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February 17, 2020

**VIA ELECTRONIC MAIL**

Mr. Sean Lyness  
Special Assistant Attorney General  
Office of the Attorney General  
150 South Main Street  
Providence, RI 02903  
E-Mail: SLyness@riag.ri.gov

Re: Justin Katz v. Town of Tiverton

Dear Special Assistant Attorney General Lyness:

This correspondence shall serve as the Town of Tiverton's ("Tiverton") formal response to a complaint filed by former Tiverton town council member Justin Katz received by my office on or about January 27, 2020. By agreement of the parties, the town was given until February 17, 2020 to respond.

As a preliminary matter, your cover letter requests that the town provide all documents in un-redacted format for an in camera review. As it is evident from the complaint, Mr. Katz is seeking almost 13 years of closed session minutes of the Tiverton town council which constitutes voluminous pages. Said records are too voluminous to produce as part of this response, but the town will make them available at the town hall at your request, if necessary. However, as the following discussion demonstrates, it is not the content of the minutes that is at issue. The issue is their legal status in light of certain acts taken and later rescinded by the Tiverton town council. Therefore, their production at this juncture does not appear critical to the resolution of this APRA complaint.

While Mr. Katz's complaint centers around the Town's denial of his request dated October 21, 2019 for "access to and copies of (1) all minutes of all closed/executive sessions of the Tiverton Town Council for all meetings held between November 7, 2006 and October 21, 2019, and (2) all audio recordings for all such sessions," it is clear from his multi-page complaint that the resolution of his concerns requires an interpretation of the Rhode Island Access to Public Records Act (APRA), the Open Meetings Act (OMA), the Tiverton home rule charter, and an "Open Government and Release of Executive Session Records" policy adopted by the town council on or about August 26, 2019 and later rescinded by that body by a vote on or about October 28, 2019.

Because the resolution and interpretation of the above referenced laws, charter, and actions of the town council all relate to the propriety of the withholding of the documents requested, the Town respectfully asserts that the determination of the ultimate issues of the complaint falls outside of the scope of the authority granted to the attorney general to issue a ruling on the interpretation and application of APRA under R.I.G.L. 38-2-8 (c). For example, at page 2 of his complaint, Mr. Katz, asserts that "given that the council was not properly seated following the faulty swearing in on October 21, rescinding the policy governing the release of executive session minutes was not accomplished." In order to defend against this statement, the Town is entitled to a full evidentiary hearing and interpretation of its home rule charter, the subject policy, and the actions of its council members that can not be afforded in a written response to an APRA request.

Later on, Mr. Katz states "the central question that this complaint poses is whether minutes that had been unsealed, but not yet released, can be sealed again – let alone retroactively resealed so as to deny an existing APRA request." (Katz complaint, p. 2). However, the answer to this "central question" must necessarily relate to an initial determination that the town council was validity constituted when it made the decision to do so. Mr. Katz's asserts that "given that the council was not properly seated following the faulty swearing in on October 21 rescinding the policy governing the release of executive session minutes was not accomplished." (Katz complaint, p. 2). While the town believes that its town council was validity constituted and seated after the recall election that removed Mr. Katx from office, the determination of this fact for purposes of this APRA complaint must rest within the state's courts through a more intensive process rather than through an administrative decision centered around the denial of a request for executive session minutes.

Nevertheless, it is undisputed that under APRA, "any minutes of a meeting of a public body which are not required to be disclosed pursuant to Chapter 46 of title 42" are not deemed public records. R.I.G.L. § 38-2-2(4)(J). The OMA states that the "the minutes of a closed session shall be made available at the next regularly scheduled meeting unless the majority of the body votes to keep the minutes closed pursuant to §§ 42-46-4 and 42-46-5." Per the terms of these two complimentary statutes, the minutes of a town council of a properly closed session become a public record only if the town council fails to vote to keep those minutes closed. Once closed and sealed, "the OMA does not require a public body to unseal properly sealed executive session minutes at some future date . . ." See, Archer v. Smithfield Town Council, OM 09-03, fn 3 (March 11, 2009).

Since the statute does not require that release of previously closed executive session minutes, it is also true that the statute may also be read to not authorize a public body to unseal previously sealed minutes except in the case when it fails to keep the minutes sealed at the conclusion of the executive closed session. Therefore, for purposes of this complaint, the town's own policy could be in contravention of the OMA and APRA, and therefore unenforceable as a matter of law even if it determined that it was not properly rescinded by the town council due to a defect in the manner in which the town council was seated as alleged by Mr. Katz.<sup>1</sup> Again, the

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<sup>1</sup> For example, the stated intent of the policy "is to automatically release all executive session minutes and related records when the subject matter had concluded." Neither APRA nor (footnote continued)

determination of the passage, rescission, and legality of the town's policy is beyond the purview of Office of the Attorney General in the context of an APRA complaint and best left to the state's courts which provides a more robust procedure to determine the rights and obligations of parties before it.

For the purposes of the town's response to this complaint, however, a brief review of the actual language of the rescinded policy, however, may provide some guidance at this stage of the proceeding.

First, the policy clearly states that "the intent is to release not only formal written minutes and all related documentary material. The release of audio is withheld pending further review and study." (Emphasis added). Thus, as it relates to Mr. Katz request for the audio tapes of the closed session meetings, it is clear that the audio tapes were never intended nor authorized to be released. Therefore, his request for said material, regardless of the legal status of the promulgation, interpretation, and later rescission of the policy by the town council is irrelevant because the audio was never contemplated to be released from the inception of the policy.

Furthermore, the policy contemplates an administrative review period in which "Town Solicitor with the assistance of the [Town Clerk] shall gather and review all minutes and related records to prepare them for release, proposing any redactions which may be needed to comport with applicable law."

The response of the then assistant town solicitor Matthew L. Fabisch to Mr. Katz's original records request is instructive of the Town's understanding of the purview and scope of this administrative period. Attorney Fabisch wrote:

Sections Four (4) and Five (5) of that policy, establishes an administrative review period of between six months and five years for the purpose of reviewing minutes for redaction and other legal obligations to keep the minutes sealed in preparation for release. Prior to the expiration of the administrative review period executive sessions minutes remain sealed. On Monday, October 28, 2019, the Tiverton Town Council expressly found that the requirements of Section 5 of the policy permitting release of the sealed executive session minutes have not yet been satisfied with response to any set of minutes. In addition, the evening the Town Couccil repealed the policy.

(Emphasis added)

Based on the lack of the administrative review of the adopted policy and the rescission of the policy, Mr. Katz's APRA request was denied. It is also instructive that the assistant solicitor's

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OMA contemplates and automatic release of executive session minutes under any circumstance outside of the failure of a public body to vote to seal the minutes of a executive session once it is concluded.

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interpretation of the policy concluded that the closed session minutes remained sealed in preparation for release pending the administrative review. This position is echoed by the town clerk's affidavit which confirms that no such administrative review period occurred for any of the sealed records, and therefore, remained sealed and closed. (Mello affidavit, paragraph 7).

In his complaint, Mr. Katz posits his own interpretation of the policy that he helped promulgate. He proffers that the review period "only applies to minutes generated after August 26, 2019. The policy adopted on that day creates no special definition covering matters' conclusion or the administrative review period applying to *historical minutes unsealed through a subsequent vote*. All matters that had already met the definition for conclusion at that moment became unsealed. (Katz complaint, p.4). Therefore, he disagrees with his own formerly appointed assistant solicitor and notes "that was not my intent as a council member participating in that discussion." (Katz complaint, p. 5).

Regardless of his intent, it is the plain, clear, and unambiguous language of the policy that a reviewing court and your office must rely in giving meaning to the policy at issue, and not the subjective intent of one or more of the council members. If the office chooses to further investigate this matter including issues related to the legal status of the town council, the adoption, rescission and legal status of the subject policy, and the basis of the denial in light of these inter-related issues, then the town requests the ability to further brief these very important issues in a more comprehensive fashion.

However, if your office believes that it has enough information and authority to issue a decision, the Town would request that the denial of the subject records be upheld under APRA under the exemption contained in R.I.G.L. § 38-2-2(4)(J).

If you have any questions or concerns, please do not hesitate contact me.

Very truly yours,

/s/ Michael J. Marcello

Michael J. Marcello of  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
TOWN SOLICITOR

MM

cc: Justin Katz via email  
justin@justinkatz.com

LEWIS BRISBOIS BISGAARD & SMITH LLP

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**AFFIDAVIT OF NANCY MELLO**

I, Nancy Mello, understanding the duty and obligation to tell the truth under the pain and penalties of perjury, hereby swear as follows:

1. I am the Town Clerk of the Town of Tiverton and have served since November 2004.
2. As the Town Clerk, I am the keeper of records for the town council. These records include the executive session minutes of the town council.
3. I am aware of Mr. Katz's request for executive session minutes from November 7, 2006 to October 21, 2019.
4. I estimate that said physical records would constitute at least 350 executive session meeting minutes that are currently sealed.
5. On August 26, 2019, the Town Council passed a policy regarding the release of executive session minutes.
6. That policy sets out an administrative review period of various duration during which the town solicitor with the assistance of the town clerk "shall gather and review all minutes and related records to prepare for them for release."
7. From the date of passage of this policy on August 26, 2019 until its recession by the town council on October 28, 2019, I did not engage in any review of the closed minutes with the town solicitor as contemplated by the administrative review period.
8. Therefore, as the keeper of records, I believe that the records were never unsealed and therefore are not available to the public.

Nancy Mello  
NANCY MELLO

STATE OF RHODE ISLAND

COUNTY OF NEWPORT

Subscribed and sworn to before me this 17<sup>th</sup> day of FEBRUARY, 2020.

Jean Marie Veeagh  
Notary Public  
My Commission Expires:

JEAN MARIE VEEGH Notary Public State of Rhode Island Notary ID #764361 My Commission Expires 7/1/2022
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