State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
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Peter F. Kilmartin, Attorney General

May 30, 2014
OM 14-21

Mr. John Marion

RE: Common Cause v. I-195 Redevelopment District Commission

Dear Mr. Marion:

The investigation into your Open Meetings Act ("OMA") complaint filed against the I-195 Redevelopment District Commission ("I-195 Commission") is complete. By correspondence dated October 23, 2013, you allege the Commission violated the OMA when a subcommittee of the I-195 Commission, namely, the Frameworks Subcommittee, held at least one (1) meeting without notice to the public on October 3, 2013.

In response to your complaint, we received a substantive response from the I-195 Commission's legal counsel, Jon M. Anderson, Esquire. Attorney Anderson states, in pertinent part:

> "Common Cause's letter presumes that both the I-195 Commission and the Frameworks Subcommittee are 'public bodies' under the OMA. They are not, however, the same 'public body' as there are members of the I-195 Commission who are not members of the Frameworks Subcommittee. (Emphasis in original). [Ms.] Diana Johnson, [Mr.] Michael Van Leesten, [Mr.] Mark Ryan, and [Ms.] Bobbie Hunger are members of the I-195 Commission, but they are not members of the Frameworks Subcommittee. The I-195 Commission did not meet on October 3, 2013. Moreover, there was no quorum of the I-195 Commission at any meeting on October 3, 2013. * * *
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> Common Cause nevertheless purports to hold one 'public body,' I-195 Commission liable for the acts of another 'public body,' the Frameworks Subcommittee, on the basis of some theory of supervisory liability or respondent superior. There is no legal authority in either the OMA or the Supreme Court's decisions for doing this. As you are aware, the mandate of your office is not to substitute the Attorney General'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. There is no law promulgated by either the General Assembly or the Supreme Court that supports Common Cause's theory of supervisory liability or respondent superior under the OMA."

We acknowledge your reply dated November 13, 2013. You indicate, in pertinent part:

> "We do not assert that the Subcommittee consists of the entire Commission. According to Webster's, a subcommittee is 'any of the small committees chosen from among the members of a main committee to carry out special assignments.' [ ]. In this case the Frameworks Subcommittee is [ ] 'chosen from among the members' of the Commission.
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> There is past precedent for a complaint against the parent entity resulting in a finding against its subdivision. In Garon v. Cumberland Fire District (OM 04-08) * * * [this Department] found, '[i]n light of the OMA's application to 'any subdivision' of a public body, we conclude that the September 19, 2003 meeting of two of the three members of the Personnel Subcommittee was subject to and violated the OMA.' That is all we have done in our complaint; make a complaint against the Commission for a violation of the OMA by the Subcommittee."

Pursuant to this Department's request for additional information, on February 21, 2014, we received an affidavit from Mr. Colin P. Kane, Chair of the I-195 Commission. Mr. Kane states, in pertinent part:

> "The Frameworks Subcommittee was an informal, ad hoc group of three members of the I-195 Commission who volunteered at my request for the purpose of obtaining information regarding the development process to present to the Board of the I-195 Commission. They are [Mr.] John Kelly, [Mr.] Barrett Bready, and myself.
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> The Frameworks Subcommittee was not established by any vote of the I-195 Commission.
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> The I-195 Commission never approved the creation or membership of the Frameworks Subcommittee.
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> The Frameworks Subcommittee has no legal authority to take any action on behalf of the I-195 Commission.
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> The Frameworks Subcommittee has no actual authority to take any action on behalf of the I-195 Commission.

The membership of the Frameworks Subcommittee does not constitute a quorum of the I-195 Commission.

* * *

On October 3, 2013, there was a meeting of the Frameworks Subcommittee of the I-195 Commission. in attendance were Mr. Kelly, Dr. Bready, and myself as well as [Ms.] Jan Brodie, District Executive Director, [Ms.] Kate Holguin, District Project Associate; [Mr.] Michael Walker, as staff assigned by the Rhode [Island] Economic Development Corporation, [Mr.] David Dixon and [Mr.] Ben Carlson from the interdisciplinary urban design firm, Goody Clancy, LLC ('Goody Clancy'); and [Ms.] Dyana Koelsch of DK Communications, LLC. Goody Clancy was retained by the I-195 Commission to assist its efforts in promoting the development of the district.

The purpose of the meeting was to receive information, a briefing, from Goody Clancy, not give advice or take any votes. Throughout the meeting, Mr. Kelly, Dr. Bready, and I asked questions which the representative from Goody Clancy answered. The Frameworks Subcommittee did not post advance notice of its meeting because I did not believe that by attending a briefing by Goody Clancy the Frameworks Subcommittee was acting as a 'public body' subject to the Open Meetings Act.

Mr. Dixon and Mr. Carlson reported that they had conducted interviews with many Providence and Rhode Island stakeholders, including institutions of higher education and developers. Through these meetings, Goody Clancy has developed a list of challenges and strengths of the I-195 land, as well as worked on a strategy for developer outreach. A list of potential markets has also been developed, which includes design (specifically web design) job and business seeking proximity to the institutions. Mr. Dixon and Mr. Carlson also informed us that [Ms.] Sara Woodworth of W-ZHA will be providing specific numbers for these potential markets in the frameworks handbook. Commitment to quality is an important outreach strategy to insure that how the land develops is sustainable and provides long term growth to the City.

Goody Clancy proposed that 'The Link' be the short name for the I-195 Redevelopment District. In the next month, Goody Clancy said it would work on the logo for 'The Link' that will be used on letterhead, business cards, website, etc. The ultimate decision for naming the district, however, was vested in the I-195 Commission.

Goody Clancy also reported it was working on the content, organization and graphics for the development guideline documents, which will include an urban design framework for the district and adjacent areas. Once developed, these

> documents will also be used in public presentations and highlight the quality of life, bike-ability, and walkability of the I-195 land and its surrounding communities. A table was distributed providing the characteristics of the land's subdistricts. In the next few weeks Goody Clancy said it would have a draft of the characteristics and options for each parcel as well as a full parking analysis, strategy, and timetable.
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> Goody Clancy also distributed an overall timeline for the development of the frameworks handbook and materials for the I-195 Commission. The Commission will release a Request for Information (RFI) in December, followed by a Request for Proposal to those whose concepts and credentials are approved by the Commission. Goody Clancy stated that in the next month it would develop a draft document to present to the Commission, which will include zoning and design guidelines, parking strategy, a disposition checklist, and full build-out scenarios with preferred uses and diagrams. Also, Goody Clancy said that W-ZHA will develop a more focused set of incentive and public-private partnership options and recommendations.
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> No votes were taken during the meeting."

This Department requested affidavits from the other Frameworks Subcommittee members, Mr. John Kelly and Mr. Barrett Bready. On May 14, 2014, we received affidavits from Messers. Kelly and Bready, who both stated, in pertinent part:

> "I have reviewed the affidavit of [Mr.] Colin P. Kane dated February 20, 2014.
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> Mr. Kane's affidavit accurately reflects my recollection of the meeting on October 3, 2013."

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 I-195 Commission violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The purpose of 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. In accordance with this

stated policy, the OMA mandates that all "meetings" of all "public bodies" be held in open session, unless otherwise exempt. R.I. Gen. Laws § 42-46-3.[1]

In order for the OMA to apply, a "quorum" of a "public body" must convene for a "meeting" as these terms are defined by the OMA. See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). For purposes of the OMA, a "public body" is defined as "any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government." R.I. Gen. Laws § 42-46-2(c) (emphasis added). A "meeting" is defined as "the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." R.I. Gen. Laws § 42-46-2(a) (emphasis added). A "quorum" is defined as "a simple majority of the membership of a public body." R.I. Gen. Laws § 42-46-2(d). "A literal reading of the act demonstrates that all meetings to discuss or act upon matters over which the [public body] has supervision, control, or advisory power, are required to be open to the public." Solas v. Emergency Hiring Council, 774 A.2d 820, 825 (R.I. 2001).

This Department has been presented with similar situations. We considered an instance where a "quorum" of the Exeter Town Council attended an event sponsored by the Housing Network of Rhode Island, entitled a "Forum on Affordable Housing," which as its title implies, was convened to discuss affordable housing issues in Exeter. See Johnson v. Exeter Town Council, OM 06-06. The Forum in Johnson was organized by the Housing Network of Rhode Island, included the presentation of a film and featured speakers, none of whom were associated with the Exeter Town Council or other public bodies. Moreover, although members of the Exeter Town Council attended and participated in the Forum, we found that "there [was] no evidence that a quorum of members of the Exeter Town Council collectively discussed or took any action regarding a matter that they had supervision, control, jurisdiction, or advisory power over." We added that instead, "the evidence illustrates that to the extent that individual members may have participated in the Forum, they did so in the same manner as any other member of the public who attended." See also Kelly v. Rhode Island House of Representatives & Rhode Island Senate, OM 10-17 (The Rhode Island General Assembly did not violate the OMA when House and Senate members gathered for a presentation by the Education Commissioner followed by questions and answers. Since no collective discussion and/or action was taken by House and Senate members, the OMA did not apply to the presentation.).

In another situation, this Department examined the case where a "quorum" of the North Kingstown School Committee attended an Educational Summit sponsored by the School Department. See Fry v. North Kingstown School Committee, OM 06-17. In Fry, the evidence revealed that not only did a "quorum" of the North Kingstown School Committee attend the Summit, but other members of the community also attended. Furthermore, we were presented with evidence that the Educational Summit was a community forum sponsored by the school

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[1] Although the I-195 Commission asserts that this complaint should be dismissed since it was lodged against the wrong entity, i.e., the I-195 Commission and not the Frameworks Subcommittee, we overlook this potential issue and reach the merits. See e.g., R.I. Gen. Laws § 42-46-8(e).

department to obtain input from the community as to the district's strategic plan and that this Summit was called for and organized by the school department, not the North Kingstown School Committee. We concluded that we were presented "no evidence that a quorum of the School Committee collectively discussed or took any action regarding a matter that they had supervision, control, jurisdiction, or advisory power over." For these reasons, we found no violation.

In Neubert v. Governor's Office and Exeter Town Council, OM 98-09, several individuals, including members of the Exeter Town Council, were invited by legislators to attend an informational presentation on the development possibilities for the Ladd Center. At that meeting the Exeter Town Council members "did not take any votes, discuss the issues among themselves, render any collective decisions, or take any action." Based upon that representation this Department found that the informational session did not constitute a "meeting" pursuant to R.I. Gen. Laws § 42-46-2(a) because the members of the Exeter Town Council did not discuss and/or act upon a matter over which it had jurisdiction. We added that "had the Council members discussed and/or acted upon matters over which it had supervision, control, jurisdiction or advisory power, the Council would have held a 'meeting' as defined by the Act." See also North Kingstown Town Council, OM Advisory 99-05 (informing government leaders of concerns relating to the proposed Quonset Point development not a "meeting" provided that members of town council do not engage in a collective discussion, vote, or take other action). See also Pine v. McGreavy, 687 A.2d 1244 (R.I. 1997).

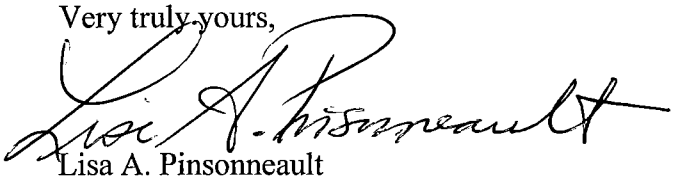
The cases outlined above stand for the proposition that a "meeting" may not have been convened for purposes of the OMA if the "meeting" does not involve any collective discussion or actions taken amongst a quorum of members, but instead consists of an informational sessions and/or presentations directed to members of a public body. Also, by analogy, this Department has previously held that a "site visit" by a public body would constitute a "meeting" under the OMA if, during the viewing the members collectively discussed and/or acted upon matters over which they had "supervision, control [, jurisdiction] and advisory power." Vadenais v. North Smithfield Town Council, OM 14-03. If the members of the public body only viewed the site and did not collectively discuss their observations or findings during the site visit and did not take any action, however, such a gathering would not rise to the level of a "meeting" under the OMA. Id. See also Lamb v. Tiverton Budget Committee, OM 98-31.

Similarly, in the instant case, although the Frameworks Subcommittee met for a presentation by Goody Clancy, there is no evidence that any collective discussions of the members of the Frameworks Subcommittee occurred. Rather, it appears a presentation was made, and members of the Frameworks Subcommittee asked questions during the presentation. While in the proper circumstances these questions and answers could implicate the OMA, in light of the affidavits submitted by the three (3) Frameworks Subcommittee members, the evidence falls short of any collective discussions or action amongst them. The Frameworks Subcommittee members' collective presence, as well as the asking and answering of questions, is insufficient to trigger the OMA, and our findings indicate and require more. See e.g., In re Providence School Board, ADV OM 99-08. As such, we find no violation.

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.

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

Very truly yours,



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LP/pl

Cc: Jon M. Anderson, Esquire