



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

February 17, 2014
OM 14-07

Mr. Stephen N. Guarino
Mr. Michael J. Davis
Dr. Anthony C. Nunes

RE: Guarino, et al. v. Rhode Island Atomic Energy Commission

Dear Mr. Guarino, Mr. Davis and Dr. Nunes:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Rhode Island Atomic Energy Commission (“RIAEC” or “Commission”) is complete. By correspondences dated February 26, 2013, and March 28, 2013, you allege the RIAEC violated the OMA on several occasions. For ease of reference, we take each of your allegations in turn below.

Before addressing the merits of your complaint, we make several preliminary observations. We observe that your complaint and all subsequent correspondences were written on RIAEC letterhead. While at the time your complaint was filed you were all associated with the RIAEC, we do not view your complaint as written on behalf of the RIAEC, and in fact, your complaint is filed against the RIAEC. You have provided this Department with only one address – the address for the RIAEC – and accordingly, this is the address we have used.

It also bears noting that, at the time this complaint was filed, you were all associated with the RIAEC and one of you (Dr. Nunes) was a Commissioner of the RIAEC, the public body against whom this complaint is filed. While parts of your correspondences can be read as trying to distance or separate Dr. Nunes from the conduct that this complaint alleges the RIAEC committed in violation of the OMA, we make no such distinction. Instead, our finding concerns the RIAEC as a whole. Lastly, a fair reading of the evidence presented may demonstrate two (2)

different factions within the RIAEC, each blaming the other – to a more or less extent – for some or all of the issues presented in this complaint. Our statutory obligation is to investigate this OMA complaint and we limit our finding to fulfilling this Department’s statutory obligation.

With respect to the OMA issues, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to determine whether this Department believes that an infraction has occurred or to examine the wisdom of a given statute, 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 RIAEC violated the OMA.¹ See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

Lastly, before we begin our analysis, we note that this Department may only address allegations for which you are aggrieved.² The OMA provides that only “aggrieved” citizens may file a complaint with this Department. R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Supreme Court examined the “aggrieved” provision of the OMA. In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission’s March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission’s March 25, 1996 meeting, Mr. Hawkins and his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission’s notice was deficient, the trial justice determined that the Lottery Commission violated the OMA, and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was “unnecessary” to address the merits of the OMA lawsuit because “the plaintiffs Graziano and Hawkins ha[d] no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

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

¹ Please be advised that, by law, the Department of Attorney General (“Department”) represents the State and its agencies, and is delegated jurisdiction to enforce certain laws, such as the OMA and the Access to Public Records Act (“APRA”). As such, in this instance, this Department has authority only to investigate whether the RIAEC violated the OMA. For all other claims not related to the OMA, you may wish to contact a private attorney on those matters.

² Because there are three complainants, there may be times when none, all or some are aggrieved, and we address those grievances in turn.

With this in mind, we proceed with your allegations.

I. September 7, 2012 Meeting.

You contend that the agenda for the September 7, 2012 meeting failed to list an executive session. You further contend that no vote was taken to amend its agenda. Lastly, you contend that no statement specifying the nature of the business to be discussed during executive session was recorded in the minutes, in violation of Rhode Island General Laws § 42-46-4(a).

In response to these allegations, we received a substantive affidavit from Dr. Bahram Nassersharif, Commissioner and Acting Chair of the RIAEC. Dr. Nassersharif states, in pertinent part:

Commission unexpectedly voted to convene executive session as the topic resulted from a need to discuss in more depth the item #2 on the Agenda - Radiation & Safety Program and ADRRS position – job performance of current executive Director Tehan...

[T]he minutes filed with the Secretary of State clearly document that Dr. Nassersharif made a motion to go into executive session which was seconded by Dr. Mecca and unanimously passed...

[A]mended minutes filed with Secretary of State clearly state that the reason the Commission went into executive session was to address the process that was used to recruit for the position recently made vacant by retirement of staff member.

With regard to whether you are aggrieved, Dr. Nassersharif states:

[T]he complainants were in attendance. Complainants are staff members of RINSC [Rhode Island Nuclear Science Center] – as executive session minutes reflect, the RINSC staff were fully informed of the Commission's concerns about job title. Complainants fail to describe how they were individually or collectively aggrieved by the alleged violations of the Open Meetings Act...

Here, we find no violations. Specifically, this Department has previously held that a public body does not violate the OMA when its agenda fails to include a notation that it will convene into executive session and our holding applies equally in this case. See Balbat v. Westerly Housing Authority Board of Commissioners, OM 13-18. Likewise, since the OMA does not require a public body to amend its agenda, a public body that fails to amend its agenda does not violate the OMA. See R.I. Gen. Laws § 42-46-6(b). Lastly, you contend that the RIAEC failed to record in its open session minutes a statement specifying the nature of the business to be discussed. On this point, the RIAEC's September 7, 2012 open session minutes, posted on the Secretary of State's website on September 10, 2012, did indeed fail to contain a statement specifying the nature of the executive session business to be discussed. On October 4, 2012 – more than four (4) months before you filed the instant complaint – the RIAEC filed amended minutes with the

Secretary of State. These amended minutes indicated that “[i]n executive session the commission addressed the process that was used to recruit for the position recently made vacant by retirement of [a named individual].” We view this amended statement to comply with R.I. Gen. Laws § 42-46-4(a)’s requirement that the open session minutes contain a statement specifying the nature of the business to be discussed in executive session. Since the open session minutes were amended within the thirty-five (35) day period required for open session minutes to be made publicly available, see R.I. Gen. Laws § 42-46-7(b), and since you provide no evidence that you were aggrieved prior to the amendment, we find no violation.

You further raise issues pertaining to the substance of the executive session. First, you contend that the purpose for convening into executive session was not proper under Rhode Island General Laws § 42-46-5(a). You further contend that votes taken during executive session were neither disclosed nor recorded, in particular the vote changing the title of Assistant Director for Reactor and Radiation Safety to Radiation Safety Officer and giving the Commissioner(s) authority to instruct the RIAEC staff to apply for a license amendment for the title change.³ Lastly, you contend that Mr. Guarino was not provided advanced written notice that he could have the executive session where “his qualifications were mentioned” held in open session pursuant to Rhode Island General Laws § 42-46-5(a)(1).

In response to these allegations, we received a substantive affidavit from Dr. Nassersharif, who states, in pertinent part:

Executive session was called pursuant to 42-46-5(a)(1) due to potential nature of the Executive Director’s...recruitment and hiring process and his failure to properly advertise the position creating a situation that there would be only one candidate... [t]he Commission was apprehensive that the concerns raised years ago about the eventual filling of this position were being ignored by the Executive Director...

There was no vote taken in executive session – there was only discussion about the process and the perceived ignoring of the Commission’s expressed concerns on the title of the position. Staff were apprised of Commission’s desire to change the title from ADRSS to RSO...

³ You allege that there was a discussion at the December 18, 2012 meeting about both of these issues, and that Commissioners cannot unilaterally take action. In the context of this case, this Department only has jurisdiction to review alleged violations of the OMA and the Access to Public Records Act (“APRA”). As such, it appears from your correspondence that the discussions held at the December 18, 2012 meeting did not implicate the OMA, but that a potential undisclosed vote taken during executive session on September 7, 2012 relating to topics discussed at the December 18, 2012 meeting may implicate the OMA. Thus, as noted in our acknowledgment letter dated April 23, 2013, we will consider this allegation along with your other OMA allegations for the September 7, 2012 meeting.

The reason for the Commission going into executive session was to discuss the general process of the recruitment and hiring practices of the Executive Director, the discussion unexpectedly lead to questions of the qualifications of the incumbent in the ADRSS position (Stephen Guarino) therefore his name was mentioned in the discussion; however, there was no formal vote or adverse personnel actions taken against him... [.]

Rhode Island General Laws § 42-46-5(a)(1) allows a public body to convene into executive session to discuss “job performance, character, or physical or mental health of a person or persons provided that such person or persons affected shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting.” A “passing reference” to a person’s job performance not amounting to a discussion does not violate the notice requirement under the OMA. See Albro v. West Greenwich Town Council, OM 12-20. Indeed, the plain language of R.I. Gen. Laws § 42-46-5(a)(1) requires that advance notice be provided only to such “person or persons affected.”

After an *in camera* review of the executive session minutes, we determine that the RIAEC did convene into executive session for a proper purpose.⁴ Moreover, while Mr. Guarino alleges that his job performance was discussed in executive session, an *in camera* review of the executive session minutes indicates that his job performance was not discussed.⁵ In fact, your complaint states that “[a]lthough the meeting was not specifically about the qualifications of Mr. Guarino for the position in question, his qualifications were mentioned***.” Even if Mr. Guarino’s job qualifications had been “mentioned,” as you allege, this Department has previously determined that a “passing reference” to a person’s job performance not amounting to a discussion does not violate the notice requirement under the OMA. See Albro v. West Greenwich Town Council, OM 12-20. This is particularly the case when there is no evidence that an individual was “affected” by the executive session discussion. Lastly, you contend that votes taken in executive session with regard to changing the title of Assistant Director for Reaction and Radiation Safety to Radiation Safety Officer were not disclosed. The RIAEC counters that there was no vote taken in executive session. Having reviewed the evidence presented, including the executive session minutes, we find insufficient evidence to establish a vote or a consensus, and therefore, we find no violations.

⁴ While we find that the RIAEC did convene for a proper purpose under R.I. Gen. Laws § 42-46-5(a)(1), we have some concerns that an “affected” person or persons whose job performance may have been discussed, other than the instant complainants, were not notified. Given the fact that the substance of the executive session did not concern any of the complainants, and that only an aggrieved party may bring an allegation under this provision, we decline to investigate this issue. See Okwara v. Rhode Island Commission on Deaf and Hard of Hearing, OM 00-07.

⁵ The amended open session minutes indicate that the RIAEC convened into executive session to address “the process that was used to recruit for the position recently made vacant by retirement of Henry Bicehouse.”

II. December 10, 2012 Meeting.

You allege the RIAEC committed the following four (4) violations with respect to its December 10, 2012 meeting: failure to post notice within forty-eight (48) hours of the meeting; failure to post notice that the meeting was an “emergency” meeting; failure to list executive session on the agenda; and failure to convene into executive session for a proper purpose. As previously discussed, before reaching the merits of your allegations, you must demonstrate that you are aggrieved. See Graziano, 810 A.2d at 221-22. Based upon the evidence presented, both Mr. Guarino and Dr. Nunes were present at the December 10, 2012 meeting. Having been presented with no evidence demonstrating that Mr. Guarino or Dr. Nunes were aggrieved by the allegedly improper notice set forth in allegations Nos. 1 and 2, we will not reach the merits of these allegations with respect to these two individuals. We reach the merits of all allegations with respect to Mr. Davis, who did not appear to be in attendance at the meeting.

In response to these allegations, we received a substantive affidavit from Dr. Nassersharif, who states, in pertinent part:

The Commission conveyed [sic] an emergency meeting on December 10, 2012 to address the sudden departure of the Executive Director (Terrence Tehan) of the RINSC. The Executive Director had been on medical leave and then vacation. The Executive Director notified the Commission by email dated December 6, 2012 indicating that he was retiring effective December 21, 2012 and he apparently moved his belonging[s] out of his office on December 7, 2012 effectively vacating his position at that time. There was clearly an emergency situation for the Commission due to the unexpected departure of the Executive Director. ***

Pursuant to R.I. Gen. Laws 42-46-6(c) a public body may hold an emergency meeting, upon affirmative vote of the majority of the members of the body when the meeting is deemed necessary to address an unexpected occurrence that requires immediate action to protect the public. Clearly, the unexpected retirement of the Executive Director of the RINSC (which was effective the date of his email – 12.6.12) rises to the level of an emergency where immediate action by the Commission was necessary in order to protect the public – i.e. the management of the atomic nuclear reactor. Chair moved forward with meeting as he and [the] Commission considered the sudden departure of the Executive Director an *emergency* as it posed serious questions that represented in their opinion timely consideration and action.

The OMA requires that all public bodies provide written notice of their meetings within forty-eight (48) hours of the meeting. R.I. Gen. Laws § 42-46-6(b). The notice shall include the date the notice was posted, the date, time, and place of the meeting, and a statement specifying the nature of the business to be discussed. Id. The OMA also contains a so-called “emergency meeting provision” that allows a meeting to convene with less than forty-eight (48) hours notice:

[N]othing contained herein shall prevent a public body from holding an emergency meeting, upon an affirmative vote of the majority of the members of the body when the meeting is deemed necessary to address an unexpected occurrence that requires immediate action to protect the public. If an emergency meeting is called, a meeting notice and agenda shall be posted as soon as practicable and shall be electronically filed with the secretary of state pursuant to subsection [f] and, upon meeting, the public body shall state for the record and minutes why the matter must be addressed in less than forty-eight (48) hours and only discuss the issue or issues which created the need for an emergency meeting.

Here, the evidence presented shows that by email dated Thursday, December 6, 2012, the RIAEC was aware that the Director would retire effective December 21, 2012. The evidence further indicates that, while the Director apparently planned to retire on December 21, 2012, he, according to the RIAEC, unexpectedly vacated his office and position on Friday, December 7, 2012. The meeting was held on Monday, December 10, 2012. The length of time from when the Director physically vacated his position, December 7, and the date when the meeting was held, December 10, is three days – well beyond forty-eight (48) hours.

It is thus unnecessary to determine whether these circumstances constituted an “emergency,” as defined in R.I. Gen. Laws § 42-46-6(b), because the RIAEC could have posted notice on Friday, December 7, 2012 – the day the Director moved his belongings – for a meeting on Monday, December 10, 2012. Considering these circumstances, the less-than-forty-eight (48) hours notice provision of R.I. Gen. Laws § 42-46-6(b) simply does not apply, and the RIAEC violated the OMA by convening its December 10, 2012 meeting on less than forty-eight (48) hours notice.

You further contend that the RIAEC failed to list the executive session on the agenda and improperly convened in executive session because the reason given, as reflected in the minutes, did not fall within Rhode Island General Laws § 42-46-5(a)(1)-(10). In response, Dr. Nassersharif states, in pertinent part:

[T]he executive (closed) session was unexpectedly voted by [the] Commission to convene as topic resulted from the need to discuss in more depth a number of concerns arising from the short notice, interim responsibilities and the personnel process of filling the vacancy in the Executive Director’s position. In addition, there were financial and budget questions that arose out of the Executive Director’s notification as well as questions relating to medical leave and the continuing operations and management.

As discussed, supra, the OMA does not require that an executive session be listed on the agenda. Thus, we find no violation. With respect to your second allegation, the OMA allows a public body to convene into executive session for one of ten (10) enumerated purposes. See R.I. Gen. Laws § 42-46-5(a). The open session minutes from the December 10, 2012 meeting state that in executive session, “[t]he Commission addressed a number of concerns arising from the short notice of Dr. Tehan [leaving], interim responsibilities and the process of filling the upcoming vacancy in the Director’s position.” Because no minutes specific to the executive session were

ever provided, we must rely on the open session minutes to determine whether there was a violation. Based on the open session minutes, as well as the evidence presented, the topic of the executive session does not appear to fall within the ambit of Rhode Island General Laws § 42-46-5(a). Indeed, the RIAEC has never cited a subdivision of Rhode Island General Laws § 42-46-5(a) to justify the executive session and this omission, by itself, violates the OMA. See R.I. Gen. Laws § 42-46-4. With no evidence presented to the contrary, we find that the Commission improperly convened into executive session during its December 10, 2012 meeting, and thus violated the OMA.

III. January 2, 2013 Meeting.

You raise several allegations regarding notice, agenda, and executive session for the January 2, 2013 meeting. With respect to notice, you contend that the “online notice” for this meeting was posted one day after the meeting took place, in violation of Rhode Island General Laws § 42-46-6(b) and (c). You further contend that notice of this meeting was not included in the requisite annual notice required by Rhode Island General Laws § 42-46-6(a).

In response, Dr. Nassersharif states, in pertinent part:

The Commission Chair requested a meeting take place on January 2, 2013 to review a recent recruitment and selection process and requested by email on December 28, 2012 to have RINRC [sic] staff (Sophia Lenihan and Jeff Davis) which was part of their ordinary duties on behalf of Commission at the time to post the meeting notice for Wednesday January 2, 2013 at 9:00am in Classroom at RINSC. The staff **failed** to properly post the meeting notice. Had the staff posted the notice as instructed by the Commission there would have been the requisite 48 hour notice of the meeting. (Emphasis in original).

Here, the evidence presented to this Department suggests that all three (3) complainants attended the January 2, 2013 meeting, and accordingly, this Department’s letter dated April 23, 2013, asked how you were aggrieved. You responded to this Department in a letter dated May 14, 2013, stating “each of us was able to attend the meeting and thus Mr. Davis and Mr. Guarino were not personally aggrieved.”⁶ Upon careful review of the minutes from the January 2, 2013 meeting, all three (3) complainants were in attendance. Only “aggrieved” citizens may file a complaint with this Department. See R.I. Gen. Laws § 42-46-8(a). We have been presented with no other evidence demonstrating how you may be aggrieved. Thus, we decline to reach the merits of the allegations for the January 2, 2013 meeting with respect to notice. See Graziano,

⁶ While not explicitly stated in your letter, Dr. Nunes is a Commissioner and was present at the meeting. There was no evidence presented to demonstrate that Dr. Nunes was aggrieved in this instance. In fact, the evidence shows that Dr. Nunes seconded the motion to convene into executive session.

810 A.2d 221-22 (requiring a person who raises an allegation of defect of notice to show that he was aggrieved by the defect).⁷

With respect to the agenda, you contend that it fails to specify the nature of the business to be discussed. You further contend that the agenda failed to list notice of executive session.

In response, Dr. Nassersharif states, in pertinent part:

[T]he items on the meeting agenda were recurring old business items and the executive (closed) session arose from the agenda item – an investigation by Office of Human Resources, Department of Administration of Health Physics recruitment and selection process – pursuant to R.I. Gen. Laws 42-46-5(4). Discussion was related to report on the hiring and recruitment process not specific individuals and work performance issues. Therefore advance notice to any specific person or persons was not required.

Here, you were all present during the January 2, 2013 open session, yet complain that certain topics discussed during the open session were not properly advertised, such as staff not being prepared for class and personnel teaching a class. As noted, the open session minutes not only indicate that all complainants were present for the open session, but that at least two (2) complainants participated in discussions that now serve as the basis of the instant complaint. Based on your attendance and participation, we simply fail to see that you were aggrieved by this allegation. See Graziano, 810 A.2d at 221-22 (“[i]t 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”). Accordingly, although we have concerns regarding what appears from the open session minutes to be a free-wheeling discussion, we do not reach the merits of your claim. We also find that the RIAEC did not violate the OMA when it failed to cite an executive session on its agenda. See Albro v. West Greenwich Town Council, OM 12-20. Thus, we find no violation.

With respect to the executive session, you contend that the RIAEC convened in executive session for an improper purpose.

In response, Dr. Nassersharif states, in pertinent part:

...[T]he executive (closed) session arose f[rom] the agenda item – an investigation by Office of Human Resources, Department of Administration of the Health Physics recruitment and selection process – pursuant to R.I. Gen. Laws 42-46-5(4)...Discussion was related to report on the hiring and recruitment

⁷ It is worth noting that the Commission Chair sent an email dated December 28, 2012 to staff, including one of the complainants, Mr. Davis, requesting that they post notice for the meeting to be held on January 2, 2013. You provided a written rebuttal dated June 11, 2013 to address Dr. Nassersharif’s affidavit, but you fail to address this specific allegation or the averment that one of the complainants never posted the notice that is the subject of this complaint. In any event, for the reasons stated, we find you are not aggrieved.

process[,] not specific individuals and work performance issue. The Commission had basic information on the education qualifications of each of the candidates for the Health Physics [sic] position. Note was made of these for all candidates[.]

Rhode Island General Laws § 42-46-5(a)(4) allows a public body to convene into executive session for “[a]ny investigative proceedings regarding allegations of misconduct, either civil or criminal.” The OMA does not define “investigative proceedings.” This Department has previously observed that “investigate” is variously defined as “[t]o follow up step by step by patient inquiry or observation,” “to search into,” “to examine and inquire with care and accuracy,” “to find out by careful inquisition,” and “examination.” Black’s Law Dictionary (6th Edition), p. 825; see also Re: Request for Open Meetings Act Advisory Opinion, ADV OM 00-01. “Investigation” is defined as “[t]he process of inquiring into or tracking down through inquiry.” Black’s Law Dictionary (6th Edition), p. 825. In addition “proceeding” is defined as the “regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.” Id. at 1204.

Here, Dr. Nassersharif admits that the “[d]iscussion was related to report on the hiring and recruitment process, not specific individuals and work performance issue.” In this vein, the RIAEC has failed to convince this Department that it was conducting an “investigative proceeding,” nor has the RIAEC demonstrated that its alleged “investigative proceeding” concerned an allegation of civil or criminal misconduct. Indeed, very little, if anything, has been advanced by the Commission on these points. Thus, we find that the RIAEC violated the OMA when it failed to convene into executive session for a proper purpose.

Next, it appears you contend that votes taken during executive session were not disclosed when RIAEC reconvened into open session, in violation of Rhode Island General Laws § 42-46-4(b). In response, Dr. Nassersharif states that “[t]he outcome of the meeting was disclosed when the Commission went back into open session.” Rhode Island General Laws § 42-46-4(b) states, in pertinent part, that “[a]ll votes taken in closed session shall be disclosed once the session is reopened.” The minutes must include “[a] record by individual members of any vote taken” and “[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***.” R.I. Gen. Laws § 42-46-7(a)(3) and (b).

Here, an *in camera* review of the executive session minutes reveals that a vote was taken.⁸ Although the Commission maintains that the outcome of the meeting was disclosed, no evidence has been submitted to establish that the RIAEC complied with the above provisions. In fact, the executive session minutes indicate a 4-1 vote, but the open session minutes fail to indicate the identity of the dissenting member. See R.I. Gen. Laws §§ 42-46-4(b) and 42-46-7(a)(3). Thus, we find that the RIAEC violated the OMA by failing to disclose in open session (and record in the open session minutes) the votes taken by each individual member in executive session.

⁸ Dr. Nunes was present during the executive session and appears to have cast a vote during the executive session.

Lastly, it appears that you contend that “[a]fter the adjournment of the meeting,” the Commissioners were asked to remain to “discuss” the outcome of a telephone conversation. According to your complaint “an informal poll of Commissioner’s feelings on the matter of terminating the the [sic] Health Physicist and reopening the search” occurred. While your complaint indicates that “[n]o formal vote was taken or disclosed,” you relate that a later e-mail chain included an e-mail from Commissioner Kadak, see infra, which supports your position that a vote occurred. Although your complaint does reference Commissioner Kadak’s e-mail as evidence to support your position, to be fair, your complaint omits Commissioner Nunes’ email, which indicated that “the Commission has not held a formal vote to approve this action.” (Commissioner Kadak’s e-mail was in response to Commissioner Nunes’ email).

Based upon the evidence presented, we find no violation and reach this conclusion for several reasons. Commissioner Kadak’s after-the-fact impression of what occurred during the January 2, 2013 meeting is contradicted by Commissioner Nunes’ after-the-fact email. More importantly, your complaint makes clear that the RIAEC “took an informal poll of Commissioner’s feelings on the matter of terminating the the [sic] Health Physicist and reopening the search” and based upon our review of the above-referenced e-mails, these e-mails seem to consider the same subject-matter. While the foregoing seems to suggest that the RIAEC did consider and vote upon re-opening the search process and thus terminating the Health Physicist, our review of the January 2, 2013 executive session minutes finds that this was the subject-matter voted upon by the RIAEC and not disclosed. See supra.⁹ Because this was the subject-matter discussed and voted upon in executive session, the basis of this aspect of your complaint, i.e., that an informal vote was taken after the adjournment of the meeting, is unclear. Considering this ambiguity, the conflicting e-mails, and the fact that all three (3) complainants were present for the January 2, 2013 meeting, which raises the unanswered question whether all three (3) complainants were present for this aspect of your complaint, we find no violation. See Graziano, 810 A.2d at 221-22.

IV. Job interviews conducted on February 8, 2013, February 15, 2013, and February 22, 2013.

You contend that RIAEC convened to conduct interviews for the Director’s position, without notice to the public, on February 8, 2013, February 15, 2013, and February 22, 2013. In response to these allegations, Dr. Nassersharif stated, in pertinent part:

[C]onducting interviews to fill the unexpected vacancy for the Executive Director position is not a subject matter for the Open Meetings Act.

Following the sudden retirement of Executive Director Terrence Tehan in December, 2012, the Commission agreed to serve as a committee of the whole for

⁹ Generally, we would not disclose the subject matter of an executive session, but given that the subject matter has become public, and considering our finding that the subject matter was inappropriate for executive session and the executive session vote must be disclosed, we see little harm in the limited disclosure that is necessary to explain our finding.

the purpose of recruiting the next executive director. That committee was meeting not as the Commission but rather as an executive director search committee. * * *

The Commission does not agree that the interviews are subject to the Open Meetings Act as the process was being conducted by a committee (effectively charged by the Commission). The interviews were day long involving meetings with staff, members of the committee and the Director of Radiation and Safety at the University of Rhode Island***.

In its April 23, 2013 letter, this Department asked that you provide evidence demonstrating that you, and not the public at large, were aggrieved by the alleged lack of notice. See Graziano v. Rhode Island State Lottery Comm'n, 810 A.2d 215, 222 (R.I. 2002) (requiring a person who raises an allegation of defect in notice show that he was aggrieved by that defect). In your response letter dated May 14, 2013, you state, in pertinent part, "Mr. Davis and Mr. Guarino were personally aggrieved because they were not allowed to view or participate in the interviews. The interviews were held in closed session with nobody from the public or staff allowed to participate."¹⁰

Here, the RIAEC submits that it conducted "day long" interviews and that "conducting interviews to fill the unexpected vacancy for the Executive Director position is not a subject matter for the Open Meetings Act." The RIAEC cites no authority for this conclusion and this argument contradicts precedent from this Department for more than two decades. See Friend v. East Greenwich Town Council, OM 13-31; Cosper v. Mental Health Advocate Search Committee, OM 13-01; In re Warwick Police Department, ADV OM 99-13; Pedro v. Tiverton Personnel Board, OM 96-30; The Westerly Sun v. Westerly Town Council, OM 94-01.

While there may very well be aspects of the interview process not subject to the OMA – such as those that did not involve a quorum of a public body – you contend that the RIAEC convened to interview a candidate for the position of Director and the RIAEC does not contradict that the Commission – albeit allegedly convening as a search committee and not as a Commission – convened to interview a candidate for the position of Director. The fact that the RIAEC convened as a search committee is of no moment to our analysis. See Finnegan v. Scituate Town Council, OM 97-05 (committee with three "citizen members" appointed by Town Council President to conduct interviews of finalists for police chief was a "public body" under the OMA). Since the interview process does fall within the ambit of the OMA, and because the RIAEC/Search Committee failed to post notice for this aspect of its interview process, the RIAEC violated the OMA.

¹⁰ We note that it appears that Dr. Nunes, as an appointed Commissioner, was present for these interviews, and thus is not aggrieved. At the very least, your May 14, 2013 response fails to address how or if Dr. Nunes was aggrieved.

V. Email Chains of December 19, 2012, January 20, 2013, and February 6, 2013.

You contend that the email chains of December 19, 2012, January 20, 2013, and February 6, 2013 constituted “meetings” pursuant to Rhode Island General Laws § 42-46-2, and thus violate the OMA. In response to your allegation, Dr. Nassersharif avers that “these email chains are not meetings as actions were not taken” and argues that the emails “were private conversations.”

The OMA applies to “meetings” of a “quorum” of a “public body.” Although the definitions under R.I. Gen. Laws § 42-46-2 are seemingly straightforward, a quorum may be created, and a meeting may be “convened,” by unconventional means. In particular, this Department has previously recognized the “rolling” or “walking” quorum, where a majority of the members of a public body attain a quorum by a series of one-on-one conversations or interactions, including communications via email. See In Re Westerly School Committee, ADV OM 12-02 (a quorum of members engaging in active communication about the business of the School Committee on a Facebook forum may be engaging in a “walking” or “rolling” quorum and implicate the OMA); In Re: Pawtucket City Council, ADV OM 05-01 (warning against the “walking quorum,” where public business is conducted in a series of individual encounters that may not constitute a quorum, but which collectively do so); In Re: South Kingstown School Committee Electronic Mail Policy, ADV OM 04-01 (series of email communications among a quorum of a Committee would satisfy the quorum requirement and implicate the OMA).

In In Re: South Kingstown School Committee Electronic Mail Policy, this Department opined that “list serves” (which are email distribution lists through which subscribers receive information on a particular topic in the form of electronic mail) do not violate the OMA because the receipt of information alone, even if a quorum of a public body receives that information, does not constitute a “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.” See R.I. Gen. Laws § 42-46-2(a). The sending of an email alone is not enough to constitute a violation because there is no collective communication. Thus, if a quorum of members of a public body creates a chain of communication and responses, through any electronic media, about any matter over which a public body has supervision, jurisdiction, control or advisory power, other than to schedule a meeting, the OMA may be violated. See R.I. Gen. Laws § 42-46-5(b)(1).

This Department has reviewed the emails contained and referenced in your complaint and we address these e-mails seriatim.

With respect to the e-mail chain that begins on December 19, 2012 and ends on December 21, 2012, and with the above findings as background, we find that the RIAEC violated the OMA.¹¹

¹¹ Considering that Commissioner Nunes participated in this e-mail chain, it is difficult to find that he is aggrieved. In your May 14, 2013 correspondence, you relate that:

“Dr. Nunes is aggrieved differently by all these actions. Because he is a commissioner he was privy to the email chains, and the illegal meetings. When he voiced his opposition to the emails and the meetings, as he believed they were

Specifically, the e-mails associated with this chain evince that all the RIAEC Commissioners engaged in a collective discussion by email concerning the search process for the Health Physicist position - a matter over which the RIAEC has supervision, control, jurisdiction or advisory power. For instance, by e-mail dated December 19, 2012 (12:19 pm), Chairman Mecca emailed all the RIAEC Commissioners (Nassersharif, Kadak, Nunes, and Gromet) discussing the Health Physicist position, expressing concern regarding the process utilized to fill the position and seeking "everyone's opinion on this and whether or not you believe we should take a next step." Shortly thereafter, Commissioner Kadak discussed this issue by replying to all Commissioners; followed by Commissioner Nassersharif replying to all Commissioners with his thoughts on this issue and his "vote [] to reopen the search for the [Health Physicist] position;" followed by Commissioners Gromet and Nunes, who also discussed this issue. In all, the entire RIAEC collectively discussed this issue outside the public purview through e-mail. We have little trouble concluding that this discussion violated the OMA.

We view the other two (2) e-mail chains contained within your complaint differently. Much of the January 20, 2013 e-mail chain contained e-mails between Chairman Mecca and another individual associated with the State of Rhode Island seeking human resource advice or information relating to the Health Physicist position. Since these e-mails - at least the beginning of the e-mail chain- were between Chairman Mecca and no other RIAEC Commissioner, these emails did not evince a collective discussion or action by the RIAEC and did not violate the OMA.¹²

On January 25, 2013, Commissioner Nassersharif responded to Chairman Mecca's above e-mails inquiring whether the RIAEC asked someone from the State of Rhode Island to conduct a review of the RIAEC human resource situation, as was suggested by Chairman Mecca's prior emails. Commissioner Nassersharif also inquired whether a meeting had been scheduled to discuss applications for the Director's position. (It is unclear whether Commissioner Nassersharif's email was sent to all Commissioners, but for purposes of this finding we answer this question in the affirmative). Later on January 25, 2013, Chairman Mecca responded and e-mailed all other Commissioners outlining/updating the process for the search to fill the Health Physicist position. In this e-mail, Chairman Mecca discusses the day-long agenda to interview candidates - including a two (2) hour meeting with the RIAEC - and seeks input concerning the scheduling of a meeting to decide on the candidates that will be interviewed. The remaining e-mails are

illegal, he was put in a catch 22 situation. Either he could participate in the illegal meetings and risk being a party to a lawsuit, or he could not participate and be disenfranchised by the other commissioners."

You cite no legal authority, and we are unaware of any, that would lead to the conclusion that under these circumstances Commissioner Nunes is aggrieved within the context of the OMA.

¹² One or more of these e-mails evince that they were copied to all Commissioners, but since these Commissioners did not respond, there was no "collective discussion" among the RIAEC Commissioners.

limited to discussing whether the meeting can be conducted by a telephone conference call, and if so, making arrangements to do so.¹³

As discussed, supra, the beginning of the e-mail chain did not concern a collective discussion or action among RIAEC Commissioners, and therefore, did not implicate the OMA. The end of the e-mail chain was limited to making arrangements to schedule a meeting, which is permitted by the OMA. See R.I. Gen. Laws § 42-46-5(b)(1) (“discussions of a public body via electronic communication * * * shall be permitted only to schedule a meeting”). Accordingly, the only two (2) e-mails that do not fall within one of the foregoing categories is Commissioner Nassersharif’s email inquiring whether the RIAEC sought an outside review of the human resources issue and Chairman Mecca’s email outlining the process to fill the Health Physicist position and attempting to schedule an outside meeting. Having reviewed these e-mails, we conclude that the RIAEC did not collectively discuss (or take action) upon a single subject matter within its supervision, control, jurisdiction or advisory power. In other words, Commissioner Nassersharif’s e-mail, by itself, could not violate the OMA. See In re South Kingstown School Committee Electronic Mail Policy, ADV OM 04-01. If Chairman Mecca replied to all Commissioners (as he did) and further discussed the subject-matter of Commissioner Nassersharif’s email, this may have violated the OMA. In our view, and based upon our review of the e-mails, however, Chairman Mecca’s email did not continue or discuss the subject-matter of Commissioner Nassersharif’s e-mail, *i.e.*, whether the RIAEC sought a review from the State of Rhode Island on the human resources issue. Instead, Chairman Mecca’s email addressed a new subject-matter, an update of the search for a Health Physicist and the scheduling of interviews and meetings. In this respect, Chairman Mecca’s e-mail was no different than Commissioner Nassersharif’s email - a single email disseminating information that was not responded to by other members of the public body.¹⁴ Consistent with In re South Kingstown School Committee Electronic Mail Policy, ADV OM 04-01, we find no violation.

Lastly, we address your complaint that the February 6, 2013 e-mail chain violated the OMA. All e-mails within this chain are dated February 6, 2013 and begin with a RINSC staff member e-mailing Chairman Mecca concerning a personnel matter. As discussed above, since this email did not concern any RIAEC Commissioners, this e-mail is not governed by the OMA. In response to this e-mail, at 9:55 a.m. Chairman Mecca responds to the staff member, and copies all other Commissioners, responding to the personnel matter. Again, since this e-mail did not concern a collective discussion or action by RIAEC Commissioners, the OMA is not implicated. See In re South Kingstown School Committee Electronic Mail Policy, ADV OM 04-01. In response, Commissioner Nunes - one of the instant complainants - responds to all Commissioners indicating the “Commission has not held a formal vote to approve this [personnel] action [discussed in the prior e-mails].” Commissioner Nunes’ e-mail continues to

¹³ But for limited exceptions, meetings may not be convened by telephone conference call. See R.I. Gen. Laws § 42-46-5(b).

¹⁴ We realize that with respect to Chairman Mecca’s email seeking to schedule a meeting, there was a collective discussion among RIAEC Commissioners, but the OMA expressly permitted this discussion. See R.I. Gen. Laws § 42-46-5(b)(1).

discuss the personnel issue/Health Physicist position and closes with the notation that “[t]his email chain does not constitute a meeting of the RIAEC under [the OMA].” It is also significant that Commissioner Nunes’ e-mail was copied to, among other people, the other two (2) complainants - Messrs. Davis and Guarino. In response, Commissioner Kadak replied to all, indicating that Commissioner Nunes was “wrong[, a] vote was taken - 3 to 1 at the meeting in question.”¹⁵

Here, as detailed above, the first two (2) e-mails associated with this chain did not violate the OMA, and considering the facts of this allegation, we decline to address whether the second two (2) e-mails associated with this chain violated the OMA. Our reasoning primarily concerns the lack of any evidence that any of the complainants were aggrieved. Indeed, our OMA analysis would be confined to the last two (2) e-mails, the first of which was sent by one of the complainants - Commissioner Nunes - and both of which were received by the other two (2) complainants - Messrs. Davis and Guarino. Under these circumstances and consistent with Graziano, even if the RIAEC engaged in an e-mail discussion outside the public purview, we simply find no evidence that any complainant was aggrieved, and in fact, all complainants either received the e-mails in question and/or participated in the e-mails in question. Accordingly, we find no violation.

VI. Meeting on March 1, 2013.

Lastly, you contend that the RIAEC violated the OMA when it: (1) convened its March 1, 2013 meeting before the regular/annual notice was posted, (2) discussed three candidates for the Director’s position outside the public purview, and (3) “acknowledged that [it] review[ed] and discussed the meeting minutes before they are posted.” In response, Dr. Nassersharif states, in pertinent part:

the meeting referenced to in the complaint was not a ‘closed’ meeting of the Commission. The search committee met prior to the scheduled Commission meeting scheduled for March 1, 2013 which was properly posted. An agenda item included a report on the recruitment status for the Executive Director. The Commission agreed to serve as a committee of the whole for the purpose of recruiting the next executive director. That committee was meeting not as the Commission but rather as an executive director search committee.

Here, our review of the March 1, 2013 open session minutes reveals that all three (3) complainants attended the March 1, 2013 meeting. Accordingly, consistent with Graziano, you are not aggrieved by any alleged improper posting of the regular/annual meeting notice. See R.I. Gen. Laws § 42-46-6.

You also complain that the RIAEC violated the OMA when it discussed the candidates for the Director’s position outside the public purview. While we question whether Commissioner

¹⁵ Commissioner Kadak sent this email at 12:14 on February 6, 2013. Commissioner Nunes sent his email at 12:10 on the same date. The email chain appears to contain emails out of order.

Nunes is aggrieved - since no evidence or argument has been presented that Commissioner Nunes did not participate in this discussion - it is clear that the Messrs. Davis and Guarino have standing. Likewise, the RIAEC acknowledges that it convened outside the public purview prior to the March 1, 2013 meeting, but claims it did so as a search committee and not as the RIAEC.

As we discussed, supra, such a distinction hardly allows a quorum of the RIAEC - or any other designated name - to discuss matters over which it has supervision, control, jurisdiction or advisory power outside the public purview. Accordingly, the RIAEC violated the OMA when it discussed this subject-matter outside the public purview.

Finally, you allege that “[d]uring the March 1st meeting the [C]ommissioners acknowledged that they review[ed] and discussed the meeting minutes before they are posted.” You direct our attention to the March 1, 2013 draft minutes, which you represent indicate:

[t]he Chairman pointed out that the [March 1, 2013] draft minutes were not seen or reviewed by the [C]ommissioners for accuracy or completeness before posting on the state web site. Mr. Davis prepared the draft minutes but for some reason did not circulate them for review which is counter to the longstanding past practice of the Commission. Dr. Nunes stated that the Commission acted illegally in the past by reviewing minutes citing RI General Law 42-46-5(b) that he thought prevented ex-parte review of minutes. Dr. Kadak stated that after a careful reading of the citation it does not suggest that review of minutes constitutes such communications. As such, the [C]ommissioners voted 4 to 1 (Nunes in opposition) to table the minutes until they could be reviewed and corrected as necessary.

You also direct this Department to certain pages of an uncertified transcript that includes a discussion of this topic during the March 1, 2013 RIAEC meeting.

Based upon the foregoing, it is clear that the RIAEC did not discuss the March 1, 2013 draft minutes outside the public purview. Indeed, your complaint, as well as the transcript, makes clear that the March 1, 2013 minutes were not circulated to the RIAEC Commissioners prior to the March 1, 2013 meeting. Accordingly, the RIAEC did not violate the OMA with respect to these minutes.

Notwithstanding this conclusion, your complaint can be interpreted to suggest that the RIAEC violated the OMA in the past when it “review[ed] and discussed the meeting minutes before they are posted.” We have reviewed your complaint, as well as the transcript, and this material provides no timeline concerning when these alleged violations occurred or any facts to support these allegations. In fact, the mere review - without any collective discussion - would not violate the OMA. See In re South Kingstown School Committee Electronic Mail Policy, ADV OM 04-01. Moreover, even if two (2) RIAEC Commissioners discussed the draft minutes, since a quorum would not be implicated, this less-than-a-quorum discussion would not violate the OMA. Because none of these details or facts are provided in your complaint, and because the statute of limitations may bar our review of some allegations, we are unable to review any allegation that

the RIAEC violated the OMA when it discussed draft minutes prior to March 1, 2013. See MacDougall v. Quonochontaug Central Beach Fire District, OM 13-24 (Complaint 1).

To summarize, this Department has found the RIAEC violated the OMA when it 1) held its December 10, 2012 meeting on less than 48 hours notice and discussed a topic that was not appropriate for executive session; 2) discussed a topic not proper for executive session on January 2, 2013 and failed to disclose in open session (and record in the open session minutes) the votes taken by each individual member in executive session; 3) failed to hold interviews in open session; 4) engaged in a collective discussion via an email chain beginning December 19, 2012 and ending on December 21, 2012; and 5) failed to post notice of its search committee meeting prior to conducting the March 1, 2013 meeting.

Upon a finding of an OMA violation, 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:

The court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of this chapter. In addition, 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 this chapter. R.I. Gen. Laws § 42-46-8(d).

After review of the evidence presented, we find that there are no willful or knowing violations. Because we concluded that the topic was not appropriate for executive session held during its January 2, 2013 meeting, we require that the RIAEC release those executive session minutes.¹⁶ We further require that the RIAEC release the vote, by individual member, for the January 2, 2013 executive session. Because no action was taken during the interview process or at the March 1, 2013 search committee meeting or from the email chain, injunctive relief is not appropriate in these instances. Nevertheless, we do require that the RIAEC release the email chain that begins on December 19, 2012 and ends on December 21, 2012.¹⁷ Please be advised that this finding serves as notice to the RIAEC that it is responsible for complying with the OMA at all times. This finding further serves as notice to the RIAEC that its actions as detailed herein violated the OMA and may serve as evidence of willful or knowing violations in any future similar circumstances.

¹⁶ While we also concluded that the topic of the December 10, 2012 executive session was not appropriate, the evidence presented suggests that no executive session minutes were kept and thus, none can be released. In any event, it appears the RIAEC took no action during this meeting.

¹⁷ This Department has spoken with legal counsel for the RIAEC and has been assured that the RIAEC will comply with these directives. Email addresses may be redacted provided the identities of all senders and recipients are disclosed. The email chain is six (6) pages long; however, only five (5) pages need be disclosed. The sixth (6) page contains communication among non-members of the RIAEC and thus falls outside the purview of the OMA.

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

Very truly yours,

A handwritten signature in cursive script that reads "Maria R. Corvese". The signature is written in black ink and is positioned below the closing "Very truly yours,".

Maria R. Corvese
Special Assistant Attorney General

MRC/pl

Cc: Jennifer Sternick, Esquire
Gail Theriault, Esquire