



STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

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Peter F. Neronha
Attorney General

VIA EMAIL ONLY

October 30, 2020
OM 20-49

Ms. Nicole Fiero

Anthony F. Cottone, Esquire
Chief Legal Counsel, RIDE

RE: Fiero v. Rhode Island Department of Education Council on K12

Dear Ms. Fiero and Attorney Cottone:

We have completed an investigation into the Open Meetings Act (“OMA”) complaint filed by Ms. Nicole Fiero (“Complainant”) against the Rhode Island Department of Education Council on K12 (“RIDE”). For the reasons set forth herein, we find that RIDE did not violate the OMA or the Governor’s Executive Order regarding conducting open meetings during the COVID-19 pandemic.

Background

The Complainant alleges RIDE violated the OMA and the Governor’s Executive Order¹ at its Zoom virtual meeting on July 21, 2020 because “participants were not able to activate video for the purpose of displaying signs, as they would at an in-person meeting. The chat box was also disabled, which could have functioned as a way for attendees to have their voice ‘heard.’” The Complainant also states that “RIDE slated speakers as ‘panelists,’ who had video enabled, but attendees did not have video enabled.”

Attorney Anthony F. Cottone submitted a substantive response on behalf of RIDE contending that the July 21, 2020 Zoom meeting complied with the OMA, the Governor’s Executive Order regarding open meetings, and the guidance for conducting Zoom meetings issued by the Rhode

¹ The Complaint includes an alleged violation of a provision in an executive order that modified the OMA. RIDE did not contest this Office’s authority to investigate and resolve that portion of the Complaint. We assume jurisdiction to review this Complaint. *See* R.I. Gen. Laws § 42-46-8.

Island Department of Business Regulation. RIDE states that the agenda for the July 21, 2020 virtual meeting provided instructions to members of the public on how to submit written public comments or to request an opportunity to present verbal comment at the July 21, 2020 meeting. This statement is confirmed by the July 21 meeting agenda provided to this Office. RIDE further contends that:

“The Zoom Webinar platform available for Council meetings permits only one hundred (100) individuals to appear on two separate screens as ‘panelists’ who are able to address the Council. In fact, over 800 individuals logged into the July 21st meeting, and twenty (20) members of the public signed-up to speak in advance. Thus, the Council made the necessary decision to limit the individuals who would be permitted to log in as ‘panelists’ to the Council members, RIDE staff who were presenting at the meeting, and the twenty (20) participating members of the public. The remaining roughly seven hundred (700) members of the public interested in ‘attending’ the meeting joined as ‘participants.’”

We acknowledge Complainant’s rebuttal.

Relevant Law

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 OMA provides that “[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the 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.

On March 9, 2020, Governor Gina Raimondo declared a state of emergency in response to the public health crisis created by the outbreak of the 2019 novel Coronavirus (“COVID-19”). *See* Executive Order 20-02 (March 9, 2020). On March 16, 2020, Governor Raimondo issued an executive order that temporarily modified certain provisions of the OMA as part of the State’s emergency response to the COVID-19 crisis. *See* Executive Order 20-05, “Third Supplemental Emergency Declaration – Public Meetings and Public Records Requests” (March 16, 2020) (“Executive Order 20-05”). Among other provisions, Executive Order 20-05 relieved public bodies “from the prohibitions regarding use of telephonic or electronic communications to conduct meetings, contained in Rhode Island General Laws § 42-46-5(b).” Executive Order 20-05 permitted public bodies to conduct meetings through telephonic or electronic means, provided that the public body “makes provisions to ensure public access to the meeting of the public body for members of the public through adequate, alternative means.” Executive Order 20-05 defined adequate alternative means as “measures that provide transparency and permit timely and effective public access to the deliberations of the public body.” (Emphasis added). Additionally, Executive Order 20-05 provided that “[a]ll other OMA provisions shall remain unchanged and fully applicable to the activities of public bodies.”

Executive Order 20-05 expired on April 15, 2020 and was replaced by Executive Order 20-25, which was extended by subsequent executive orders until June 12, 2020, when it was superseded by Executive Order 20-46. Executive Order 20-46, which was in effect at the time of the meeting that is the subject of this Complaint, did not differ from Executive Order 20-05 in any way that is material to this finding.² Executive Order 20-46 has been extended by subsequent executive orders and remains in effect as of the date of this finding.

Findings

Regarding the Complainant's first allegation that RIDE violated the OMA and the Governor's Executive Order by failing to enable the video function for meeting participants so they could "hold signs" as they would have during an in-person meeting, we appreciate the Complainant's concern but note that nothing within the OMA or the Governor's Executive Order gives members of the public a right to hold signs or otherwise participate, verbally or non-verbally, in an open meeting. *See* R.I. Gen. Laws § 42-46-1 ([i]t is essential *** that the citizens be *advised of and aware of* the performance of public officials[.]") (emphasis added); Executive Order 20-05 (defining adequate, alternative means as "measures that provide transparency and permit timely and effective public *access* to the deliberations of the public body") (emphasis added); *see also* R.I. Gen. Laws § 42-46-6(d) ("Nothing contained in this chapter requires any public body to hold an open-forum session to entertain or respond to any topic nor does it prohibit any public body from limiting comment on any topic at such an open-forum session."). Complainant's argument related to the July 21, 2020 meeting is based on an alleged inability to participate in and express herself non-verbally at the meeting. Although we certainly recognize the important interest members of the public have in wishing to express their thoughts and viewpoints at public meetings, the Complaint in this case does not allege a lack of public access to the meeting. As Complainant has not identified any provision within the OMA or the Governor's Executive Order that requires that members of the public be permitted to be visible and to non-verbally express themselves at a meeting, and we are aware of no such provision, we find that RIDE did not violate the OMA or the Governor's Executive Order when it disabled the video function for participants at its July 21, 2020 Zoom meeting. Our finding is limited to the OMA and the Governor's Executive Order, and does not consider any implications under the First Amendment to the United States Constitution (or its similar provision under the State Constitution), which are beyond the scope of this Office's jurisdiction to enforce. *See* R.I. Gen. Laws § 42-46-8.

With respect to the Complainant's allegation that RIDE violated the OMA and the Governor's Executive Order by disabling the "chat box" during the July 21, 2020 Zoom meeting, the OMA expressly provides that it does not require "any public body to hold an open forum session, to entertain or respond to any topic nor does it prohibit any public body from limiting comment on any topic at such an open forum session." R.I. Gen. Laws § 42-46-6(d). Additionally, the Governor's Executive Order did not modify this provision of the OMA or create a requirement for

² Executive Order 20-05 only permitted conducting a meeting by adequate alternative means if the meeting was held for an essential purpose, but that "essential purpose" requirement did not appear in Executive Orders 20-25 and 20-46. This difference has no bearing on the issues raised in the Complaint.

public bodies to hold an open forum session. Because the OMA does not provide for a right to a public forum session during an open meeting, RIDE's disabling of the "chat box" at the July 21, 2020 meeting did not violate the OMA. *See Neill v. Nasonville Fire District Board*, OM 19-01; *Brunetti, et al. v. Town of Johnston*, OM 17-19; *Vargas v. Providence School Board*, OM 02-12, PR 02-06. We also note that the July 21, 2020 meeting agenda did provide instructions to members of the public regarding how to submit written public comment or to request an opportunity for verbal public comment. The Complainant has provided no evidence that she followed the agenda's instructions and submitted written comment and/or requested an opportunity to present verbal public comment and was denied.

Accordingly, based on the totality of the evidence before us, we find that RIDE did not violate the OMA or the Governor's Executive Order related to conducting open meetings at its July 21, 2020 meeting.

We find it important to close this finding by emphasizing that the requirements of the OMA set a floor, not a ceiling. Public bodies are encouraged to provide for transparency and citizen involvement in government above and beyond the minimum requirements of the OMA. In the midst of the challenges presented by COVID-19, it is more important now than ever that citizens are able to access and participate in their government. At the same time, we recognize that public bodies must grapple with a myriad of technological challenges associated with conducting virtual meetings, including dealing with technological limitations and conducting meetings in a manner that is open and accessible but also orderly and conducive to carrying out government business. Citizen engagement is an important part of governance and public bodies should strive to provide opportunities for public comment and expression when possible.

Conclusion

Although the Office of the Attorney General will not file suit in this matter, nothing within the OMA prohibits an individual from instituting an action for injunctive or declaratory relief in Superior Court. *See* R.I. Gen. Laws § 42-46-8(c). The OMA allows the Complainant to file a complaint within ninety (90) days from the date of the Attorney General's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. *See id.* Please be advised that we are closing this Complaint as of the date of this letter.

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla E. O'Rourke
Kayla E. O'Rourke
Special Assistant Attorney General