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Re: *Justin Katz v. Town of Tiverton*
Response to Town of Tiverton

February 24, 2020

Sean Lyness
Special Assistant Attorney General
Rhode Island Office of Attorney General
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Dear Special Assistant Attorney General Lyness,

The Town of Tiverton states one thing very well in its response to the complaint I filed with your office under the Access to Public Records Act (APRA). Determining whether I should have access to unsealed executive session minutes and related documentation and audio, the town writes: “it is the plain, clear, and unambiguous language of the policy that a reviewing court and your office must rely [on] in giving meaning to the policy at issue.”

As noted in my complaint, the plain language of the policy does not define a special administrative review period applying to minutes that existed when the council voted to unseal them in August. Therefore, any claim that the minutes subject to my APRA request were not truly unsealed because the administrative review period was not complete must be based on interpretation. When it suits the town, it is willing to point to "the assistant solicitor's interpretation of the policy," but that represents a departure from the plain language and, according to the town, you must not rely on interpretation.

The Town Clerk’s interpretation, as expressed in her affidavit and incorporated into the town’s response, is even more divorced from the text: It appears that she believes she has the power to keep minutes sealed indefinitely simply by choosing not to review them. As explained in my complaint, the plain language of the policy does not make unsealing and release of minutes dependent upon the completion of a review. The action of unsealing minutes was done by the council in August, and the action of extending seals on future matters was left to future councils, with the default being automatic release on a certain date.

In short, the *town council* is the body authorized to determine when to unseal its own minutes. Indeed, it isn’t clear why the town would have incorporated the clerk’s interpretation in its response at

all. She is neither a member of the body with authority over the unsealing of minutes, nor the town's legal counsel.

Furthermore, the policy did not make release dependent upon an administrative review. Rather, it created *an administrative review period* — a length of time during which the clerk may, or may not, review the minutes prior to release. This is the plain language of the policy. If there is any doubt as to the meaning of that language, it is difficult to understand how any interpretation would supersede that of a majority of the members of the council that crafted and passed the policy just a few months ago.

The town's response fails to address so much of the substance of my complaint that I can only conclude it would like you simply to agree that the "plain language" of the policy is whatever the current majority of the town council wants it to be. Otherwise, its response would have focused on grammatical justification for its interpretation.

Instead, the town focuses on a challenge to your office's authority and ability to interpret the relevant policies. As a general matter, legal questions surrounding APRA requests will inevitably require some interpretation. The action that makes a document public must be interpreted as having done so. Similarly, an action that purports to make a document *no longer public* must be subject to your review.

In this context, the statutory language of APRA does not limit the attorney general's authority to investigate or interpret, inasmuch as your office's prerogative is to bring suit in superior court as the ultimate arbiter. Indeed, the town states repeatedly its belief that the court is where some of these questions belong, and your office is one path to get there.

The town's challenge of your authority is most conspicuous when its response makes the novel claim that the town council lacks authority to unseal its own minutes at all. In developing the policy to unseal executive session minutes over the summer, the then–council president and town solicitor met with your office and was given no indication of this lack of authority. Indeed, a recent decision in Narragansett affirms your belief that town councils must implicitly have the ability to unseal minutes.

In *Jenkins, et al v. Narragansett Town Council,* OM 19-38 (R.I.A.G. November 29, 2019), you required the Narragansett Town Council to provide evidence that it had "unsealed the executive session minutes" for multiple meetings. This requirement was not presented as if your office was providing the authority for the council to unseal those minutes. Rather, you requested that the council unseal the minutes under its own authority in order to avoid your filing suit in answer to an Open Meetings Act (OMA) complaint.

Without acknowledging relevant arguments in my complaint, the town squeezes its interpretation of its lack of authority in the space between statutory language concerning when a public body is *required* to provide documents. Quoting *Archer v. Smithfield Town Council,* OM 09-03, fn3 (March 11, 2009), the town asserts that "the OMA does not require a public body to unseal properly sealed executive session minutes." That the law does not *require* a government body to take an action does not mean that it *forbids* it.

The plain fact, in our case, is that the public body in question — the Tiverton Town Council — *did* unseal the minutes. They were unsealed. What the statutory language does *not* provide authority to do is to seal and unseal and reseal the same minutes on a cycling basis depending who is in office and who asks to see them. To claim that the current council could reseal unsealed minutes, the town would have to show that the documents were subject to being sealed afresh. Presumably, the town has not attempted to do so because such an action would prove that the resealing cannot be done. Just so, the council did not vote to reseal the minutes, but is relying on everybody's pretending the policy was something that it was not.

This level of analysis is most assuredly within your authority, which sweeps away the remainder of the town's obfuscations. For instance, if unsealed minutes cannot be resealed, then you needn't determine whether the current council was properly seated because the resealing was invalid either way.

If you determine that a council *can* reseal minutes outside of the legal process described for their initial sealing, and if you determine that a council can do so retroactively in order to negate an APRA request that has already been submitted, only then must the legitimacy of the council itself become an imperative question in order to resolve this complaint.

If that is the final question on which public access to these executive session minutes depends, and if only a court is competent to make that determination, then it is within your authority to put the matter before one. The Access to Public Records Act, specifically, and public policy in a representative democracy, generally, favors transparency, and that is an end toward which we should all be working.

Respectfully submitted,

Justin Katz