



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

June 27, 2014
OM 14-09

Mr. David Gorman

Mr. Stephen P. Fay

**Re: Gorman v. Central Coventry Fire District, Board of Directors
Fay v. Central Coventry Fire District, Board of Directors**

Dear Mr. Gorman and Mr. Fay:

The investigations into your Open Meeting Act (“OMA”) and Access to Public Records Act (“APRA”) complaints are complete. Since both complaints were submitted against the Central Coventry Fire District Board of Directors (“Board”), (“CCFD”), or (“Fire District”), and since both complaints contained similar allegations,¹ this Department will address both complaints in a single finding.

By correspondences dated November 13, and November 14, 2013, Mr. Gorman alleges that the CCFD willfully or knowingly violated the OMA and/or the APRA on myriad occasions for all meetings, opened and closed, from July 2, 2013 through November 13, 2013. With some exceptions identified herein, Mr. Gorman does not identify specific meeting dates or relate specific allegations. Indeed, in the November 13, 2013 complaint, Mr. Gorman alleges the following violations:

- 1) The CCFD failed to post unofficial minutes on the Secretary of State’s website within twenty-one days of each meeting. See R.I. Gen. Laws § 42-46-7(b)(2).
- 2) At each meeting, the CCFD motions to table approval of prior meeting minutes.
- 3) The CCFD failed to submit a list of regularly scheduled meetings on file with the Attorney General, and failed to post a list of such regularly scheduled meetings on their website or in other locations required by the OMA.
- 4) The CCFD failed to provide notice (time, date, or location) of subcommittee meetings.
- 5) The CCFD failed to file or maintain subcommittee minutes and meeting notices with the Attorney General or the Keeper of Records of the Fire District.

¹ Mr. Fay does raise some allegations not raised by Mr. Gorman. These allegations will be addressed separately.

- 6) For all closed sessions held from July 2, 2013 through November 13, 2013, the CCFD cited broad and generic language to enter into closed session, specifically litigation and receivership status, when in fact the CCFD discussed in closed session unrelated matters.
- 7) The CCFD failed to disclose, in open session, votes taken in closed session.
- 8) The CCFD failed to file its closed session minutes with the Clerk's Office for all closed sessions held from July 2, 2013 through November 13, 2013. Thus, Mr. Gorman concludes there is a presumption that executive session minutes do not exist.

In the November 14, 2013 correspondence, Mr. Gorman alleges the CCFD willfully or knowingly violated the OMA when he, as a non-taxpayer, was barred from the CCFD's special meeting held on October 21, 2013 to set the Fire District's budget and tax rate. As noted, supra, in large part Mr. Fay's complaint raises similar allegations.

In response to the complaints, we received a substantive response from Mr. David D'Agostino, Esquire, legal counsel for the Board of Directors of the Central Coventry Fire District. The first argument Mr. D'Agostino sets forth in his substantive response is that the CCFD is not subject to the OMA. Specifically, Mr. D'Agostino states in pertinent part:

“[O]n behalf of the CCFD, I would assert that it (the Board) is not subject to the OMA in the first instance. To be clear, while the Board members were elected, their power is greatly, if not totally, constrained by the Court. The Board has little to no power or authorization to make any decisions that would be binding on the citizens of the District. The Board's role is best described as being representative of the 'will of the people' and in that capacity, advisory to the Court and/or Special Master.² ***

Since the Board is an agent of the Court, as such, it does not fall within the definition of 'public body' under the OMA.

In the case of the CCFD, all business decisions are made in the context and before the 'public' in Court. *** Again, while the Board can provide its collective business judgment (which is reflective of the will of the taxpayers) to the Special Master and to the Court, it cannot effectuate actions or policy without the approval or authorization of the Court. ***

As further demonstration that the role of the Board is constrained by the Court, one can look to the Decision of the Court (entered May 17, 2013) which specified what the 'new' Board was to do:

1. The Board shall develop a short- and long-term plan for the future of the CCFD to be implemented on or before September 1, 2013.

² At the time of the CCFD's response, Mr. Richard J. Land was appointed by the Superior Court as Special Master.

2. The Board shall formulate a budget for the 2013/2014 Fiscal Year that includes a plan for the satisfaction of outstanding liabilities, including administrative expenses.
3. The Board shall recommend a tax levy and tax rate to the voters to sustain the budget approved by the Board.
4. The Board shall notice and convene an annual meeting of the fire district prior to September 1, 2013 and present to the taxpayers for vote the budget approved by the Board.
5. The Board shall have the authority to negotiate and/or renegotiate contracts and agreements with third parties, including, but not limited to, the government and quasi-government agencies, as well as secured and unsecured creditors for the 2013/2014 Fiscal Year and going forward.***
6. The Board shall have the authority to negotiate with the firefighters' union and shall constitute the bargaining agent of the CCFD for the 2013/2014 Fiscal Year and future years.***
7. The Board shall formulate a contingency plan, together with evidence of the efficacy and viability of the plan, to provide for fire and emergency medical and lighting services to the fire district to be implemented should the CCFD be liquidated. The Board shall present the contingency plan to the Court for approval.

***"

At the outset, we note that in examining whether a violation of the OMA or the APRA 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 and the APRA as the General Assembly has written these laws and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire District violated the OMA or the APRA. See R.I. Gen. Laws §§ 42-46-8; 38-2-8. In other words, we do not write on a blank slate and although both complaints raise non-OMA and/or non-APRA issues, our focus concerns the OMA and the APRA issues only.

We begin by addressing two preliminary matters. First, we address the CCFD's argument that the Board is not a "public body" and, therefore, not subject to the OMA. See R.I. Gen. Laws § 42-46-2(c).

The OMA applies to "meetings" of a "quorum" of a "public body." See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). The OMA defines a "public body" 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).

"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). In Solas, the Court considered the application

of the OMA to a body formed by Executive Order of then-Governor Lincoln Almond to “manage and control the state’s hiring practices and its fiscal resources.” Solas, 774 A.2d at 823. The Council consisted of five senior executive branch staff members who met on a biweekly basis “to determine whether creating a new position in state government or filling a vacancy is absolutely necessary.” Id. at 824. It was the Governor’s intent that “no person or persons other than the Council shall have the authority to make any determinations in this regard.” Id. (internal quotation omitted). Based on these facts, including the formation of the Council by Executive Order, the Supreme Court concluded the Council was subject to the OMA and stated:

“The EHC [Emergency Hiring Council] is composed of a group of high level state officials that convenes to discuss and/or act upon matters of great interest to the citizens of this state. In addition, our reading of the executive orders creating the council persuades us that the EHC possesses significant supervisory and executive veto power over creating or filling state employment positions. At the very least the council functions in an advisory capacity in state hirings. Whether supervisory or advisory, both functions are regulated by the act. As the plain language of the statute provides, a council’s exercise of advisory power is enough to bring it under the act’s umbrella.” Id. at 825. (Emphasis added).

Solas is important for two reasons. First, it restates the basic principle that the OMA “should be construed broadly and interpreted in a light favorable to public access.” Id. at 824. Second, it affirms the use of several factors we have considered relevant in our previous findings. The Court in Solas examined the text of the executive orders under which the Emergency Hiring Council was established, the scope of its stated authority, its actual authority, the nature of the public business delegated to it, and its membership and composition. We have found each of these factors relevant, to varying degrees, in findings issued by this Department.

Normally we would begin our analysis by considering the facts presented in conjunction with the factors established in Solas. In this case, however, the Board’s argument is largely conclusionary in nature and this Department has been provided with very limited information on the structure of the Board or the factors previously considered by this Department or in Solas. For example, it is unclear whether the Board was established as a result of the receivership action (it does not appear so) or if this is the same CCFD Board that existed prior to the receivership, but was charged with new duties and responsibilities in light of the receivership. At times Mr. D’Agostino refers to the Board as “new” and briefly mentions that the Board members were elected, yet fails to further elaborate. In addition, at no time does the Board discuss its composition or the “new” elected members. Most importantly, while Mr. D’Agostino argues that “all business decisions are made in the context and before the ‘public’ in Court,” the evidence shows that the CCFD Board meets, on occasions, outside of Court to discuss, advise, and act upon matters delegated to them.

Taken as a whole, it appears that the Board argues it is not subject to the OMA since “[t]he Board has little to no power or authorization to make any decisions that would be binding on the citizens of the District. The Board’s role is best described as being representative of the ‘will of the people’ and in that capacity, advisory to the Court and/or the Special Master.” Solas makes clear, however, advisory boards are subject to the OMA. Id. at 825. The Board also contends that it is an “agent of the Court” and, therefore, “it does not fall within the definition of ‘public body’ under the OMA.” The Board provides no factual or legal support for this argument and this entire argument is comprised of a single conclusionary sentence. Since the Board has provided no legal development of this assertion, and because the Board’s

argument that it is an “agent” for the Court conflicts with its representation that it acts in an advisory capacity to the Court, this Department rejects the Board’s arguments that it is not a “public body.” See R.I. Gen. Laws § 42-46-13 (burden of proof).

As a second preliminary matter, in MacDougall v. Quonochontaug Central Beach Fire District, OM 13-24/PR 13-17/ADV OM 13-04, this Department explained that in order for us to find a violation, our attention must be directed to specific conduct that is contrary to the OMA or the APRA, and that general allegations that a public entity has violated the OMA and/or the APRA is insufficient. As made clear throughout this finding, both complaints contain numerous generalized allegations and ultimately meet with the same fate as the generalized allegations in MacDougall. Having addressed these threshold points, we address the specific allegations in light of MacDougall.

In response to the allegations, Mr. D’Agostino states, in pertinent part:

“[T]he Board has no knowledge of whether this procedure [failure to post unofficial minutes on the Secretary of State’s website within twenty-one days of each meeting] has been complied with either prior to the instant Board being constituted or following the election/appointment of the present Board. The Board relies on the District Clerk to post the required meeting notice(s), and by extension, any minutes that would be required under the OMA, if required.

[T]he Board has voted to table approval of prior meeting minutes for a variety of reasons. Notwithstanding, the Board has the understanding that the meeting minutes of prior meetings have been approved by the Board (to date).

The Board was not constituted at the time when (under the OMA), annual meeting schedule(s) are set. The Special Master did not (to our knowledge) post an annual meeting schedule, which even had he done so, would have been rendered moot given the complex travel of this case.^{3]}

While the Complainant points out that there are ‘Committee Reports’ listed on the Board’s agendas (this is true), the Board has made it clear that there are no committees, per se. Rather, various individual Board members, sometime working in conjunction with Fire Chief Andrew Baynes, the Special Master’s Office, the Tax Collector, and sometimes conducting independent inquiries, have provided updates and information to the public as to the status of various fact-finding tasks. There have been no subcommittee meetings, period.

The Board wonders how this Complainant could have any knowledge of what was discussed at any Closed/Executive Session***. Notwithstanding, as this Complainant apparently fails to recognize, everything discussed by the Board is the subject of, and

³ It is unclear what “the complex travel of this case” references, or why the “complex travel of this case” would relieve the Board of its obligation to comply with the OMA.

pertains to the pending litigation, *to wit*, the Receivership KB2012-1150. Furthermore, the Board concedes that it has not filed the Closed Session meeting minutes***.

[The Board] tried to maintain a consistent approach to meetings, in cases, using generally-accepted agenda language, which included (as a form) language from the OMA for convening into Closed/Executive Session(s). The Board concedes that at times, it failed to follow the OMA procedure to the letter, *to wit*, going through the process of specifying the nature of the business to be conducted in the Closed/Executive Session(s) and explained the 'proper' procedure for compliance with the OMA guidelines for going into and coming out of Closed/Executive Sessions.

[W]hen it was alleged that a non-resident was not allowed into the auditorium where the meeting was called to act upon the Board's recommended levy and assessment, I personallyspoke with a Canvasser and confirmed that no one was being denied entry into the auditorium (provided that there was space available for all the District voters, first-and there was ample space)."

Supplemental correspondences were received by this Department from Messrs. Gorman and Fay.

Mr. Gorman (as well as Mr. Fay) first alleges that the Board violated the OMA by failing to post the unofficial minutes of its public meetings within the required time period. Although Mr. Gorman's initial complaint simply provided an approximate five (5) months time frame without specific dates, Mr. Gorman's December 3, 2013 correspondence referenced the minutes for meetings held on: July 12, 2013, July 15, 2013, July 25, 2013, July 31, 2013, August 28, 2013, September 11, 2013, September 18, 2013, September 24, 2013, October 2, 2013, October 7, 2013, October 10, 2013, October 15, 2013, October 17, 2013, October 21, 2013, and November 13, 2013. Mr. D'Agostino argues that the Board relies on the District Clerk to post the required meeting minutes. Since the OMA requires a public body to ensure compliance with its provisions, the argument that the Clerk, but not the Fire District, is responsible for OMA compliance is rejected.⁴

In July 2013, the OMA was amended to require that "all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards, whether it is incorporated or not, and whether it is a paid department or not, shall post unofficial minutes of their meeting within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state's website." See R.I. Gen. Laws § 42-46-7(b)(2). After reviewing the evidence, it is clear that the minutes for the meetings held on the following dates were not posted within the allotted time frame:

⁴ In Mr. Fay's complaint, he alleges that "the Board fails to follow the posted agenda and at times amends the meeting's subject matter during the meeting." In this Department's November 29, 2013 letter to Mr. Fay, we requested that he provide us with specific dates for each meeting where the Board allegedly violated the OMA. While Mr. Fay did point us to the July 3, 2013 meeting, he failed to direct us to which agenda item the Board allegedly failed to follow, or how the Board otherwise violated the OMA during this meeting. Respectfully, Mr. Fay failed to provide us with sufficient facts and guidance to conduct a review. Furthermore, the lack of evidence (or even an allegation) makes it difficult for the Board to fairly respond to this issue. Consistent with our finding in MacDougall, without sufficient evidence, or in this case an allegation to direct our focus, we cannot issue a finding with respect to this allegation.

- July 12, 2013 (posted September 5, 2013)
- July 25, 2013 (posted September 5, 2013)
- July 31, 2013 (posted September 5, 2013)
- August 28, 2013 (posted November 8, 2013)
- September 11, 2013 (posted November 8, 2013)
- September 18, 2013 (posted November 8, 2013)
- September 24, 2013 (posted November 8, 2013)
- October 2, 2013 (posted November 8, 2013)
- October 7, 2013 (posted December 16, 2013)
- October 10, 2013 (posted December 16, 2013)
- October 15, 2013 (posted December 16, 2013)
- October 17, 2013 (posted December 16, 2013)
- October 21, 2013 (not posted)
- November 13, 2013 (posted February 7, 2014).⁵

Accordingly, the failure to timely post the minutes on the Secretary of State's website violated the OMA.

Related to this issue is Mr. Gorman's allegation that at each meeting the Board motions to table approval of prior meeting minutes, and according to Mr. Gorman, this violates the OMA. As stated above, the Board is required to post unofficial meeting minutes, meaning no approval is required, within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting. Only "public bodies within the executive branch of the state government and all state public and quasi-public boards, agencies and corporations" are required to file "official and/or approved" minutes with the Secretary of State's office. See R.I. Gen. Laws § 42-46-7(d). Since the CCFD Board is a municipal entity, there is no requirement that minutes must be approved. Thus, we find no violation.

Next Mr. Gorman contends that the CCFD Board failed to file a list of regularly scheduled meetings with the Attorney General, failed to post a list of such regularly scheduled meetings on the Board's website, and "failed to post such at any other public place, as required by the [OMA]." Mr. D'Agostino responds that "the Board was not constituted at the time when (under the OMA), annual meeting schedule(s) are set. The Special Master did not (to our knowledge) post an annual meeting schedule***."

While Mr. D'Agostino states that, to his knowledge, no notice of annual meetings was filed in accordance with R.I. Gen. Laws § 42-46-6(a), this Department's independent review shows that on January 14, 2013, a 2013 list of monthly meetings for the CCFD was posted on the Secretary of State's website. See www.sos.ri.gov/openmeetings/1?page=meeting&id=136656. Since the OMA only requires that the annual notice be posted with the Secretary of State's website, and the OMA does not require the annual notice to be filed with the Attorney General or posted on a public body's website, we find no violation.⁶

⁵ The CCFD's July 15, 2013 minutes were timely posted on the Secretary of State's website on July 26, 2013, accordingly, the CCFD did not violate the OMA with respect to this meeting.

⁶ Rhode Island General Laws § 42-46-6 states "[a]ll public bodies shall give written notice of their regularly scheduled meetings at the beginning of each calendar year. The notice shall include the dates, times, and places of the meetings and shall be provided to members of the public upon request and to the secretary of state at the beginning of each calendar year in accordance with subsection (f)." No evidence has been presented that a member of the public requested the annual notice. Mr. Fay makes a similar

Mr. Gorman also contends that the Board violated the OMA “for all meetings, open and closed held between July 2nd 2013 and November 13th 2013 when they represent that they have established sub-committees, issues reports on the committee progress and status at public meetings, but deliberately and intentionally fail to post time, date, or locations of the sub-committee meetings.” Mr. Gorman also alleges that the Board violated the OMA by “failing to maintain and/or file the required sub-committee minutes and meeting notices with the Attorney General or with the Keeper of the Records [for] the District.” In our November 29, 2013 acknowledgment letter to Mr. Gorman, this Department requested to be provided with specific meeting dates for each allegation. In Mr. Gorman’s rebuttal, we were directed to the July 31, 2013, August 28, 2013, and November 13, 2013 meetings to support the sub-committee argument.⁷

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). A “quorum” is defined as “a simple majority of the membership of a public body.” R.I. Gen. Laws § 42-46-2(d).

Here, it is notable that Mr. Gorman’s entire complaint that the Board failed to post subcommittee meetings (and maintain minutes and notices) is based upon the minutes from the aforementioned meetings. Having reviewed the July 31, 2013, August 28, 2013, September 11, 2013, and November 13, 2013 minutes, these minutes evince that various “subcommittees” reported on various topics during Board meetings, and with one exception, all “subcommittees” were comprised of only one Fire District member. For instance, the July 31, 2013 minutes demonstrate that a Board Director – and only one Board Director – met with the Fire Chief under the Equipment and Facilities subcommittee. This Department knows of no authority, and none has been brought to our attention, that indicates a “subcommittee” comprised of a single individual constitutes a “public body” under the OMA. In Zarella et al. v. East Greenwich Town Planning Board, OM 03-02, this Department found that the OMA is not applicable when one or more of the elements – a quorum, a meeting, or a public body – are absent. Based upon the evidence presented, we find insufficient evidence to find a violation of these single-person subcommittees.

Moreover, having reviewed Mr. Gorman’s supporting evidence, *i.e.*, the aforementioned minutes, the only exception where a “subcommittee” was comprised of multiple individuals appears to be the Finance Committee, which according to the July 31, 2013 minutes is composed of Director Jendzejec and Director Hadley. According to the July 31, 2013 minutes, which comprises the entirety of Mr. Gorman’s complaint on this issue:

allegation, but appears to acknowledge that the Fire District did post its annual notice, yet complains that the Fire District has cancelled many of its regularly scheduled meetings. This allegation does not violate the OMA.

⁷ Mr. Gorman also directs us to the September 11, 2013 meeting where the President of the Board acknowledges that there are no sub-committee minutes, but Mr. Gorman’s reference to the September 11, 2013 minutes appears to be in support of the allegation rather than an independent allegation.

“Director Jendzejec stated that she and Director Hadley have met with Union President Dave Gorman, and due to the excused absence of Director Hadley she was not ready to present a report at this time.”

Rhode Island General Laws § 42-46-8(a) states, in pertinent part, “[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.” Further, in Graziano v. Rhode Island State Lottery Commission, the Rhode Island Supreme Court stated:

“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.” See 810 A.2d 215, 222 (R.I. 2002).

While Mr. Gorman argues that he is aggrieved because the “absence of any such notice whatsoever to place, time, date, nature of business to be discussed for any and all sub-committee meetings, *** has barred and prohibited me from public participation as well as the ability to observe open, honest, and transparent government,” the minutes from the July 31, 2013 meeting show that the Finance Committee met with Mr. Gorman. Since the only situation we have been directed to where multiple individuals comprised a “subcommittee” is a situation where the “subcommittee” met with Mr. Gorman, and since no evidence has been presented that Mr. Gorman is aggrieved by the allegation that the Finance subcommittee met with him outside the public purview, we find no violation. See id. Consequently, since Mr. Gorman was not aggrieved, we find Mr. Gorman has no standing to raise the issue.

On the other hand, since the Finance subcommittee did not meet with Mr. Fay, we conclude that Mr. Fay is aggrieved by his similar allegation that the Finance subcommittee met outside the public purview as suggested by the July 31, 2013 minutes. The Fire District does not address whether Mr. Fay is aggrieved, but instead argues that despite the reference in its minutes to “Committee Reports,” the “Board has made it clear that there are no committees, per se.” Rather, the Board suggests that “individual Board members, sometimes working in conjunction with Fire Chief Andrew Baynes, the Special Master’s Office, the Tax Collector, and sometimes conducting independent inquires, have provided updates and information to the public as to the status of various fact-finding tasks.” (Emphasis added). As we have already noted, with respect to the Finance subcommittee, the July 31, 2013 minutes demonstrate that multiple Board members convened and not “individual Board members” as related by the Fire District. Despite this conclusion, on the record provided to this Department, we simply conclude that insufficient evidence has been presented to support that the instant Finance subcommittee meeting fell within the purview of the OMA. In particular, the July 31, 2013 minutes provide no indication concerning what Director Jendzejec and Director Hadley discussed with Mr. Gorman, nor is there any indication concerning the purpose of this meeting. In past findings, this Department has explained that the gathering of a “quorum” of a “public body,” without more, is insufficient to implicate the OMA. See e.g., In re Pawtucket City Council, ADV OM 05-01 (social gathering without discussion of public business not subject to OMA). Based upon the reference to the July 31, 2013 minutes, by itself, we find no violation.⁸

⁸ Our conclusion should in no way be seen by the Fire District as approval by this Department of the Fire District’s practices. Indeed, as discussed above, our conclusion is based upon standing and the lack of evidence presented. For the reasons already discussed it is unnecessary for this Department to

Next Mr. Gorman argues that “the Board willfully and knowingly violated and continues to violate the OMA for all meetings, open and closed held between July 2, 2013 and November 13, 2013 by utilizing very broad and generic language pertaining to litigation and receivership status to enter into closed session, which upon information and belief is utilized to discuss matters unrelated to the specific nature of the exemption cited.” (Emphasis added). In the Board’s response, Mr. D’Agostino argues that:

“everything discussed by the Board is the subject of, and pertains to the pending litigation, *to wit*, the Receivership KB2012-1150. *** [T]he Board asserts that the language listed on the meeting agendas did specify the nature of the business to be conducted in the Closed/Executive Sessions. By way of example, I have attached a copy of the November 13th Board meeting agenda.”⁹

As part of this Department’s investigation, we requested copies of all executive session minutes for meetings held between July 2, 2013 and November 13, 2013 for an in camera review. We were provided with closed session minutes for meetings held on July 25, 2013, July 31, 2013, August 18, 2013, and August 28, 2013.¹⁰

Rhode Island General Laws § 42-46-4 states:

specifically address the Fire District’s contention that “there are no committees, per se,” except to observe that on the proper record, this Department would have little trouble concluding that the Fire District does indeed maintain subcommittees and that these subcommittee meetings must comply with the OMA by, among other things, posting public notices and maintaining minutes. Since we conclude that there was insufficient evidence to conclude that the specific subcommittee meetings that are the subject of this finding fell within the purview of the OMA, we also reject Mr. Gorman’s complaint that these subcommittees violated the OMA and/or the APRA when they did not maintain minutes and/or post public notice. Again, our finding is based upon the specific facts presented and in different circumstances the Fire District is advised that our conclusion may differ.

⁹ While not entirely clear, we interpret Mr. Gorman’s allegation to concern the Board’s open call and not the adequacy of the Board’s posted public notice.

¹⁰ This Department is concerned with the representation that all executive session minutes have been provided to this Department. For example, Mr. D’Agostino provided this Department with the agenda and open session minutes for the November 13, 2013 meeting as an example of how the Board properly entered into closed session, but we have not been provided with the closed session minutes from this meeting. Further, this Department reviewed the open session minutes for meetings held on September 18, 2013, September 24, 2013, October 2, 2013, October 7, 2013, and October 10, 2013, all which show that the Board entered into closed session. Yet, this Department has not been provided with copies of the closed session minutes for those meetings. We have also been advised that it was Mr. D’Agostino’s understanding “that while there may have been Closed/Executive Sessions scheduled on more agendas, the [executive] sessions were not convened.” This representation, however, does not explain the reference in various open session minutes that the Board did convene into executive session. Moreover, while there are closed session minutes for the August 18, 2013 meeting, there is no agenda or open session minutes for this meeting posted on the Secretary of State’s website. All of this raises numerous issues.

“By open call, a public body may hold a meeting closed to the public upon an affirmative vote of the majority of its members. A meeting closed to the public shall be limited to matters allowed to be exempted from discussion at open meetings by § 42-46-5. The votes of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting. No public body shall discuss in closed session any public matter which does not fall within the citations to § 42-46-5(a) referred to by the public body in voting to close the meeting, even if these discussions could otherwise be closed to the public under this chapter.” (Emphasis added).

Here, several matters warrant our discussion. First, Mr. Gorman initially alleged that for all meetings between July 2, 2013 and November 13, 2013 – a period covering seventeen (17) meetings – the Fire District used broad and generic language to improperly enter executive session. This broad allegation implicates MacDougall, particularly since our review of the Fire District’s open session minutes finds several occasions within this time period where the Fire District never sought to convene into executive session.¹¹ See July 3, 2013, July 5, 2013, July 12, 2013, July 15, 2013, September 11, 2013, October 15, 2013, and October 17, 2013. In a subsequent correspondence, Mr. Gorman directs this Department to the Fire District’s September 24, 2013 and October 2, 2013 open session minutes.

Second, with respect to the two (2) meetings raised by Mr. Gorman, we have little difficulty finding that the Board failed to properly memorialize in its open session minutes an open call. Specifically, R.I. Gen. Laws § 42-46-4 provides that “[t]he votes of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting.” (Emphasis added). While our review of the September 24, 2013 and October 2, 2013 open session minutes finds that the “votes of each member” were recorded, the open session minutes contain no reference to “the reason for holding a closed meeting, by a citation to the subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed.” This violated the OMA. See R.I. Gen. Laws § 42-46-4.

Third, while not specifically raised, our review finds at least one additional situation that warrants discussion. Specifically, the Fire District’s October 7, 2013 open session minutes evince a similarly deficient open call. See R.I. Gen Laws § 42-46-4. What is even more troubling, however, is the paragraph immediately preceding this insufficient open call in the open session minutes, which indicates:

“President stated they will adjourn go [sic] into executive session to review anything that people went to various meetings for.” See October 7, 2013 open session minutes.

¹¹ In response to our November 29, 2013 letter acknowledging Mr. Fay’s complaint and seeking to be directed to specific dates for various allegations, Mr. Fay provided a December 18, 2013 email. In relevant part, Mr. Fay indicated that “[w]ith regard to the ‘executive’ session complaint, the board does not properly enter into closed sessions and they do not file minutes, notes or votes taken of these sessions. You can review audio and the minutes of every meeting and this will be confirmed as far as the procedure.” As noted herein, the failure to direct this Department to specific allegations/violations often results in the inability of this Department to review such allegations. This is such a case. See MacDougall v. Quonochontaug Central Beach Fire District, OM 13-24/PR 13-17/ADV OM 13-04.

The October 7, 2013 open session minutes contain no reference to the exemption within R.I. Gen. Laws § 42-46-5 that would purportedly allow a public body to convene into executive session for “anything that people went to various meetings for” and convening into executive session for the above-stated purpose violates R.I. Gen. Laws §§ 42-46-4 and 42-46-5. Frankly, convening into executive session for this stated purpose is so astonishingly inappropriate that further discussion is not warranted by this Department.¹²

Fourth, we have great concerns regarding the allegation that the Board discussed matters unrelated to the receivership during executive session. In this respect, the Board appears to take the position that because the Fire District is in receivership, everything that the Board discusses about the Fire District must necessarily involve the litigation exemption. We thoroughly reject this overly broad interpretation. See The Barrington Times v. Barrington School Committee, OM 09-10. With respect to the specific executive session minutes examined,¹³ although our review is somewhat hindered by the fact that the minutes are not written in complete sentences but rather stated in bullet point format, the evidence shows that at times the discussions were not appropriate for closed session. For example, and without disclosing the contents of the documents provided as part of an in camera review, the first five (5) items referenced in the July 31, 2013 executive session minutes appear inappropriate for executive session under the exemption cited. The July 25, 2013 executive session minutes, as well as the August 18, 2013 and August 28, 2013 executive session minutes, contain similar deficiencies. Therefore, we find that the Board violated the OMA when they discussed, in closed session, matters that did not fall within R.I. Gen. Laws § 42-46-5(a)(2).

In Mr. Gorman’s seventh (7th) allegation, he claims that the Board “failed to disclose any closed session votes when or if they reconvene from said closed session.” Mr. D’Agostino asserts that there were no votes taken during closed session and, in fact, our review of the aforementioned executive session minutes demonstrates that no votes were taken.¹⁴ Therefore, we find no violation.

Mr. Gorman also contends that the Board violated the OMA and the APRA when the “CCFD failed to file its closed session minutes with the Clerk’s Office for all the closed sessions held from July 2, 2013 through November 13, 2013.” Mr. D’Agostino concedes that the closed session minutes were not provided to the District Clerk, but argues that “[t]here are several reasons for this, all related to the unique facts and circumstances of the pending Receivership and the litigation surrounding the Board’s actions and positions taken.”

¹² As previously noted, although we requested all executive session minutes during the July 2, 2013 through November 13, 2013 time period, we have not been provided, among others, the October 7, 2013 executive session minutes. Although the open session minutes for the October 7, 2013 meeting show that the Board convened into closed session at 7:40 p.m. and reconvened into open session at 7:45 p.m. “*** due to meeting area [the Board] wanted to use was locked,” it is unclear whether any substantive discussion took place, during an executive session.

¹³ Again, we have only been provided executive session minutes for the Board’s meetings on July 25, 2013, July 31, 2013, August 18, 2013, and August 28, 2013.

¹⁴ This Department has concluded that a public body that reaches a “consensus,” but does not necessarily vote, falls within the vote disclosure requirements. See Clarke v. North Cumberland Fire District, OM 10-21. Based upon our review of the executive session minutes, we are unable to conclude that the Fire District reached a consensus.

Rhode Island General Laws § 42-46-7(b) provides “[t]he minutes shall be public records and unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier, except where the disclosure would be inconsistent with §§ 42-46-4 and 42-46-5 or where the public body by majority vote extends the time period for the filing of the minutes and publicly states the reason.” (Emphases added). Here, nothing within the OMA requires any minutes – either open or closed – to be filed with the “Clerk’s Office” – but instead only requires that open session minutes be made available “at the office of the public body.” Moreover, with respect to the complaint that executive session minutes have not been filed “with the Clerk’s Office,” the OMA contains no such requirement for executive session minutes. Indeed, Mr. Gorman’s complaint contains no legal authority. Accordingly, we find no violation.¹⁵

Next, Mr. Gorman alleges that the CCFD violated the OMA when he, as a non-taxpayer, was barred from the CCFD’s special meeting held on October 21, 2013 to set the Fire District’s budget and tax rate. Specifically, Mr. Gorman contends that:

“non-taxpayers were being segregated and that we had to stay in the Cafeteria or, we could leave entirely. ***Approximately thirty to forty minutes after the beginning of the meeting, I was advised that the residents and taxpayers had made a request to allow non-taxpayers into the meeting, specifically myself ***. Although the President and the Board, to my knowledge, failed to approve the public request from the floor to allow non-taxpayers into the meeting, I was told by a taxpayer to come into the meeting, and subsequently I as well as others, was now allowed into the meeting. Albeit nearly completed.”

In response to this allegation, Mr. D’Agostino states “when it was alleged that a non-resident was not allowed into the auditorium where the meeting was called to act upon the Board’s recommended levy and assessment, I personally left the stage, walked to where the Board of Canvassers was processing voters and non-voters, spoke with a Canvasser and confirmed that no one was being denied entry into the auditorium (provided that there was space available for all the District voters, first-and there was ample space).”

In Pine v. McGreavy, 687 A.2d 1244 (R.I. 1997), the Rhode Island Supreme Court confronted a similar situation where the moderator for the Tiverton financial town meeting ejected a news photographer for failing to observe an earlier instruction to remain in a section designated for media. Subsequently, this Department filed an OMA complaint in Superior Court, which was dismissed on the basis that the financial town meeting was not included in the OMA’s definition of a “public body.” Id. at 1245. This Department appealed to the Supreme Court, which affirmed.

In its opinion, the Supreme Court observed that it was “in agreement with the trial justice that a financial town meeting of the electors qualified to vote on the imposition of a tax and the expenditure of money does not fit within this definitional section.” Id. Significantly, the “public body” definition examined in Pine is, in all material respects, the same “public body” definition presently set forth in the OMA. See R.I. Gen. Laws § 42-46-2(c). The Pine Court continued that the OMA “was designed to prevent public

¹⁵ Mr. Fay makes a similar allegation. The analysis discussed above applies with equal force. See also R.I. Gen. Laws § 42-46-7(b)(“A record of all votes taken at all meetings of public bodies, listing how each member voted on each issue, shall be a public record and shall be available to the public at the office of the public body, within two (2) weeks of the date of the vote.”).

bodies of a different type from holding meetings in closed sessions. It was not directed at financial town meetings that by their very nature cannot be closed and cannot be other than highly public.” *Id.* Similar to *Pine*, the October 21, 2013 meeting was a meeting of electors qualified to vote on a budget and tax rate and as such, not subject to the OMA. Therefore, consistent with *Pine*, and in the absence of any evidence that the Board collectively discussed any topic and/or took action during the October 21, 2013 meeting, we find no violation. *See In re Financial Town Meeting*, ADV OM 09-01 (“Since the Supreme Court has already determined that the OMA does not apply to financial town meetings, whether or not the Town of Lincoln permits non-electors to be admitted to its financial town meeting does not implicate the OMA.”).

The same analysis would also apply to Mr. Fay’s complaint concerning the same subject-matter and allegation. The only difference being that Mr. Fay acknowledges that since he is a Fire District resident, he was permitted to attend the meeting. As such, Mr. Fay is not aggrieved by this allegation and lacks standing to raise this complaint. *See Graziano*, 810 A.2d at 222.

Additionally, Mr. Fay contends that the Board failed to list “public comment” on the agendas for the following meetings: September 18, 2013, September 24, 2013, October 2, 2013, October 7, 2013, October 10, 2013, October 17, 2013, October 21, 2013, and November 13, 2013. In what appears to be a related complaint, Mr. Fay contends that during the November 13, 2013 public comment, “[t]here were discussions on operational changes as well as change of the mission statement being changed [and n]one of this is listed on the agenda.” Our review of the minutes available on the Secretary of State’s website demonstrates that you were present, and participated in public comment, for the October 17, 2013 and November 13, 2013 meetings.

Pursuant to the OMA, there is no requirement that a public body must have an open forum session. Nonetheless, the OMA provides that if a public body does permit public comment, “[n]othing within th[e OMA] shall prohibit any public body, or the members thereof, from responding to comments initiated by a member of the public during a properly noticed open forum even if the subject matter of a citizen’s comments or discussions were not previously posted, provided such matters shall be for informational purposes only and may not be voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public or to refer the matter to an appropriate committee or to another body or official.” R.I. Gen. Laws § 42-46-6(d).

Here, we begin by expressing our concern that Mr. Fay is not aggrieved with respect to the allegation raised. Notably, Mr. Fay was present for the Fire District’s October 17, 2013 and November 13, 2013 meetings, and in fact, participated in the public comment that he alleges to have been improperly noticed. There is no evidence that Mr. Fay was aggrieved with respect to the alleged improperly noticed “public comment” during the meetings he attended and provided public comment. *See Graziano*, 810 A.2d at 222 (“[i]t is not unreasonable to require that the person who raises the issue of defect in notices be in some way disadvantaged or aggrieved by such defect”).

Moreover, based upon the evidence presented, we simply conclude there is insufficient evidence to find a violation. Specifically, we observe that the OMA provides that “[n]othing within th[e OMA] shall prohibit any public body, or the members thereof, from responding to comments initiated by a member of the public during a properly noticed open forum even if the subject matter of a citizen’s comments or discussions were not previously posted[.]” *See* R.I. Gen. Laws § 42-46-6(d). As we read this provision, if a “public body, or the members thereof” are going to “respond[] to comments initiated by a member of the public,” such a matter must occur “during a properly noticed open forum.” *Id.* From our review of the September 18, 2013, September 24, 2013, October 2, 2013, and October 7, 2013 minutes, it does not

appear that the Fire District engaged in any public comment period. Further, while our review of the October 10, 2013 minutes suggests at least one member of the public engaged in public comment, no evidence exists that such public comment resulted in a “quorum” of the Fire District “responding to comments initiated by a member of the public.” It is also notable that despite this Department’s November 29, 2013 correspondence seeking evidence that Mr. Fay was aggrieved by “allegations regarding notice,” this Department has been presented with no evidence that Mr. Fay is aggrieved by these allegations. Accordingly, we find no violation.¹⁶

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 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) “[t]he court may impose a civil fine not exceeding five thousand (\$5,000) dollars 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(d).

Here, with the exception of the Board’s August 18, 2013 and October 21, 2013 open session minutes, the Board has posted its open session minutes that are the subject of this finding on the Secretary of State’s website. Accordingly, with the exception of the August 18, 2013 and October 21, 2013 minutes, injunctive relief is not appropriate. With respect to the August 18, 2013 and October 21, 2013 open session minutes, to the extent that the Board can create reliable open session minutes that fairly memorialize the August 18, 2013 and October 21, 2013 meetings, the Board should do so and post such minutes on the Secretary of State’s website within twenty (20) days of the date of this finding. With respect to the willful or knowing element, by letter dated November 4, 2013, the Attorney General advised all Fire Districts that the OMA had been amended, effective July 2013, to include R.I. Gen. Laws § 42-46-7(b)(2)’s posting requirement on fire districts. For this reason, among others, we have concerns that the Fire District’s failure to post minutes for the October 21, 2013 meeting, failure to post both public notice and open session meeting minutes for the August 18, 2013 meeting, and the untimely posting of its November 13, 2013 open session minutes, posted on February 7, 2014, may have been willful or knowing within the meaning of the OMA.

We also conclude that insufficient evidence exists that the Board’s failure to provide a proper open call was willful or knowing, but at this juncture we are unable to conclude that the Board’s discussion of matters unrelated to R.I. Gen. Laws § 42-46-5(a)(2) was not willful or knowing. In this respect, we direct the Fire District to review the executive session minutes that were provided to this Department and publicly disclose the portions of those executive session minutes that do not fall within R.I. Gen. Laws § 42-46-5(a)(2). As already noted, we thoroughly reject the Board’s argument that because the Fire District is in receivership, everything that the Fire District discusses falls within R.I. Gen. Laws § 42-46-5(a)(2). Our prior findings, available on the Attorney General’s website and the Attorney General’s Guide to Open Government in Rhode Island provide sufficient guidance to assist the Fire District in determining the matters that legitimately fall within R.I. Gen. Laws § 42-46-5(a)(2) and those that do not. We have no doubt that each of the four (4) executive session minutes that we have reviewed contain matters that do not fall within R.I. Gen. Laws § 42-46-5(a)(2). Only those matters that fall within R.I. Gen. Laws § 42-46-5(a)(2) may be redacted.

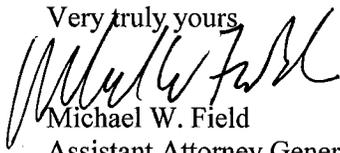
¹⁶ It appears the main focus of Mr. Fay’s allegation may be that different speakers are treated differently based upon the content of their speech. While this is no doubt a serious allegation, this allegation does not implicate the OMA and will not be addressed in this finding.

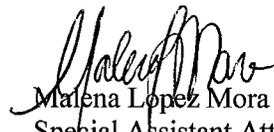
With respect to the Fire District convening into executive session on October 7, 2013, at this time, we are also not prepared to conclude that this violation was not willful or knowing. As noted above, it is simply astonishing to us that a public body would seek to convene into executive session, stating as its purpose that it intends "to review anything that people went to various meetings for." It appears to us that the Fire District made no effort to comply with R.I. Gen. Laws § 42-46-4 and § 42-46-5. To be fair, we reach this conclusion without reviewing the October 7, 2013 executive session minutes; but in equal fairness, we must also point out that we have not reviewed these executive session minutes because the Fire District has not provided them to this Department despite our request that it provide all executive session minutes from July 2, 2013 through November 13, 2013. Even if the Fire District ultimately did not convene into executive session for the reason related earlier, the Fire District's intent to convene into executive session for the stated purpose is of great concern. See supra footnote 12. The Board's review and disclosure of matters improperly discussed within executive session must be accomplished within twenty (20) days of this finding and a copy of the redacted minutes that the Board intends to publicly disclose must be provided to this Department.

With respect to the matters that we have identified as possible willful or knowing violations,¹⁷ the Board is directed to provide a supplemental response to this Department within ten (10) business days of legal counsel's receipt of this finding. The Board's supplemental response should address in a non-conclusionary manner the willful or knowing concerns that we have raised in light of the willful or knowing standard identified by the Supreme Court and this Department. See DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994); Carmody v. Rhode Island Conflict of Interest Comm'n, 509 A.2d 453 (R.I. 1986); Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13. Both Mr. Gorman and Mr. Fay may also (but need not) provide a supplemental response to this Department, which must also be provided to the Fire District's legal counsel, within the same time period. We recognize that the Fire District is in receivership and even the filing of a lawsuit in Superior Court, as well as enforcement, may present some unique challenges, including possibly seeking Court approval to file a lawsuit. Nonetheless, we are resolute in the fact that – as explained herein – various matters that should be within the public purview are not within the public purview and that these matters must be remedied.

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

Very truly yours,


Michael W. Field
Assistant Attorney General


Malena Lopez Mora
Special Assistant Attorney General

Cc: David M. D'Agostino, Esq.,

¹⁷ To avoid any misunderstandings these areas are: (1) failure to timely post the November 13, 2013 open session minutes on the Secretary of State's website, (2) failure to maintain and post on the Secretary of State's website its August 18, 2013 and October 21, 2013 open session minutes, as well as post on the Secretary of State's website public notice for the August 18, 2013 meeting, (3) failure to maintain executive session minutes for those meetings post-July 2, 2013 that were not provided to this Department for in camera review, (4) discussing matters during the July 25, 2013, July 31, 2013, August 18, 2013, and August 28, 2013 meetings that were not appropriate for executive session, and (5) convening into executive session, and possibly discussing in executive session, an improper topic during its October 7, 2013 meeting.