



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Patrick C. Lynch, Attorney General*

October 6, 2009  
OM 09-15

Mr. Paul J. Cannistra  
3 Shippen Avenue  
Warwick, Rhode Island 02888

**RE: Cannistra v. Warwick City Council Finance Sub-Committee**

Dear Mr. Cannistra:

The investigation into your Open Meetings Act [OMA] complaint against the Warwick City Council Finance Sub-Committee [Finance Committee] has been completed. By letter received June 22, 2009, you alleged that the Finance Committee violated the OMA when four members of the City Council, three of whom were members of the Finance Committee, met in a private meeting at the home of the Finance Committee Chairman, on May 31, 2009, without proper notice.

In response to your complaint, we have received a substantive response from the Solicitor for the City Council, John J. Harrington, Esquire. In relevant part, Attorney Harrington states:

“The Complaint alleges that the Finance Committee violated the Open Meetings Act when the three members of that Committee got together informally to review the proposed budget for the new fiscal year prior to the full City Council hearing on the budget.

Affidavits of the four City Council people who met to review the proposed Budget are attached hereto [ ] . . . In the Affidavits, each of the four City Council members acknowledges attending the informal session. That the session occurred was acknowledged publicly during the City Council meeting on June 2, 2009, when the City Council considered and voted on the proposed budget for the new fiscal year. . .

[. . .]

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<sup>1</sup> For clarity, this Department notes that the four people are council members Raymond E. Gallucci, Steven Colantuono, and Donna Travis – who compose, in its entirety, the Finance Committee, and City Council President Bruce Place.

Procedurally, the budget did start in the Finance Committee, as all matters start in some Committee. However, that Committee took no action on the Budget, but merely referred it to the full City Council for discussion. . . .

The Respondents respectfully submit that even though the three members of the Finance Committee gathered at the same place at the same time and discussed aspects of the Budget, there was no 'meeting' of the Finance Committee because that Committee did not possess the power of 'supervision, control, jurisdiction or advisory power' over the budget.

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As stated in the affidavits of the Council members who attended the informal session on the Budget, discussion took place, Councilman Gallucci individually then prepared a list of proposed amendments to the Budget that he personally put forward at the Council meeting. . . They were presented to the full City Council by Councilman Gallucci."

Attorney Harrington also provided a transcript of the portion of the June 2, 2009 meeting where the budget was considered by the City Council and where the May 31, 2009 meeting was disclosed. In relevant portion, the transcript states:

**"Solomon to Gallucci:** These amendments are being proposed by you as an individual councilman and only you as an individual councilman? Was this discussed by other council people?

**Gallucci:** It was discussed....not discussed...but I did have a caucus<sup>2</sup> at my home with three other council people present. So, that's where I came up with some of these changes. I am proposing these amendments whether these other council people agree with it or not I felt as if I'm here to reduce the tax rate.

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<sup>2</sup> Although Attorney Harrington does not raise the subject of a 'caucus,' we pause to comment on use of the term 'caucus.' The definition of a "public body" specifically exempts "any political party, organization, or unit thereof . . . provided, however, that no such meeting shall be used to circumvent the requirements of [the OMA]. "R.I. Gen. Laws § 42-46-2(c). Black's Law Dictionary defines a 'caucus' as "[a] collection of representatives from a political party who assemble for the purposes of nominating candidates and deciding party policy." A 'caucus' cannot be used to discuss business that is subject to the jurisdiction, control, supervision, or advisory power of the public body. See McCaffrey v. Providence City Council, OM 97-18. In this instance, members of both the Democratic and Republican parties assembled on May 31, 2009 to discuss the Budget. Accordingly, on May 31, 2009 members of a single party did not assemble "for the purposes of nominating candidates and deciding party policy." The term 'caucus' is inapplicable here and we caution the Council that the use of the term 'caucus' will not, alone, exempt a meeting from the OMA.

**Solomon:** When you had this member caucus with these four people, four members, did you speak with any other council members over the telephone that may not have been present at that caucus?

**Gallucci:** No, I did not. The only one, Councilwoman Taylor called me during part of the day and asked me if I did have a meeting. I said we did a caucus and it was three members there of the council and I decided to do it that way as Chairman of the Finance Committee.

[ . . . ]

**Solomon:** Hence the result of all of these proposed amendments.

**Gallucci:** Most of them.

**Solomon:** Thank You.

**Taylor:** Council President. I did call Councilman Gallucci to say 'why didn't you call me? Other times you call me, this time you didn't.' You got very hostile with me. He said he would call me, or I could talk to him after they decided and I never got a call back.

**Gallucci:** The reason why I could not ask more then four members, at my home to discuss this, is that would be breaking the Open Meetings Law and I don't feel I have the authority to do that."

Before this Department considers your allegations we pause to note that in examining complaints under the OMA, we are mindful that our mandate is 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. In other words, we do not write on a blank slate. The OMA requires that all "public bodies" hold open meeting unless closed pursuant to R.I. Gen. Laws §§ 42-46-4 and 42-46-5. See R.I. Gen. Laws § 42-46-3. In order for the provisions of the OMA to apply, a "quorum" of a "public body" must be present for a "meeting." See Fischer v. Zoning Board for the Town of Charlestown, 723 A.2d 294 (R.I. 1999). A "quorum" is defined as "a simple majority of the membership of a public body." R.I. Gen. Laws § 42-46-2(d). Likewise, 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).

In this instance, it is uncontroverted that all three members of the Finance Committee<sup>3</sup> met on May 31, 2009 at Councilman Gallucci's house to review and discuss the budget. Attorney

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<sup>3</sup> The fact that one additional member of the Council was there does not change that this was a meeting of the entire Finance Committee. As Councilman Gallucci said during the June 2, 2009 City Council meeting, "I decided to do it that way as Chairman of the Finance Committee."

Harrington asserts “the mere physical presence in a single location at the same time of a number of members of a public body sufficient to constitute a quorum does not establish a ‘meeting’ as that term is defined in the statute.” Mr. Harrington adds that “[a]ttendance at an informational session is not a ‘meeting’ where council members did not collectively discuss and/or take any action upon a matter over which it had supervision, control, jurisdiction, or advisory power.” As support he cites Neubert v. Governor’s Office and Exeter Town Council, OM 98-09, a finding issued by this Department. Neubert differs from the instant matter in several ways.

In Neubert, several individuals, including members of the Exeter Town Council, were invited by legislators to attend an informational presentation on the development possibilities for the Ladd Center. At that session, the Exeter Town Council members “did not take any votes, discuss the issues among themselves, render any collective decisions, or take any action.” Based upon that representation, this Department found that the informational session did not constitute a “meeting,” pursuant to R.I. Gen. Laws § 42-46-2(a), because the members of the Exeter Town Council did not collectively discuss and/or act upon a matter over which it had jurisdiction, control, supervision, or advisory power. We added that “had the Council members discussed and/or acted upon matters over which it had supervision, control, jurisdiction, or advisory power, the Council would have held a ‘meeting’ as defined by the [OMA].”

Unlike Neubert, the evidence in this case establishes that members of the Finance Committee did not meet for an informational session; rather they came together to “review the proposed Budget for the fiscal year commencing July 1, 2009.” See Affidavits of Gallucci, Place, Travis and Colantuono. In addition, the affidavits reveal that: “suggestions were made by individuals about where some cuts in the budget might be made and notes were taken of these suggestions.” Id. These suggestions were brought to the full Council at the Council meeting on June 2, 2009, the meeting at which the Council considered and voted upon the budget. Moreover, in his response, Mr. Harrington acknowledges that the members “discussed aspects of the Budget” and that a “discussion took place.” Since the evidence establishes that a “discussion took place,” Neubert is clearly distinguished.

Attorney Harrington also asserts that “there was no ‘meeting’ of the Finance Committee because that Committee did not possess the power of ‘supervision, control, jurisdiction or advisory power’ over the budget.” Despite his assertion that the Finance Committee lacked supervision, control, jurisdiction or advisory power over the budget, Attorney Harrington acknowledges that “[p]rocedurally, the budget did start in the Finance Committee, as all matters start in some Committee. However, that Committee took no action on the Budget, but merely referred it to the full City Council for discussion.”

In our view, the fact that the budget began in the Finance Committee, whether it is termed procedural or substantive, demonstrates that the Finance Committee had supervision, control, and jurisdiction over the budget. See Warwick City Charter §2-17 (“[a]ny committee of the council may investigate and report on any matter referred to it and make a full recommendation thereon”). Moreover, we disagree with the notion that because the Finance Committee took ‘no action’ on the budget, it therefore lacked the “supervision, control, jurisdiction or advisory power” necessary to constitute a meeting. The intent of the Open Meetings Act is to ensure that

“public business be performed in an open and public manner and that 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 (Emphasis added). That is to say, it is not only the “action” of a public body that is governed by the OMA, but also all of the deliberations and discussions that occur before the “action.” Therefore, we do not agree with Attorney Harrington’s assertion that despite the budget starting in the Finance Committee, the Finance Committee had no “supervision, control, jurisdiction or advisory power” over the budget because the Finance Committee did not make any final actions or otherwise take “actions.” For all of the aforementioned reasons, we find that the Finance Committee did engage in a collective discussion on a matter upon which it had jurisdiction, control, supervision, or advisory power in violation of the OMA.

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies in suits filed under the OMA: (1) “[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];” or (2) “[t]he court may impose a civil fine not exceeding five thousand (\$5,000) dollars against a public body or any of its members found to have committed a willful or knowing violation of [the OMA].” R.I. Gen. Laws § 42-46-8(d).

In this instance, we find that injunctive relief is not appropriate. From our review of the evidence, the Finance Committee did not make any decisions the Superior Court could declare null and void, and indeed, the substance of the discussion and the recommendations were made public at the June 2, 2009 Town Council meeting.

Having concluded that the Finance Committee violated the OMA, however, we must determine whether this violation was willful or knowing. In Carmody v. Rhode Island Conflict of Interest Com’n, the Rhode Island Supreme Court examined the standard of “knowing and willful” conduct and authorized an assessment of civil penalties if a person is cognizant of an appreciable possibility that they may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt. 509 A.2d 453 (R.I.1986).

With that standard as background, this Department is troubled by Councilman Galluci’s statement at the June 2, 2009 Council meeting that, “[t]he reason why I could not ask more than four members, at my home to discuss this, is that would be breaking the Open Meetings Law.” The obvious implication of this statement, and the evidence set forth above, is that one or more members in attendance at the May 31, 2009 meeting was cognizant of an appreciable possibility that the OMA may have applied to this meeting and did not take reasonable steps to resolve that doubt. In fact, the evidence could be construed that despite their awareness of the OMA, Finance Committee members took steps, which were unsuccessful, to avoid the mandate of the OMA.

Because the Finance Committee did not address in its response to this Department whether its violation was willful or knowing, before we reach this issue the Finance Committee should address whether the instant violation was a willful or knowing violation under R.I. Gen. Laws §

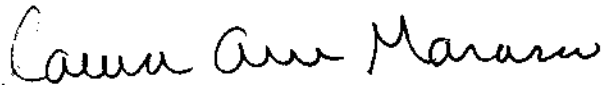
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42-46-8(d). The Finance Committee should feel free to present any mitigating factors as to why this violation should not be considered willful or knowing. This Department requests that Finance Committee kindly respond to this request within ten (10) business days. Failure to respond within the allotted time may 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.

Our file remains open pending the Finance Committee's response. After receiving the Finance Committee's response, we will issue a supplemental finding addressing the willful or knowing issue and whether or not this Department will seek civil penalties.

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

Very truly yours,

A handwritten signature in cursive script that reads "Laura Ann Marasco".

Laura Ann Marasco  
Special Assistant Attorney General  
Extension 2297

Cc: Peter D. Ruggiero, Esquire