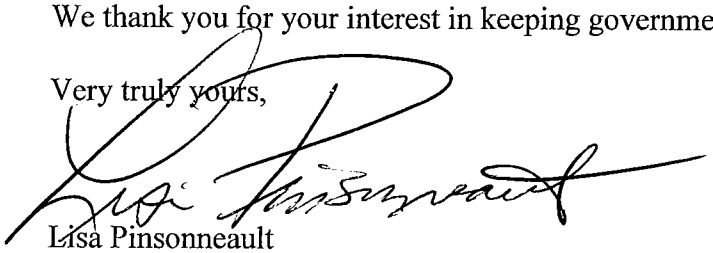
Regarding injunctive relief, although the Commission disclosed the vote of each individual Commission member at its June 25, 2014 meeting, it did not disclose the results of the "preliminary" paper vote. While injunctive relief would be appropriate, we prefer to allow the Commission the opportunity to remedy the violation on its own. See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) ("By scheduling, re-noticing, and re-voting on the challenged appointment, the town council, albeit belatedly, was acting in conformity with both the letter and spirit of the avowed purpose of the OMA – to ensure that 'public business be performed in an open and public manner.'"). The Planning Commission should notify this Department within ten (10) business days to advise of its intentions concerning whether it will voluntarily release the results of the "preliminary" vote from its May 7, 2014 meeting. This finding serves as notice to the Commission that the conduct discussed herein is unlawful 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 an OMA complaint in the Superior Court. The complainant may do so 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. Please be advised that we are closing our file as of the date of this letter, although we reserve the right to reopen this matter should the Commission not remedy this violation on its own.

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

Very truly yours,



Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Peter D. Ruggiero, Esquire
peter@rubroc.com