



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

June 4, 2014

OM 14-22

Ms. Annette Bourbonniere

**RE: Bourbonniere v. Newport City Council**

Dear Ms. Bourbonniere:

The investigation into your Open Meeting Act (“OMA”) complaint filed against the Newport City Council (“City Council”) is now complete. By correspondence dated December 26, 2013, you alleged the City Council violated the OMA when it held its December 11, 2013<sup>1</sup> meeting at a location that was not accessible for persons with disabilities in violation of R.I. Gen. Laws § 42-46-13.

Specifically, you indicate that City Council meetings are held on the second floor of City Hall and that the elevator is very small and that most wheelchairs, including yours, cannot fit in the elevator. Further, you explain that there is a platform lift that goes up the stairs but that “it is very slow and not very safe.” According to your complaint, on July 23, 2009, the Rhode Island Governor’s Commission on Disabilities completed an inspection for open meeting accessibility at Newport City Hall. The report, which you attached to your complaint, concluded in pertinent part:

“The elevator and wheelchair lift provided for people with disabilities at Newport City Hall **do not** meet the minimum standards of the American’s [sic] with Disabilities Act. Because the reconstruction of the elevator and wheelchair lift would be costly and time consuming, the Rhode Island Governor’s Commission on Disabilities **requires that public meetings are no longer held at Newport**

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<sup>1</sup> The acknowledgment letters sent to the City Council and you incorrectly state that the alleged violation occurred on December 9, 2013 (there was no meeting held on that date). For the purpose of this finding, any reference to the meeting shall refer to the December 11, 2013 meeting.

**City Hall.** A location change would be the easiest and most beneficial change for the city of Newport.” (Emphases added).

Your complaint continues that following the Governor’s Commission on Disabilities inspection, the City Council established remote access to public meetings in the Police Assembly Room for individuals with disabilities, which consists of video conferencing equipment and a sound system. In your complaint you write, “[b]esides segregating and isolating persons with disabilities, this arrangement fails because we have no recourse when the sound system fails, which is frequently.” Further you state, “[t]he City has acknowledged the problem by moving many committee meetings to accessible locations, but steadfastly refuses to move the most important one - City Council meetings.”

This Department received a substantive response from Joseph J. Nicholson, Jr., the City Solicitor. In pertinent part, Attorney Nicholson writes:

“Ms. Bourbonniere at times has used the video conferencing arrangement successfully, as a participant at City Council meetings. \*\*\*

In discussions with the City’s technical department which is responsible for the sound quality of the video conferencing, the City will look into ways to improve the quality going forward. One of the issues that has been raised is that individuals stray from the microphone and thus, the sound quality is not transmitted properly. However, this is no different from what might happen in the Council chamber during the meeting. \*\*\* However, a sound system failure of the municipal video conferencing system is unacceptable and will be addressed.

\*\*\*I am unsure how her complaint rises to a level of an OMA violation when she did not attend the meeting for some unspecified reason.”<sup>2</sup>

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<sup>2</sup> While you did not attend the December 11, 2013 meeting, you did provide this Department with evidence that suggests you would have attended the meeting if the meeting was held in a location accessible to persons with disabilities. Indeed, by email dated December 6, 2013, you e-mailed the City and asked:

“Is there a Council meeting this week like it says on the website? If so, I would like to attend, so I’m requesting that it be moved to an accessible location.”

In response, you were advised:

“Yes, there is a council meeting Wednesday evening. I checked with the City Manager and the meeting will not be relocated. However, the Police Department will be set up for video conferencing if you desire. Please let me know at your earliest convenience if you will want the video conferencing at the Police Station.

In your January 29, 2014 rebuttal, you write:

“\*\*\*[T]his arrangement isolates and segregates persons with disabilities and the sound system does fail. I find the response from the City to be inadequate since, when the sound system does fail, we are left with no recourse in this arrangement. After the worst such failure during a meeting of great importance to myself and others with disabilities, we made repeated requests for another meeting to allow us to voice our input. This never happened.

I believe I should have the same access to my city government as any citizen in the City of Newport and my right to this access has been violated.”

Consistent with this Department’s statutory authority to investigate OMA allegations, on April 23, 2014, the undersigned visited Newport City Hall, located at 43 Broadway, Newport, Rhode Island.<sup>3</sup> During this inspection, the undersigned confirmed your allegations. While conducting this site visit, Attorney Nicholson provided this Department with a copy of a Settlement Agreement (“Agreement”) between the United States Department of Justice (“DOJ”) and the City of Newport.<sup>4</sup> The Agreement states, in pertinent part:

“The [wheelchair] lifts from the basement to the 1<sup>st</sup> floor and from the 1<sup>st</sup> floor to the 3<sup>rd</sup> floor are inaccessible because the controls require tight grasping and twisting of the wrist to operate, the interior dimensions are 30 by 41 inches, and there is a 2inch high change of level to enter the lifts.”

The Settlement Agreement required remediation of the wheelchair lift inaccessibility issue within thirty (30) months of the Settlement Agreement date, which was signed on September 30, 2010.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether 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 City Council violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

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See emails from Ms. Bourbonniere to Ms. Kathy Silvia, dated December 6, 2013 and December 9, 2013.

<sup>3</sup> Attorney Nicolson was present for this visit and this Department appreciates the City’s cooperation in facilitating this visit.

<sup>4</sup> See Settlement Agreement between the United States of America and the City of Newport, Rhode Island in DJ # 204-66-49.

Before beginning our analysis it is helpful to emphasize what is – and what is not – at issue. Specifically, the State of Rhode Island was not a party to the Settlement Agreement and the Settlement Agreement in large part examines the City’s compliance with the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. The Settlement Agreement does not examine the OMA. In contrast, your complaint – and this finding – examines only the OMA, and does not examine the City’s compliance with federal law. Against this legal landscape, we examine the OMA.

The OMA requires that:

“[a]ll public bodies, to comply with the nondiscrimination on the basis of disability requirements of R.I. Const., Art. I, § 2 and applicable federal and state nondiscrimination laws (29 U.S.C. § 794, chapter 87 of this title, and chapter 24 of title 11), shall develop a transition plan setting forth the steps necessary to ensure that all open meetings of said public bodies are accessible to persons with disabilities.” R.I. Gen. Laws § 42-46-13(a).

The OMA further requires that:

“(b) The state building code standards committee shall, by September 1, 1989 adopt an accessibility of meetings for persons with disabilities standard that includes provisions ensuring that the meeting location is accessible to and usable by all persons with disabilities.

(c) This section does not require the public body to make each of its existing facilities accessible to and usable by persons with disabilities so long as all meetings required to be open to the public pursuant to chapter 46 of this title are held in accessible facilities.

(d) The public body may comply with the requirements of this section through such means as reassignment of meetings to accessible facilities, alteration of existing facilities, or construction of new facilities. The public body is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section.” (Emphases added).

R.I. Gen. Laws § 42-46-13.

Here, there is no dispute that you are unable to physically access the City Council’s meetings. Specifically, you indicate that the elevator is unable to accommodate your wheelchair and that although the wheelchair lift is operational, the lift is “very slow and not very safe.” It is significant to our finding that in 2009, the Governor’s Commission on Disabilities concluded that both the “elevator and wheelchair lift \* \* \* do not meet the minimum standards of the American’s [sic] with Disabilities Act” and that in 2010, the City signed a Settlement Agreement with the United States acknowledging that the wheelchair lift failed to provide handicapped accessibility to all disabled wheelchair users. A January 6, 2014 memorandum from the City’s

Assistant City Engineer also details the steps the City has taken in order to furnish and install a new lift that would comply with the Americans with Disabilities Act.<sup>5</sup>

With the above facts undisputed, the narrow issue presented to this Department can be defined as whether the City's video conferencing accommodation complies with R.I. Gen. Laws § 42-46-13. Indeed, the City's substantive response focuses solely on the video conferencing alternative and does not suggest that you could physically access the City Council meetings. We conclude that this alternative fails to comply with the OMA because the OMA requires that "all meetings required to be open to the public pursuant to [the OMA] are held in accessible facilities." R.I. Gen. Laws § 42-46-13(c). (Emphasis added).

As enacted in 1989, the OMA provided that "[a]ll public bodies \* \* \* shall develop a transition plan setting forth the steps necessary to insure that all open meetings at said public bodies are accessible to handicapped persons." P.L. 1989, ch. 487, § 1. The present version of the OMA contains similar language. See R.I. Gen. Laws § 42-46-13(a)("[a]ll public bodies \* \* \* shall develop a transition plan setting forth the steps necessary to ensure that all open meetings of said public bodies are accessible to persons with disabilities."). The plain language of another present OMA provision evinces that the OMA requires that "the meeting location is accessible to and usable by all persons with disabilities." R.I. Gen. Laws § 42-46-13(b). (Emphasis added).

In addition to the above provision requiring an accessible "location," the OMA contains other provisions that lead to the conclusion that the video conferencing alternative offered by the City Council violates the OMA. For instance, R.I. Gen. Laws § 42-46-13(c) recognizes that the OMA "does not require the public body to make each of its existing facilities accessible to and usable by persons with disabilities so long as all meetings required to be open to the public pursuant to [the OMA] are held in accessible facilities." (Emphasis added). The OMA also provides guidance on how a public body can comply with the accessibility requirement, observing that:

"[t]he public body may comply with the requirements of [the OMA] through such means as reassignment of meetings to accessible facilities, alteration of existing facilities, or construction of new facilities." R.I. Gen. Laws § 42-46-13(d).

While R.I. Gen. Laws § 42-46-13(d) does not appear to be an exhaustive list of alternative accommodations, it is notable that video or tele-conferencing are not included within R.I. Gen. Laws § 42-46-13(d) and that all alternatives listed within R.I. Gen. Laws § 42-46-13(d) would permit a person with a disability to physically attend a public meeting. Moreover, the State

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<sup>5</sup> This memorandum makes clear that the City solicited a request for proposals in 2013, but that "[n]o bidders responded and no proposals were received." Subsequently, the City engaged in an engineering feasibility study to retrofit the existing elevator car/shaft to comply with the Americans with Disabilities Act. This memorandum anticipates that another request for proposals will be submitted after July 1, 2014.

Building Code standards referenced within R.I. Gen. Laws § 42-46-13(b) further support our conclusion.<sup>6</sup>

For all these reasons, and based upon the evidence presented, we conclude that the video conferencing alternative violates the OMA.<sup>7</sup>

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.

Here, we find neither remedy appropriate at this time. It is our understanding that the City will soon be submitting a request for proposal for bids to modify the elevator to ensure compliance with the OMA. In the interim, the City Council must make alternative arrangements to ensure compliance with the OMA. Rhode Island General Laws § 42-46-13(d) provides some alternatives and at least some evidence has been presented to this Department that other public bodies and/or committees have moved their meetings from City Hall to other alternative locations accessible to persons with disabilities. Because we would expect the City Council to comply with the OMA, we deem injunctive relief to be unnecessary at this time. Should the City Council fail to comply with this finding and the OMA, you should feel free to contact this Department and this Department will re-evaluate the OMA remedies in light of any subsequent facts. This finding does provide notice to the City Council that this conduct violates the OMA

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<sup>6</sup> The State Building Code Standards provide, under the heading “Transition Plan,” that:

“[a] plan should list those facilities accessible complying with the standards established by the Rhode Island Building Code Standards Committee. By utilizing program accessibility pursuant to Chapter 42-46 all meetings required to be open to the public are permitted to be relocated to a facility that complies with public meeting accessibility standards. For example if an existing town hall was not accessible in a community, but a new police/fire station or school complied to the standards, meetings could be relocated to that site to conform.

Failure to find conforming space in a community would require changes to be made to existing structures to facilitate compliance.” See Rhode Island State Building Code SBC-17 Public Meetings Accessibility Standards.

<sup>7</sup> Nothing within this finding abrogates our advisory opinion in In re Town of West Warwick, Adv OM 99-02, where we found that a public body generally would not violate the OMA if a person could not attend a meeting due to room capacity issues.

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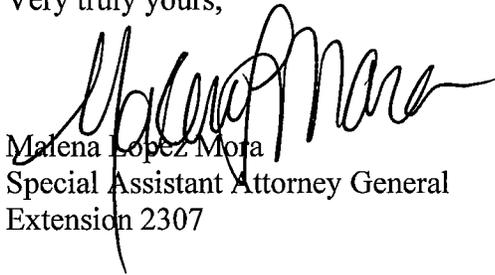
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and any future similar conduct may be considered as a willful or knowing violation. R.I. Gen. Laws § 42-46-8.

Although the Attorney General will not file suit in this matter at this time, 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 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, although we reserve the right to reopen this matter should the City Council fail to comply with the OMA.

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

Very truly yours,



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