

Justin Katz
189 Cottrell Rd.
Tiverton, RI 02878
justin@justinkatz.com
(401) 835-7156

Re: Justin Katz v. Tiverton Board of Canvassers
Response to Town of Tiverton

March 12, 2020

Sean Lyness
Special Assistant Attorney General
Rhode Island Office of Attorney General
150 South Main St.
Providence, RI 02903
SLyness@riag.ri.gov

Dear Special Assistant Attorney General Lyness,

In its response to my Open Meetings Act (OMA) complaint against the Tiverton Board of Canvassers, the town insists that I have “no evidence that there was any discussion, decision, or vote made by a quorum” of the board on September 3, 2019. To the contrary, the affidavits provided as part of that response provide precisely such evidence and — even more — strain credulity with the town’s denials.¹

Affidavits Show Violation

To illustrate why this is so, I’ll begin by re-quoting the passage of *Mudge v. North Kingstown School Committee* (OM 15-20, footnote 2, December 31, 2015) on which the town erroneously relies to prove that no violation occurred (emphasis added):

The OMA specifically provides that “discussion of a public body via electronic communication ... shall be permitted *only to schedule a meeting*. If discussions may occur via electronic communication to “schedule a meeting,” we see no reason why the OMA would prohibit these same communications in-person when such discussions are solely limited to scheduling a meeting and the agenda items.

A quorum of the Board of Canvassers did not *solely* discuss their own agenda. They also discussed the desirability of placing an item on the agenda *of the Town Council*. (Whether or not this was accomplished with the Town Clerk as an intermediary — who happened to be in the same room and then in the same car with them — is not relevant to the OMA.) Even more, the item that the board placed on the council’s agenda was not merely for discussion of a topic but was presented as a request for action at that council

¹ Although not critical to my argument, it’s worth noting that RIGL § 42-46-14 does not place the burden of proof on the complainant, but on the public body

meeting. In paragraphs 12 and 13 of her affidavit, Town Clerk Nancy Mello admits that she, Chairman Bob Harris, and Vice-Chair DeEtta Moran discussed and agreed to take this action.

Two members of a three-member board considered the next step that would follow a particular outcome during a vote of their body and instructed the clerk to take that action beforehand. The agreement of the chair and vice-chair on the underlying issue was sufficient to ensure the outcome, and indeed, as the town's Exhibit E shows, that proved to be what happened.

The language of Vice-Chair Moran's motion at the September 6 meeting reinforces the point. Her successful motion was not actually to request special counsel, but rather: "D. Moran motioned to keep the request on the Town Council Agenda." *That* was the action of the body; the request for the item on the council's agenda *was* the request for special counsel. But how could a motion be needed *to keep* a request on the other body's agenda, but not *to place* it there to begin with?

If this is not violative of the OMA, then government bodies would be free to take actions in secret meetings as long as they have the opportunity to withdraw those actions in public meetings before they go into effect. Citizens who have advocated for particular votes before public bodies know that officials find it much easier *to not stop* things in motion than they do *to initiate* the action at a public meeting.

"Placeholder" Claim Is Misleading

The town attempts to diminish the weight of the board's act by describing the Town Council agenda request as a "placeholder." Far from providing an excuse, however, the so-called "placeholder" item on the council agenda is further proof of the violation (see town's Exhibit D):

Board of Canvassers - Request Approval to Retain Special Council for Special Recall Election

The town's response makes much of the clerk's awareness of OMA requirements, and yet the "placeholder" contains no language whatsoever to indicate that it is speculative. The item placed on the agenda was not a "possible request"; it asserts that there was one. It was on the agenda under the board's name as a body, rather than just chairman's or the clerk's name, which would have left open the possibility that the entire body might not agree. It does not say "pending a vote of the body," as the town's response attempts to reframe it. This goes to show that there was never any doubt in anybody's mind as to the outcome of the board's vote.

Claim of Deadline Is a Ruse

The town attempts to cast the board's improper action as necessitated by a time crunch. According to the town's response, the urgency derived from a "deadline" supposedly set in a footnote from a letter the clerk had received from Robert Coulter. Several observations easily show this to be a ruse:

1. Mr. Coulter had no authority or ability to impose a deadline on the Board of Canvassers, certainly not one of sufficient severity to justify actions conflicting with the OMA.
2. The supposed deadline had only to do with acknowledgment of receipt of the letter, which hardly required special legal counsel.

3. Mr. Coulter requested acknowledgment by September 10, so even if the Board of Canvassers wished to consult special counsel before complying, the September 9 meeting of the Town Council was almost certainly too late already.
4. The town's response makes no mention of any effort to seek additional time from Mr. Coulter to address whatever deadline they perceived. He was, after all, the president of the Town Council and in frequent contact with Mrs. Mello and other government officials.
5. The town's response entirely ignores the possibility that the Board of Canvassers or the Town Council might have considered holding an emergency meeting pursuant to the OMA, even though they now assert great urgency was needed.
6. The Board of Canvassers took no other action to expedite the search for special counsel beyond placing its request on the Town Council's agenda.
7. In her affidavit, Ms. Moran states that "many" members of the public had suggested separate counsel for her board prior to September 3. Why, then, had she not acted on such requests beforehand?
8. Interestingly, neither the Board of Canvassers as a body nor any of the three affiants individually requested independent counsel to represent them in this OMA process, even though three members of the current council ran on the same political slate as Katz and Coulter and had a role in selecting the current solicitor.

In this light, the request for special counsel begins to look more political than practical, which is why the town's response strains credulity.

Violation in Alignment with Personal and Political Interests

In places, the affidavits attempt to describe the affiants' intentions during their September 3 meeting. For a different context, consider that the husbands of both the Town Clerk and Vice-Chair Moran signed the recall petition that initiated the election in question.² Additionally, as your office has reason to know owing to my separate Access to Public Records Act (APRA) complaint, *Justin Katz v. Town of Tiverton*, the Town Clerk had an interest in changing the leadership of the council to eliminate a policy that created additional workload and new transparency responsibilities for her office. Conspicuously, "reconsideration" of this policy was the first new order of business placed before the Town Council at a special meeting after the recall, and it was placed under the clerk's name.

Additionally, Vice-Chair Moran had verbally expressed support for the recall election at a Town Council meeting despite holding office on the Board of Canvassers. In fact, on the morning of September 9, she sent an email to Mr. Coulter and to me with the subject line, "Whoever Exalts Himself" (see Exhibit A). This is a biblical reference to Matthew 23:12, "Whoever exalts himself will be humbled." The body of the email quotes from a published column of the bishop of the Roman Catholic diocese of Providence, in which he writes of people being "humiliated." I certainly took the email as a political threat.

² This being a contextual point focused on government officials of the Town of Tiverton, I do not wish to bring spouses into it by name. However, should your office find it relevant, I will provide the backup documentation for this claim.

She also exclaimed at a public Town Council meeting that the entire recall process was a “clusterfuck.” The Office of Attorney General needn’t follow every episode of the saga to have a sense of the landscape underlying the chair and vice-chair’s September 3 meeting.

Summary of Violation

At a minimum, on September 3, Mello, Moran, and Harris met at Tiverton Town Hall, drove together to Providence, waited for the beginning of a Board of Elections meeting on the topic of the recall (in which the Board of Election’s vice-chairman expressed a unique interest), and drove together back to Tiverton. The town would have you believe that they did so without Harris and Moran ever once offering their opinions on either Mr. Coulter’s letter or their shared desire for special counsel — directly or through Mello or some other person or channel of communication.

The town’s claim is that the very first thought of both the Board of Canvassers chair and vice-chair upon being informed of Coulter’s letter was — without any delay, discussion, or prejudgment whatsoever — that the Board of Canvassers agenda should include the possibility of special counsel. The three officials’ own affidavits belie the insinuation that the boundaries around this conversation were so strict. Although the language is notably vague and passive (e.g., “it was decided”), the affidavits present the sequence of events as follows:

- Harris arrives at Town Hall, and Mello informs him about the Coulter letter.
- Harris instructs her to schedule a meeting of the Board of Canvassers to address it.
- Harris separately asks Mello to put discussion of special counsel on the board’s agenda because he was “concerned about the independence of the town solicitor” (although he notably does not say whether or not he articulated this explanation to Mello).
- “At some point” Moran arrives, and Mello informs her of Coulter’s letter. (Mello does not say why this was necessary, given that she and the chairman had already discussed the matter sufficiently to place it on an agenda. Given her years of experience with the OMA, she would have understood what sensitive ground she was on.)
- Moran expresses that the board “needed to consider hiring separate legal at its next meeting,” and Mello tells her that Harris had made “a similar request.” (Note that the word “needed” implies an opinion on the matter.)
- Mello does not remember which board members were in the room for the discussions up to this point, but she apparently informs them both together that a vote at their September 6 meeting would be too late to put the request on the council’s September 9 agenda (see Mello paragraph 12).
- The three agree to put the item on the council’s agenda — again not merely for “discussion” or with any other indication that the item was tentative, but as a substantive request for specific action by the Town Council for that body to consider as such.

Even if the trio somehow spent the afternoon in each other’s company without elaborating, *this alone is a discussion of the matter*. Harris and Moran manifestly agreed on the substance of the special

counsel decision, so there is no reason expect extended debate. Moreover, the OMA sets no minimum threshold for what constitutes discussion.

Inasmuch as the town's defense relies entirely on the three affidavits, those documents call for close scrutiny. Despite the appearance of having been carefully crafted and prepared by the same counsel, many holes are apparent. Most importantly, they offer essentially zero probative value because the most-critical assertions are qualified in time or only offered "information and belief," or the affiant does not "recall" a critical item. Furthermore, the affidavits do not foreclose other modes and methods of communication.³ The affidavits, then, are hardly dispositive of the matter in the town's favor as required under the OMA. Nor has any affidavit been offered by the other member of the Board of Canvassers or the alternate members.

Conclusion

In summary, Town Clerk Nancy Mello informed a quorum of the Board of Canvassers about correspondence she had received no more than a few hours earlier. The members processed the substance of the correspondence in sufficient detail to consider a time request mentioned in a footnote. They then went beyond scheduling discussion of the correspondence itself at a meeting of their own body to the distinct topic of requesting action from a different body. At a bare minimum, it was conveyed from Chairman Harris to Vice-Chair Moran that his mind had made the same leap. Together, they instructed the clerk to take an action in keeping with their shared opinion.

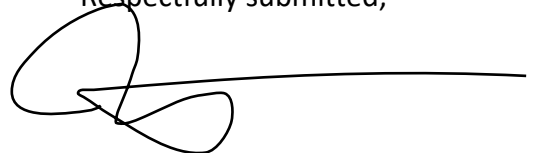
They then traveled together to meet, as a body, with the Board of Elections. After having been admonished by the Board of Elections' vice chairman not to favor the targets of the recall election, they traveled together back to Tiverton Town Hall. A few days later, they voted in an open meeting not to halt the action they had already taken (at an un-noticed meeting), which action implicitly expressed suspicion of the council members who were subject to the recall and drew attention to a topic that was central to the recall petition — namely, the hiring of the town solicitor.

All of this was done in an atmosphere in which two of the affiants had demonstrated interests in and family connections to the recall election, and the vice-chair of the Board of Canvassers had sent an email to the targets of the recall implying that they would be humiliated.

³ Ms. Moran's affidavit is limited only to "speaking" and "discussions" and then only with Board of Canvassers members only and further qualified by information and belief and recollection. She also seems to limit her response to the "period of [my] complaint," whatever that may mean, even though she separately asserts the subject of her request was voiced to her by "many" people throughout the ongoing recall process (a process before the Board of Canvassers at least as early as July). Her affidavit is completely silent on the possibility of written communications or communicating through persons who are not members of the Board of Canvassers, such as Mrs. Mello or members of the public. Mr. Harris's affidavit is likewise qualified by information and belief when it comes to discussions and remains silent as to written or other communications or indirect means of communication. For her part, Mrs. Mello also does not "recall" whether Harris and Moran were in the room at the same time to discuss the "need" for an agenda request even though Mello says she informed them. Mello is also silent as to written or indirect communications and, of course, does and cannot speak to whether the others communicated outside of her presence.

If this is not a violation of the Open Meetings Act, the message to all of Rhode Island will be loud and clear that government bodies should studiously avoid records or falsifiable memories of their un-noticed meetings. A heavily hedged denial will always trump the obvious.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a horizontal line extending to the right.

Justin Katz

Subject: Fwd: "Whoever Exalts Himself..."
From: "DeEtta M. Moran" <baysidemoran@cox.net>
Date: 9/9/2019, 10:26 AM
To: rcoulter@outlook.com, justin@justinkatz.com

Food for thought.
Sent from Perki's Pad

Begin forwarded message:

Subject: "Whoever Exalts Himself..."

The Imitation of Christ by Bishop Thomas J. Tobin
Rhode Island Catholic page 3, September 5, 2019

"The fact is, humiliation can steam roll us in different ways, but if accepted with honesty and grace, it is good for the soul. We can be humiliated by the shameful admission of our own sins; by our embarrassing public failures; by the recognition that we're not in control of all the circumstances of our lives; by the realization that something we firmly believed to be true turned out to be false; by the betrayal of once good friends; and by some silly, embarrassing deeds from the past, the memory of which makes us blush even today."