



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

August 13, 2013
OM 13-25

Mr. Kenneth J. Block

Re: **Block v. Board of Elections**

Dear Mr. Block:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Board of Elections (“Board”) is complete. You contend that the Board violated the OMA when the agenda for its March 11, 2013 meeting failed to adequately specify the nature of the business to be discussed, *i.e.*, election-related legislation then-pending before the General Assembly. Specifically, you claim that:

“[w]hile the agenda for the March 11, 2013 [meeting] included descriptions of each bill that the Board generated on their own, it did not include specific bill numbers. Furthermore, the descriptions that the Board generated did not match the bill summaries (which are provided by the General Assembly legislative council and act as descriptions) contained in the actual legislation. At the time that this agenda was produced and published, the General Assembly had provided bill numbers and published the text of each of these bills, which had been submitted to the General Assembly on behalf of the Board.”

With respect to this allegation, you also assert that “many of the descriptions provided by the Board were inaccurate or seriously lacking in specificity;” that following a February 25, 2013 inquiry you received a “list of bill numbers” that would be discussed at the Board’s February 27, 2013 meeting; and that you attended the March 11, 2013 meeting. You also contend that the Board violated the OMA when it failed to post its March 11,

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2013 minutes on the Secretary of State's website in accordance with R.I. Gen. Laws § 42-46-7(d).

In response to your complaint, we received a substantive response from the Board's legal counsel, Raymond A. Marcaccio, Esquire. In relevant part, Mr. Marcaccio maintains that the "OMA does not require a specific reference to legislative bills" and that the Board's March 11, 2013 agenda provided sufficient public notice in accordance with the OMA. Mr. Marcaccio also challenges your standing as an "aggrieved" citizen to bring this complaint.¹ Specifically, Mr. Marcaccio relates:

"Mr. Block cannot satisfy that statutory requirement that he be an 'aggrieved' party, as required by R.I. Gen. Laws § 42-46-8. * * * Mr. Block had full notice not only of the nature of the business to be conducted on March 11, but also the specific bill numbers. * * * Mr. Block contacted the Board staff concerning the February 27 agenda and was immediately provided with copies of each of the pieces of legislation. Mr. Block cannot now contend that he lacked any knowledge concerning the purpose for the Board's meeting on March 11."

With respect to your second allegation, the Board notes that on March 20, 2013, Board staff completed draft minutes for the March 11, 2013 meeting and, as of March 20, 2013, draft minutes were available for public inspection and copying. Mr. Marcaccio adds that:

"Mr. Block contends that the Board was required to post the draft minutes on the Secretary of State's website prior to acceptance and approval by the Board. The Board again must respectfully disagree. Under R.I. Gen. Laws § 42-46-7(d), which appears to be the provision relied upon by Mr. Block, only the 'official and/or approved minutes' are to be published within 35 days of the meeting. Since the minutes were not approved and therefore were not official, the minutes could not be posted on the Secretary of State's website. Again, the draft minutes remained available for inspection and copying prior to final approval, in accordance with the OMA."

In examining whether an OMA violation has occurred, we are mindful that our mandate is not to determine whether this Department believes that an infraction has occurred, but instead, 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. Furthermore, our statutory mandate is limited to determining whether the Board violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

In Block v. Board of Elections, OM 13-14 (hereafter "Block I"), we examined your complaint that the Board of Elections violated the OMA when its February 27, 2013

¹ You also address this point. See infra.

agenda did not adequately inform the public of the nature of the business to be discussed. Specifically, in Block I, you alleged that ten (10) legislative bills were discussed during the February 27, 2013 meeting under the agenda item “[d]iscussion and possible vote in regards to election legislation in the R.I. General Assembly,” but that the agenda did not identify the nature of legislation to be discussed. Id.

The evidence in Block I established that on February 25, 2013, the Board provided you and others actual notice wherein it emailed you its February 27, 2013 agenda. Upon receiving this actual notice, on February 25, 2013, you responded to the Board’s email inquiring as to the specific legislation that would be discussed and possibly voted upon. On the morning of February 26, 2013, the Board responded to your email and provided you (and others) with pdf copies of the ten (10) legislative election-related bills to be discussed during the February 27, 2013 meeting. In a reply correspondence in Block I, you also advised that on March 11, 2013, the Board convened another meeting – the meeting that is the subject of the instant complaint – wherein it discussed the same ten (10) election-related bills that had been emailed to you on February 26, 2013. In this correspondence you related that the March 11, 2013 public notice contained a statement indicating the nature of each of the ten (10) bills, but did not contain the bill numbers.

Based upon the foregoing, when you filed your reply in Block I, you requested that this Department not only determine that the Board violated the OMA with respect to its February 27, 2013 agenda, but that the Board also violated the OMA with respect to its March 11, 2013 agenda when the Board failed to include the bill numbers on its agenda. We declined to reach the issue of the March 11, 2013 agenda and explained, inter alia, that “unlike the issue of the February 27, 2013 agenda where you received notice of the nature of the bills to be discussed less than forty-eight (48) hours prior to the meeting and claim you were aggrieved, you make no similar argument with respect to the March 11, 2013 agenda.” Id.² We added, with respect to your March 11, 2013 allegation, that “there is no evidence you were ‘aggrieved’ by this issue.” Id. Accordingly, as explained in Block I, we determined that the Board violated the OMA since its February 27, 2013 agenda did not provide a statement specifying the nature of the business to be discussed, but declined to reach your allegation that the March 11, 2013 agenda violated the OMA. We issued Block I on June 3, 2013, and you filed the instant complaint on June 13, 2013, wherein you complain, inter alia, that the March 11, 2013 agenda was insufficient since it failed to include the bill numbers of the ten (10) legislative items to be considered.

The OMA provides a number of requirements to ensure that public meetings are open and accessible to the public. To enforce these provisions, the OMA provides that “[a]ny citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general.” R.I. Gen. Laws § 42-46-

² We also explained that you did not raise the issue of the March 11, 2013 agenda until after the Board responded to your complaint, and accordingly, the Board never had an opportunity to address your allegation that the March 11, 2013 agenda violated the OMA.

8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Rhode Island Supreme Court examined the “aggrieved” provision of the OMA.

In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission’s March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. Similar to the matter at hand, at the Lottery Commission’s March 25, 1996 meeting, Mr. Hawkins, as well as his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission’s notice was deficient, the trial justice determined that the Lottery Commission violated the OMA and an appeal ensued. On appeal, the Rhode Island Supreme Court determined that it was “unnecessary” to address the merits of the OMA lawsuit because “the plaintiffs Graziano and Hawkins have no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

“has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.” Id. at 221-22.

Here, we simply find no evidence that you are “aggrieved” by the allegation that the Board violated the OMA when it failed to include the bill numbers on its March 11, 2013 agenda. Chief among our reasons for this conclusion is that on February 26, 2013, the Board emailed you – upon your inquiry – pdf copies of the ten (10) bills to be discussed during its February 27, 2013 meeting, as well as the undisputed fact that you attended the March 11, 2013 meeting. While you correctly observe that the February 27, 2013 and March 11, 2013 meeting were “two separate and distinct meeting agendas,” your complaint also notes that you “[a]ssum[ed] the same bill numbers [you received for the February 27, 2013 meeting] applied for the March 11, 2013 meeting.” Block letter, June 13, 2013, p. 2. Respectfully, even independent of the Board’s February 26, 2013 email, your complaint contains no evidence that you were “aggrieved,” “disadvantaged,” or that you were unaware of the legislation to be discussed during the March 11, 2013 meeting.

In order to attempt to demonstrate that you are “aggrieved,” your complaint reflects a two-part approach. First, you assert that:

“[i]n the case of the March 11, 2013 meeting, my right to understand both the deliberations and decisions of the Board was violated. I am an aggrieved citizen and therefore have standing to file this complaint.”

Respectfully, throughout your complaint and reply this is the only statement wherein you suggest that you (as opposed to the public at-large) are aggrieved and this statement falls far short of the burden articulated in Graziano. Indeed, this statement provides no detail or insight (or supporting evidence) concerning how your right to understand the deliberations and decisions was affected by what you allege was insufficient notice. The above statement is entirely conclusory and in this respect it is once again significant to our conclusion that on February 26, 2013, the Board provided you copies of the bills to be discussed and you make no allegation that you believed that the Board was discussing any other election-related legislation other than the copies of the legislation previously provided to you by the Board. In fact, as noted supra, your complaint represents that you “[a]ssum[ed] the same bill numbers applied for the March 11, 2013 meeting.” Moreover, while we do not ignore that you “[a]ssum[ed] the same bill numbers applied for the March 11, 2013 meeting,” and that the Board provided you not only the bill numbers but copies of the bills on February 26, 2013, even if we were to focus solely on the March 11, 2013 meeting and ignore all prior events, we would be left with a situation no different than Graziano, *i.e.*, a person who complains about the sufficiency of notice, but nonetheless attends the meeting and provides no evidence of any particular detriment or injury. The conclusory statement that your “right to understand both the deliberations and decisions of the Board was violated” falls short of what Graziano requires and would reduce Graziano into merely a pleading exercise. See Graziano, 810 A.2d at 221-22 (“The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.”).

It also bears noting that although we expressed our concern in Block I that “[t]he fact that you had actual notice of the bills to be discussed [on February 27, 2013] raises the issue whether you are ‘aggrieved,’” we explained that we were “inclined” to reach the merits of your February 27, 2013 allegation since you were provided less than forty-eight (48) hours notice. Block I, OM 13-14, n.1. In this case, however, you make no allegation that you received less than forty-eight (48) hours notice, fail to explain how the Board’s allegedly deficient notice affected your “right to understand both the deliberations and decisions of the Board,” received copies of the ten (10) bills to be discussed on February 26, 2013, and “[a]ssum[ed] the same bill numbers [that were discussed at the February 27, 2013 meeting] applied for the March 11, 2013 meeting.” While you certainly could have presented evidence in this case that was not provided in Block I, it bears referencing that Block I foreshadows our conclusion in this finding and noted that with respect to March 11, 2013 allegation there “is no evidence you were ‘aggrieved’ by this issue.” Block I, OM 13-14, n.3. For the reasons already described the conclusory statement you offer in this case does not charge our analysis or distinguish this case from Graziano.³

³ Your July 9, 2013 reply indicates that you were “not made aware of the specific bill numbers for the March 11 meeting.” In some ways, this statement contradicts your earlier representation that you “[a]ssum[ed] the same bill numbers [that were discussed at the February 27, 2013 meeting] applied for the March 11, 2013 meeting.” For the reasons already discussed, your July 9, 2013 statement does not alter our analysis.

Your second approach to avoid the Graziano requirement is that based upon your comparison of the March 11, 2013 agenda and the legislative bills you were provided, “there was no possible way to determine which bills of the General Assembly had been included on the agenda.” Of course, this and other lack of notice arguments you proffer ignores the issue of whether you are “aggrieved” and fails to consider that you had actual notice (or “[a]ssum[ed]”) “which bills of the General Assembly had been included on the agenda” because you had received copies nearly two (2) weeks earlier. Stated differently, for the reasons discussed above, you are not “aggrieved.” Equally important, and related to our conclusion that you are not “aggrieved,” a careful reading of your complaint reveals that you do not make these “lack of notice” arguments on behalf of yourself, but instead make these arguments on behalf of the public. For instance, you assert that “[t]he net impact of the claimed violation above makes it impossible for a member of the public to readily identify the actual bills that the Board intended to take action on in this meeting.” Block letter, June 13, 2013, p. 1. Later you write that in this case “the public” was provided insufficient public information, id., and that the March 11, 2013 agenda “failed to include details that would enable a member of the public * * * to make an informed decision[.]” Id. at 2-3. Still later your complaint avers that “[i]n the case of the March 11, 2013 meeting, the public was not fairly informed[.]” id. at 3, and that you “argue that the Board failed to fairly inform the public in its agenda for the March 11, 2013 meeting.” Block letter, July 9, 2013, p. 1. While there is no question that “[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner,” see R.I. Gen. Laws § 42-46-1, there is also no question that Graziano requires a complainant to demonstrate that he or she has been “aggrieved.” Again, your complaint reveals that you “[a]ssum[ed]” the legislation the Board provided to you on February 26, 2013 “applied for the March 11, 2013 meeting,” and that you attended the March 11, 2013 meeting. As discussed supra, other than the conclusory statement referenced earlier, you make no allegation that you – as opposed to the general public – are aggrieved.

In this respect, you reference Block I and note that this Department explained in Block I that “[t]he issue for this Department to decide is whether the agenda item for the February 27, 2013 meeting was sufficient to inform the public of the nature of the business to be discussed.” (Emphasis in original). Because this Department determined in Block I that the Board failed to provide sufficient “public” notice with respect to its February 27, 2013 agenda, you suggest in this case that “the matter of [your] personal aggrievement is inconsequential to this discussion – the Attorney General’s office must determine if the public has been aggrieved by the Board’s actions.” As already discussed, however, Graziano requires a different conclusion.

On this point, it is true that in order to determine whether a public body has complied with the public notice provisions embodied within R.I. Gen. Laws § 42-46-6(b), the operative question is “whether the notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted.” Tanner v. Town of East Greenwich, 880 A.2d 784, 797 (R.I. 2005). The fact that R.I. Gen. Laws § 42-46-6(b) applies an objective standard, however, in no way

nullifies the OMA requirement that a citizen or entity who files an OMA complaint must be “aggrieved as a result of violations of the provisions of this chapter.” R.I. Gen. Laws § 42-46-8(a). This was precisely our finding in Block I, and precisely the holding in Graziano.

Specifically, in Block I, although we determined that the February 27, 2013 agenda violated the OMA, before we even began to examine the merits of your allegation, this Department addressed whether you were “aggrieved” since you had received actual notice of the Board’s legislative agenda on February 26, 2013. In a footnote, we explained that:

“[t]he fact that you had actual notice of the bills to be discussed raises the issue of whether you are ‘aggrieved,’ pursuant to R.I. Gen. Laws § 42-46-8. You contend that you are aggrieved because even though you had actual notice, you had less than forty-eight (48) hours notice and this hindered your efforts to fully review the bills to be discussed and contact others. Although you offer no support for these arguments, we are inclined to reach the merits of your complaint. See R.I. Gen. Laws § 42-46-8(e).”

As explained herein, the reason for our “inclination” was because although you had actual notice of the Board’s agenda, it was uncontradicted that you had less than forty-eight (48) hours notice. See R.I. Gen. Laws § 42-46-6(b)(requiring 48 hours supplemental notice)

Block I, as well as many other OMA cases and non-OMA cases, demonstrates that prior to reaching the merits of an allegation, the party bringing the complaint must be “aggrieved” and/or have legal standing. See e.g., Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004)(“This case is similar to a number of cases in which this Court has refused to find standing when a plaintiff has failed to demonstrate a personalized injury distinct from that of the community as a whole.”). Your argument that you have legal standing by virtue of the fact that “the notice provided by the [public body must] fairly inform[] the public, under the totality of the circumstances, of the nature of the business to be conducted,” Tanner, 880 A.2d at 797, is also contradicted by Graziano, which similar to this case, also concerned a lawsuit brought by a private party alleging insufficient public notice despite having actual notice and attending the meeting in question. In Graziano, the Supreme Court concluded that despite the allegation of insufficient public notice – which according to you should have led the Supreme Court to conclude that the plaintiffs had legal “public” standing despite the lack of any “personal aggrievement” – the Supreme Court concluded that the plaintiffs were not “aggrieved” because they had actual notice and attended the meeting in question. Accordingly, in accordance with Graziano, we conclude because you “[a]ssum[ed] the same bill numbers applied for the March 11, 2013 meeting,” attended the March 11, 2013 meeting, and because you present no evidence that you were aggrieved or otherwise disadvantaged by

the allegedly deficient March 11, 2013 notice, we find that you are not “aggrieved” by this allegation.

You also allege that the Board failed to post its March 11, 2013 minutes on the Secretary of State’s website in accordance with R.I. Gen. Laws § 42-46-7(d), which provides:

“[a]ll public bodies within the executive branch of state government and all state public and quasi-public boards, agencies and corporations shall keep official and/or approved minutes of all meetings of the body and shall file a copy of the minutes of all open meetings with the secretary of state for inspection by the public within thirty-five (35) days of the meeting; provided that this subsection shall not apply to public bodies whose responsibilities are solely advisory in nature.”

With respect to this allegation, you contend that as of June 13, 2013, you visited the Secretary of State’s website and that “there are no minutes on file for the March 11, 2013 meeting.” While the Board maintains that draft minutes were available at the Board within thirty-five (35) days of the March 11, 2013 meeting in accordance with R.I. Gen. Laws § 42-46-7(b), the Board was nonetheless required to post “official and/or approved” minutes on the Secretary of State’s website in accordance with R.I. Gen. Laws § 42-46-7(d). No evidence has been presented that this was accomplished. The Board’s failure to comply with R.I. Gen. Laws § 42-46-7(d) violated 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 available 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) “the court may impose a civil fine not exceeding five thousand dollars (\$5,000) 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.

In this instance, we find no evidence that the Board knowingly or willfully violated the OMA by failing to post its minutes on the Secretary of State’s website within the time specified by R.I. Gen. Laws § 42-46-7(d). Instead, the evidence demonstrates that the Board’s draft minutes were available for public inspection as of March 20, 2013, and that the Board had not posted “official and/or approved” minutes because the Board had not convened since its March 11, 2013 meeting. Our review of the Secretary of State’s website also finds that the March 11, 2013 minutes are presently posted on the website. This finding serves as notice to the Board that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within ninety (90) days from the date of the Attorney General’s

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closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. R.I. Gen. Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael W. Field". The signature is fluid and cursive, with the first name being the most prominent.

Michael W. Field
Assistant Attorney General
Extension 2380

Cc: Raymond A. Marcaccio, Esquire