



State of Rhode Island and Providence Plantations

OFFICE OF THE ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400

Peter F. Neronha
Attorney General

VIA EMAIL ONLY

April 12, 2019

OM 19-03

Matthew Jerzyk, Esq.
City of Central Falls City Solicitor
mjerzyk@centralfallsri.us

Patrick J. McBurney, Esq.
Counsel for Central Falls Detention Facility Corporation
pmcburney@pldolaw.com

RE: City of Central Falls v. Central Falls Detention Facility Corporation

Dear Mr. Jerzyk and Mr. McBurney:

We have completed an initial investigation into the Open Meetings Act (“OMA”) complaint filed by Mr. Matthew Jerzyk, Esq. (“Mr. Jerzyk”), in his capacity as City Solicitor representing the City of Central Falls (“City” or Complainant”), 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 is a municipal detention facility entity that operates the Donald J. Wyatt Detention Facility (“Wyatt”) located in Central Falls, Rhode Island. The Complainant alleged that the Corporation committed several OMA violations arising out of an emergency meeting of the Corporation Board of Directors (“Board”) on January 22, 2019. The Corporation submitted a response and the Complainant offered a rebuttal. Before delving into the substantive arguments, it is necessary to set forth the background gleaned from the undisputed facts.

The Board had originally scheduled a meeting for Friday, January 18 at 5:30 p.m. Just prior to the start of that meeting, one Board member informed the acting Chairman that he would not be able to attend the meeting due to a family emergency. That member’s absence left the Board without a quorum. Consequently, the January 18, 2019 meeting was cancelled.

At 8:53 a.m. on Tuesday, January 22, 2019, the Board posted public notice of an emergency meeting scheduled for 5:30 p.m. that evening. The agenda item relevant to this Complaint simply provided “Amendment to Forbearance Agreement.” A blanket statement at the top of the agenda

provided that all the agenda items “are subject to discussion and/or official action by the Board of Directors.”

At the January 22 meeting, the Board approved a “Third Amendment to Forbearance Agreement” (“Third Amendment”) with UMB Bank, N.A. (“Bank”), which is trustee for bonds issued by the Corporation in 2005. This Office was provided with a copy of that Third Amendment, as well as the original Forbearance Agreement that was entered in 2015. We discern from the terms of those agreements that the Corporation entered into the 2015 Forbearance Agreement as a result of defaulting on its obligations to the bondholders. The City of Central Falls was a signatory to the original Forbearance Agreement between the Corporation and the Bank, but not to the Third Amendment.

The Third Amendment approved at the January 22 meeting provided, among other terms, that the Bank would advance the Corporation up to \$1.5 million in a “bridge loan” to allow the Corporation to pay its operating expenses during the partial shutdown of the federal government that was in effect at that time. The Third Amendment also included Section 3.12, which contained various terms requiring the Corporation to cooperate with evaluating and providing information to potential parties considering a sale, investment, or other affiliation with the Corporation. The bridge loan was provided to the Corporation after the Board approved the Third Amendment.

With that background in place, we turn to the relevant law and the substantive arguments advanced by the parties.

Relevant Law and Legal Arguments

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.

The Complainant alleged that there was no “unexpected occurrence” that required an emergency meeting because the Corporation knew there was a partial government shutdown since December 22, 2018. *See* R.I. Gen. Laws § 42-46-6(c). Relatedly, the Complainant alleged that the Corporation could have resolved the issues caused by the shutdown by seeking a loan elsewhere or taking other measures, rather than holding an emergency meeting to approve the Third Amendment. The Complainant also alleged that the Corporation failed to obtain an affirmative majority vote that the emergency meeting was deemed necessary to address an unexpected occurrence, as required by R.I. Gen. Laws § 42-46-6(c).

Additionally, the Complainant alleged that the Corporation violated the OMA by voting to approve the Third Amendment because the OMA provides that the public body may “only discuss” the issue that precipitated the need for an emergency meeting. *See* R.I. Gen. Laws § 42-46-6(c). The Complainant further alleged that even if voting on the loan was permissible, the Corporation’s actions reached beyond any emergency need that precipitated the meeting because in addition to providing a loan, the Third Amendment contained provisions providing “a roadmap for the bondholders to seize control of the corporation’s board and to sell the [Corporation] to a private prison corporation. . . .”

Finally, the Complainant alleged that the agenda posted for the January 22, 2019 meeting was insufficient to inform the public of the nature of the business to be discussed or acted upon because it did not describe the nature of the forbearance agreement or indicate that a vote would occur. *See* R.I. Gen. Laws § 42-46-6(b) (“This notice shall include . . . a statement specifying the nature of the business to be discussed.”).

The Corporation submitted a substantive response arguing that the Complainant is not an “aggrieved” party with standing to bring an OMA complaint. *See Graziano v. R.I. State Lottery Commission et al.*, 810 A.2d 215, 221 (R.I. 2015); R.I. Gen. Laws § 42-46-8(a). Specifically, the Corporation asserted that Mr. Jerzyk knew about the January 22 meeting before it occurred and did not attend. The Corporation also noted that prior to the meeting, Mr. Jerzyk reviewed and suggested edits to the Third Amendment.

Next, the Corporation argues that the January 18, 2019 meeting was duly scheduled and had to be cancelled due to unforeseen circumstances and that notice of the emergency meeting was promptly posted at the start of the next business day, since January 18 was the Friday before a long weekend due to Martin Luther King, Jr. Day. The former acting Chairman of the Board submitted an affidavit stating that due to the government shutdown, the Corporation would not be able to process payroll for the next day unless the Bank received a signed agreement by January 22, 2019. The Corporation also noted that the duration of the government shutdown was uncertain and that failure to meet payroll could have resulted in insufficient staffing resources and significant security risks.

The Corporation concedes that the Board failed to take an affirmative vote at the January 22 meeting regarding the need for an emergency meeting. *See* R.I. Gen. Laws § 42-46-6(c). The Corporation asserts that even though this “procedural hurdle may have been overlooked,” the Board did recount the need for the emergency meeting and voted to approve the Third Amendment.

The Corporation responds to the allegation that the Third Amendment was not only “discuss[ed]” but also voted upon by arguing that emergency meetings would be useless if public bodies could not take action on the issue that created the emergency.

Finally, the Corporation asserts that the agenda for the meeting was sufficient because the language at the top of the agenda stated that any item was subject to “official action,” which encompasses voting. The Corporation did not address the substantive description of the agenda item.

The Complainant submitted a rebuttal that argued, among other points, that the Complainant was aggrieved because Mr. Jerzyk filed the Complaint in his capacity as City Solicitor representing the mayor and other city officials who were unaware of the emergency meeting.

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.

The Corporation contends that the Complainant does not qualify as an aggrieved person under the OMA. *See* R.I. Gen. Laws § 42-46-8(a). The Complainant responds by noting that Mr. Jerzyk filed the Complaint as the Solicitor representing the City. We believe that the public interest is clearly implicated in this case because the Board voted on an issue that could have a substantial impact on a detention facility that is located within the State of Rhode Island and employs its citizens. Because the Office of the Attorney General may initiate a complaint on behalf of the public interest, *see* R.I. Gen. Laws § 42-46-8(e), we need not address whether the Complainant qualifies as an aggrieved person under the OMA. Pursuant to our statutory authority, we proceed to consider the alleged violations set forth in the Complaint.

We turn first to the allegation that the meeting agenda did not provide “a statement specifying the nature of the business to be discussed.” R.I. Gen. Laws § 42-46-6(b). In *Anolik v. Zoning Board of Review of the City of Newport*, the Rhode Island Supreme Court held that R.I. Gen. Laws § 42-46-6(b) 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.” 64 A.3d 1171, 1173 (R.I. 2013); *see also* *Tanner v. Town of East Greenwich*, 880 A.2d 784, 797 (R.I. 2005) (appropriate inquiry is “whether the [public] notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted”). In *Anolik*, the agenda item stated “Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel.” 64 A.3d at 1173. The Court found that the agenda item was “completely silent as to which specific property was at issue; the agenda item provided *no* information as to a street address, a parcel or lot numbers, or even an identifying petition or case number.” *Id.* at 1175 (emphasis in original). Accordingly, the Court held that the agenda item “fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration.” *Id.* at 1176.

We find that 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. Indeed, the Corporation provided no substantive argument on this point. Accordingly, the Board violated the OMA by posting an agenda that did not sufficiently describe the business to be discussed.

The Complainant also argued that the Board violated the OMA by voting on, and not merely discussing, the issue that purportedly necessitated the emergency meeting. The Complainant relies on language in the OMA providing that the public body may “only discuss” the issue that precipitated the emergency meeting. *See* R.I. Gen. Laws § 42-46-6(c). The Complainant’s interpretation fails to consider the subsection in its entirety. Subsection (c) provides that emergency meetings may be held to “*address* an unexpected occurrence that requires immediate *action* to protect the public.” *Id.* (emphasis added). The use of the words “address” and “action” convey that it is permissible for the public body to take action, including voting, during emergency meetings. Indeed, the entire purpose of permitting emergency meetings is to allow a public body to take *action* to protect the public interest. Accordingly, we do not find a violation based on the Complainant’s contention that R.I. Gen. Laws § 42-46-6(c) does not permit items to be voted on during an emergency meeting.

Next, we turn to the allegation that the Board failed to take an affirmative vote regarding the need for an emergency meeting as required by R.I. Gen. Laws § 42-46-6(c). The Corporation concedes that the Board “overlooked” this requirement. Accordingly, we find that failure to constitute an additional violation of the OMA.

Finally, we consider whether the emergency meeting was warranted by an unexpected occurrence and whether the emergency meeting on January 22, 2019 was limited to the issue that created the need for an emergency meeting. *See* R.I. Gen. Laws § 42-46-6(c). The Corporation has not provided evidence that the Board *had* to vote to approve *all* the various terms contained in the Third Amendment, including Section 3.12, in order for the Corporation to obtain a loan or otherwise resolve the issue of its funding shortfall. The Corporation has also not provided evidence regarding any other measures it took to obtain necessary funding or why it waited until January 22, 2019 (or January 18, 2019 when the meeting was originally scheduled) to approve the Third Amendment when the Corporation knew the partial government shutdown was in place since December 22, 2018. For these reasons, it remains an open question whether the emergency meeting was necessary to address an unexpected occurrence and whether the meeting was limited to addressing the issue that gave rise to the purported emergency.

Even if the subject-matter was appropriate for an emergency meeting, the record contains no evidence regarding when the Corporation decided to schedule the January 22, 2018 meeting. Nor is there any explanation for why the emergency meeting notice was not posted on January 18, 2019 when the Corporation cancelled its originally scheduled meeting, or why notice could not have been posted during the interim period between then and January 22, 2019, notwithstanding that it was a holiday weekend. Accordingly, it also remains an open question whether notice of the emergency meeting was posted “as soon as practicable.” *See* R.I. Gen. Laws § 42-46-6(c).

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 requires supplemental submissions from the parties in order to determine whether filing a complaint in the Superior Court is warranted. Within ten (10) business days of the date of this finding, the Corporation may submit supplemental briefing and evidence, including affidavits where appropriate, on the issue of whether the January 22 meeting was necessitated by an unexpected occurrence and whether the meeting was limited to the issue that purportedly created the need for an emergency meeting. The Corporation's submission should include evidence and sworn statements regarding why the entirety of the Third Amendment, including Section 3.12, had to be approved at the January 22 emergency meeting. Additionally, the Corporation's submission should include any evidence, in affidavit form, regarding why it was not practicable for notice of the January 22 meeting to have been posted sooner.

The Corporation's submission should also address whether the violations already found herein were willful or knowing.

Additionally, within ten (10) business days of the date of this finding, both parties may make a supplemental submission regarding what relief is appropriate for the violations found herein (and which may be found after reviewing the supplemental responses), including any injunctive or declaratory relief. The parties' submissions should address the current status of the loan provided pursuant to the Third Amendment, including whether it has been repaid. Additionally, the parties should address the consequences of any remedy given the current status of the Corporation's and Bank's respective performances of the terms contained in the Third Amendment. Any factual statements should be made in affidavit form.

The Corporation and Complainant are highly encouraged to confer with each other prior to making this supplemental submission and, if possible, to submit a joint statement regarding what they believe would be appropriate relief. No additional submissions should be made except as set forth above.

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

Sincerely,

Peter F. Neronha
Attorney General

/s/ Andrea M. Shea

Andrea M. Shea
Special Assistant Attorney General

AS/dg