



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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VIA EMAIL ONLY

November 17, 2016

OM 16-13

ADV OM 16-02

Mr. Richard Costa

Ms. Lisel Rockwood

RE: Costa, et al v. Rhode Island Statewide Independent Living Council
In re: R.I. Statewide Independent Living Council

Dear Mr. Costa and Ms. Rockwood:

The investigation into your Open Meetings Act (“OMA”) complaint against the Rhode Island Statewide Independent Living Council (“RISILC”) is complete. By email correspondence dated August 20, 2015, you filed an OMA complaint against the RISILC for various alleged OMA violations. By further correspondence dated October 5, 2015, you amended your complaint as memorialized in an email from this Department dated October 7, 2015. Pursuant to our letters acknowledging your original and amended (supplemental) complaints, this Department will only review the following allegations against the RISILC:

- 1) Failure to timely post meeting minutes on the Secretary of State’s website for its May 20, 2015 meeting;
- 2) Holding meetings on June 24 and June 25, 2015 outside of the public purview, and failure to post agenda and minutes for these meetings;
- 3) Meeting on June 25, 2015;

- a. Emergency meeting was held for an improper purpose,
 - b. The notice of the emergency meeting was incorrectly posted as an annual calendar notice,
 - c. The agenda failed to note the name of the public body, place where the meeting would be held, time of meeting and reason for the emergency meeting in violation of R.I. Gen. Laws § 42-46-6,
 - d. The RISILC discussed the job performances of both Complainants at these meetings without providing advance written notice in violation of R.I. Gen. Laws § 42-46-5(a)(1),
- 4) The agenda item "Office Space and Staff" listed on its August 19, 2015 meeting notice does not state "sufficient information for the public to understand the nature of the business" in violation of R.I. Gen. Laws § 42-46-6(b). You also allege that the RISILC failed to timely post minutes of the August 19, 2015 meeting;
- 5) On July 8, 2015, August 5, 2015 and September 2, 2015, meetings were allegedly held outside the public purview. You further alleged RISILC failed to file meeting agendas for those meetings and failed to post minutes for meetings on July 8, 2015 and August 5, 2015.¹

In response to your complaints, the RISILC provided an affidavit from Mr. John K. Ringland, then-Chairperson for the RISILC. Mr. Ringland addressed each allegation against the RISILC in substantive form, but the threshold defense is that the RISILC is not a public body and therefore not subject to the OMA. Mr. Ringland states, in pertinent part:

- The RISILC is a council established by Executive Order No. 93-23 October 29, 1993, pursuant to section 705 of the Rehabilitation Act, in order for the State of Rhode Island to be eligible for Independent Living program funds under Title 7 of the Act. ***
- RISILC is not an entity within a State Agency but rather is a private nonprofit corporation and a contractor with the State of Rhode Island Department of Human Services.
- RISILC's purpose is to co-develop and monitor the Rhode Island State Plan for Independent Living.
- RISILC is a volunteer council dedicated to the mission of Independent Living, comprised almost entirely of persons with disabilities.

¹ You further allege that the RISILC failed to post minutes for the September 2, 2015 meeting. As expressed in this Department's email to you dated October 7, 2015, this allegation was not ripe at the time of your amended complaint dated October 5, 2015 and would not be investigated. See R.I. Gen. Laws § 42-46-7.

- The RISILC does not believe its structure and activities rise to the level of the definition of a public body or extension of a state entity as described in the [OMA].
- The RISILC members have struggled with understanding the complexity of OMA and have repeatedly sought guidance and direction regarding its status as a presumed public entity and necessity for its compliance with OMA.
- The RISILC was determined not to be a state agency – not under the jurisdiction of the Rhode Island Ethics Commission in January 2014.

This Department acknowledges your rebuttal.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the RISILC violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate and our focus concerns only OMA issues.²

A. Advisory Opinion

The threshold question that must be answered before this Department can address the merits of the complaints is whether the RISILC is indeed a “public body” as defined under the OMA. The OMA defines “public body” as:

any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government or any library that funded at least twenty-five percent (25%) of its operational budget in the prior budget year with public funds, and shall include all authorities defined in § 42-35-1(b). For purposes of this section, any political party, organization or unit thereof meeting or convening is not and should not be considered to be a public body; provided, however that no such meeting shall be used to circumvent the requirements of this chapter. See R.I. Gen. Laws 42-46-2(3).

If an entity is not a public body, then the provisions of the OMA do not apply.

² We note that the RISILC is also the subject of a current OMA advisory opinion brought before this Department by Gail Theriault, Esquire, attorney for the Rhode Island Department of Human Services. The request, dated October 20, 2015, is to determine whether the RISILC is a “public body” as defined by the OMA. This advisory opinion is incorporated within this finding.

The purpose of the OMA provides that “[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy.” R.I. Gen. Laws § 42-46-1. We have noted that determining whether a particular entity is or is not a “public body” is “a fact-intensive question not subject to ‘bright line’ rules.” See e.g. Sinapi v. University of Rhode Island Student Senate, OM 14-23; Oliveira v. Independent Review Committee, OM 04-10. In order to seek clarity on whether an entity is or is not a “public body,” the following factors are frequently considered: (1) the text or authority under which the entity is established; (2) the scope and type of authority within the entity's control; (3) the nature of public business delegated to the entity; and (4) the entity's membership and composition. See Solas v. Emergency Hiring Council, 774 A.2d 820 (R.I. 2001).

“A literal reading of the [OMA] 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, 774 A.2d at 825. In Solas, the Court considered the application of the OMA to an entity formed by Executive Order of then-Governor Lincoln Almond to “manage and control the state’s hiring practices and its fiscal resources.” Id. 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.

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 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.

To determine whether the RISILC is subject to the OMA, this Department considers how the Solas factors relate to the creation, mission, and practice of the RISILC. First, we look to the text or authority under which the RISILC was established. The RISILC was created by State Executive

Order No. 93-23 under Governor Bruce Sundlun. The Executive Order was created “in order to receive funds under [The Rehabilitation Act Amendments of 1992].” Similar to Solas, this factor leans toward a determination that the RISILC is a public body because like the Emergency Hiring Council, the RISILC was created through State, not federal, Executive Order by a Rhode Island government official, then-Governor Sundlun.³

Next, we explore the scope and type of authority within the RISILC’s control and the nature of the public business, if any, delegated to the RISILC. As stated in the Executive Order, the function of the RISILC “is to jointly develop and submit, in conjunction with the Office of Rehabilitation Services, the State Plan for Independent Living Services and Centers for Independent Living.” The Executive Order further states, in pertinent part:

4. The Council shall prepare, in conjunction with the Office of Rehabilitation Services, a plan for the provision of staffing and resources to carry out the functions of the Council.
5. The Council shall perform all the functions described in the Rehabilitation Act Amendments of 1992.

The duties of a Statewide Independent Living Council (“SILC”) are further mandated by the Rehabilitation Act § 796(c)(1) [§ 705(c)(1)], which states:

The Council shall –

- (A) Develop the State plan as provided in section 796 (c)(a)(2) of this title;
- (B) Monitor, review, and evaluate the implementation of the State plan;
- (C) Meet regularly, and ensure that such meetings of the Council are open to the public and sufficient advance notice of such meetings is provided;
- (D) Submit to the Administrator such periodic reports as the Administrator may reasonably request, and keep such records, and afford access to such records, as the administrator finds necessary to verify the information in such reports; and
- (E) As appropriate, coordinate activities with other entities in the State that provide services similar to or complementary to independent living services, such as entities that facilitate the provision of or provide long-term community-based services and support.

Because the RISILC develops and monitors a state-specific plan with regular meetings at the state

³ We must note that it does not escape this Department’s consideration that the RISILC is subject to the federal Rehabilitation Act and federal regulations. However, it is this Department’s understanding that the federal government did not mandate the states to create Statewide Independent Living Councils, but rather, a state could elect to create its own council if that state chose to receive federal funds under the Rehabilitation Act. Rhode Island chose to create the RISILC by State executive order in order to receive federal funds.

level, keeps records, and coordinates activities with other state agencies, this further supports the conclusion that the RISILC may be a public body under the OMA.

Finally, we look to the RISILC's composition and membership. The Executive Order states, in pertinent part:

2. The Council shall be composed of no more than thirty (30) members. Participants on the Council shall include consumers of vocational rehabilitation services, persons with disabilities, families of persons with disabilities, employers, advocates and other individuals actively involved in vocational rehabilitation. Each member shall serve a term not to exceed more than three years, except that the terms of the initial members shall be staggered and that no member of the Council may serve more than two consecutive terms.

3. The members of the Council shall select a chairperson from their membership pursuant to the requirements of the Rehabilitation Act Amendments of 1992.⁴

RISILC's website also provides insight into the nature of the RISILC's business and composition. See <http://risilc.org/about.html>. According to the website:

The Rhode Island Statewide Independent Living Council (RISILC) is a non-profit organization dedicated to promoting Independent Living for people with disabilities throughout the state. The Council's membership is comprised of volunteers appointed by the Governor of Rhode Island, and the majority of its members are people with disabilities.

The Council has joint responsibility with the Ocean State Center for Independent Living (OSCIL) for developing and monitoring Rhode Island's State Plan for Independent Living (SPIL), a three year blueprint which directly addresses issues important to the advancement of Independent Living.

The website goes on to define "Independent Living" as:

⁴ Additionally, the United States Code of Federal Regulations § 364.21 outlines the requirements for Statewide Independent Living Councils established in the states, in accordance with Section 705 of the Rehabilitation Act and reflected in the Executive Order.

a philosophy whose principles empower people with disabilities to manage and control their own lives. This is made possible through community-based services that assist persons with disabilities so they may better perform daily activities.

After carefully considering all the evidence before us in conjunction with the Solas factors, we are not prepared to say that the RISILC is not a public body under the OMA. 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* ***.” See R.I. Gen. Laws 42-46-2(3)(emphasis added). While 29 U.S.C. § 796d(a) requires all SILCs to “be independent of the DSU and all other State agencies,” that does not mean that an SILC cannot be a State entity or public body unto itself for purposes of the OMA. The RISILC was established through state Executive Order by former Governor Sundlun in order to receive federal funds in connection with the Rehabilitation Act. There was no federal mandate to the States that they must establish such a council. The membership of the RISILC “is comprised of volunteers appointed by the Governor of Rhode Island***,” so the executive branch of Rhode Island government is key to the establishment and function of the RISILC. See <http://risilc.org/about.html>; see also CFR § 364.21(b)(1).

Based on the above discussion, and with little to no evidence that the RISILC is not a public body for purposes of the definition under the OMA, this Department considers the RISILC as a “public body” within the purview of the OMA for purposes of the complaints before us.

In support of the argument that the RISILC is not subject to the OMA, this Department was provided with a copy of a letter from the Rhode Island Ethics Commission dated January 23, 2014 to Mr. Costa. The Ethics Commission concluded that the RISILC was not a “state agency” as that term is used and defined in the Code of Ethics.⁵

Significantly, in determining that the RISILC was not a “state agency” for purposes of the Code of Ethics, the Ethics Commission stated:

This conclusion is based upon a variety of facts, including by [sic] not limited to: the state’s references to the RISILC as ‘contractor’ in its agreement to fund RISILC for 2014-2016; RISILC’s federal enabling statute, 29 U.S.C. § 796d(a), which provides that ‘[t]he Council shall not be established as an entity within a State

⁵ Under the Code of Ethics, “state agency” is defined as:

any department, division, agency, commission, board, office, bureau, authority, or quasi-public authority within Rhode Island, either branch of the Rhode Island general assembly, or an agency or committee thereof, the judiciary, or any other agency that is in any branch of Rhode Island state government and which exercises governmental functions other than in an advisory nature. See R.I. Gen. Laws § 36-14-2(8)(i).

agency'; and federal regulation 34 C.F.R. § 364.21(l), which provides that the Conflict of Interest provisions of direct grant programs apply to SILCs and 'a SILC is not considered a government, governmental entity or government recipient' as applied to those sections.

While the Ethics Commission's letter has some initial appeal to support the position that the RISILC is not a "public body, a closer examination of the Ethics Commission's correspondence finds it is distinguishable and not applicable to this OMA analysis. Indeed, two of the three factors articulated by the Ethics Commission have no application to this case. For example, while federal regulations do provide the Council "shall not be established as an entity within a State agency," as the Ethics Commission observes; we have not been directed to any provision – nor have we discovered one – that prohibits the RISILC from falling within the ambit of "any subdivision thereof of state or municipal government." R.I. Gen. Laws § 42-46-2(3)(defining "public body"). In other words, the RISILC may be an independent agency or "subdivision thereof of state or municipal government." Additionally, while 34 C.F.R. § 364.21(l) does provide that "a SILC is not considered a government, governmental entity or government recipient," our review of the entirety of this provision reveals its application only to specified provisions not relevant in this case. See 34 C.F.R. § 364.21(l) ("For purposes of this paragraph and 2 CFR 200.318 and 34 CFR 75.524, and 75.525, a SILC is not considered a government, governmental entity, or governmental recipient."). Since this provision directs that a SILC should not be considered "a government, governmental entity, or governmental recipient" for reasons not relevant here, to the extent that this provision has any applicability to this case, it is indicative that the RISILC is a "public body" or governmental subdivision for purposes of the OMA.

After reviewing all of the evidence before us – including but not limited to the Executive Order, the Rehabilitation Act, the Code of Federal Regulations, and RISILC's website – we conclude that RISILC is not exempt from the provisions of the OMA.

B. Complaint

While we have determined the threshold issue that RISILC is a public body for purposes of this Complaint, we still must determine whether you are aggrieved prior to reaching the merits of your specific allegations. The OMA states that "[a]ny citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general." See R.I. Gen. Laws § 42-46-8(a). While the term "aggrieved" is not defined in the OMA, our Rhode Island Supreme Court has examined the "aggrieved" provision of the OMA.

In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), 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, as well as his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission's notice was deficient, the trial justice determined that the Lottery Commission violated the OMA and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was "unnecessary" to address the merits of the OMA lawsuit because "the plaintiffs Graziano and Hawkins have no standing to raise this issue" since "both plaintiffs were present at the meeting

and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

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

We now turn to your specific allegations. With respect to the allegations that the June 24, 2015 and June 25, 2015 meetings were improperly posted and held outside the public purview, this Department finds that you are not “aggrieved” within the meaning of the OMA because the evidence presented, both within your complaint and in Mr. Ringland’s response, indicates you both were present at these meetings. Specifically, with respect to the meeting on June 25, 2015, wherein you allege in part that your job performances were discussed without proper advanced written notice,⁶ a review of the transcripts provided to this Department from both the June 24, 2015 and June 25, 2015 meetings fails to show how you were aggrieved with respect to the above allegations. It appears from the transcripts that the independent living specialist from the federal Department of Health and Human Services was providing oversight and management advice within the parameters of the “Technical Assistance Circular” from the U.S. Department of Education dated January 30, 2013. You were included in this discussion and actively participated.⁷

⁶ It appears that you participated in the discussion regarding your job performances and that these discussions were not held in closed session. See e.g., December 16, 2015 Rebuttal (“We, as staff members, were present for the training, but received no prior notification as required by the OMA that our job performance would be discussed.”). This is significant because the OMA provides that any affected person “shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting.” R.I. Gen. Laws § 42-46-5(a)(1)(emphasis added). Based upon the evidence presented it appears that this discussion did take place in an open session meeting and we have seen no evidence that such a discussion occurred in closed session. To the extent that the RISLIC intended to discuss your job performance in open session, and did discuss your job performance in open session, no advance written notice was required to you; rather, advance written notice was only required if the RISLIC intended to discuss your job performance in executive session. Since the evidence appears to demonstrate that this discussion occurred in open session, the RISLIC did not violate the OMA when it did not provide you advance notice pursuant to R.I. Gen. Laws § 42-46-5(a)(1).

⁷ The independent living specialist directly asked you if you were agreeable with what was being discussed with respect to a six-month period over which the staff would be supervised:

In support of the argument that you are “aggrieved,” you suggest “we were clearly unprepared and disadvantaged at the meeting by having no prior notice that our job performance would be discussed nor time to decide if we wanted this to be held in open session, no time to consult with an attorney or have someone present at the meeting on our behalf.” You also contend that you were aggrieved because “[a]ctions * * * were taken concerning our job performance which have resulted in us being placed on probation without foundation.”

While the OMA does provide an “affected” person with the right to have their job performance, which was planned to be held in executive session, discussed in an open session, see R.I. Gen. Laws § 42-46-5(a)(1), the OMA provides no corresponding right, as you phrased it, “to decide if we wanted this to be held in open session.” See supra footnote 6. In other words, if the RISLIC decided that your job performance would be discussed in open session, the OMA provides you no right to require this discussion to be held in executive session. As such, this basis cannot support that you are “aggrieved” within the OMA. Additionally, you suggest that being placed “on probation without foundation” is a sufficient basis to support the “aggrieved” requirement, but the plaintiff in Hawkins was terminated at a meeting, yet the Rhode Island Supreme Court concluded that Hawkins’ actual attendance at the meeting where he was terminated established, without further evidence, that he was not aggrieved. We fail to see how Graziano differs from the instant situation.

To be sure, your rebuttal does contain a general averment that you were “clearly unprepared and disadvantaged at the meeting” and that you had “no time to consult with an attorney or have someone present at the meeting on our behalf,” but respectfully, these general claims of being “aggrieved” are not supported with any evidence. At no time do you describe how you were “clearly unprepared” or “disadvantaged at the meeting” in a manner that would establish that you were “aggrieved” within the meaning of the OMA, nor do you present any evidence that if the facts differed you would have had “time to consult with an attorney or have someone present at

FEMALE SPEAKER: (Christina) for clarification, I think we should ask Lesil and Rick, are they okay with what we’ve just talked about?

RICK COSTA: Is that a question?

JACK: It is.

RICK COSTA: I’m fine with it.

FEMALE SPEAKER: What we talked about, what do you mean specifically?

ELIZABETH: Are you willing to work for the next six months to see if this arrangement will work and if it doesn’t work they will be able to let you go.

FEMALE SPEAKER: I will just say I would like the direction from the council as that because without that direction, how are they going to evaluate whether I’m doing what they want me do to.

ELIZABETH: You will have direction, of course.

FEMALE SPEAKER: Good. That’s all.

the meeting.” Indeed, the colloquy discussed in footnote 7 contradicts your assertions since you engaged in active discussion about possible termination and indicated no opposition to the proposed course of action; indeed, as the meeting transcript indicates, Mr. Costa stated that he was “fine with it.” There is no evidence from your complaint and rebuttal that you were not aware of the June 25, 2015 meeting at least 48 hours in advance, and your presence at the June 24, 2015 meeting suggests that you had at least 48 hours notice that a meeting was going to take place on June 25, 2015. You also do not contradict Mr. Ringland’s assertion that “[t]hese June 24 and 25 meetings were scheduled and required by ACL [U.S. Administration for Community Living] for the purposes of maintaining grant compliance.” With respect to this issue, it is significant that the Rhode Island Supreme Court has made clear that “[t]he burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.” Graziano, 810 A.2d at 222. Respectfully, on this record, you fail to satisfy this burden and rather seek to transform the “aggrieved” provision into merely a pleading requirement in contravention of Graziano. Therefore, we find that you are not “aggrieved,” within the meaning of the OMA and we find it unnecessary to address the merits of these allegation concerning improper public notice, the improper convening of an emergency meeting, and the convening of a meeting outside the public purview.

With respect to the meeting on August 19, 2015, you state in your rebuttal that you were not in attendance at this meeting, accordingly, we address the merits of this allegation. You allege that the agenda item “Office Space and Staff” listed on its August 19, 2015 agenda does not state “sufficient information for the public to understand the nature of the business” in violation of R.I. Gen. Laws § 42-46-6(b).⁸

In response to these allegations, Mr. Ringland states, in pertinent part:

The agenda item “Office Space and Staff” reflects exactly the content of the discussion. The Council as a 501c3 non-profit corporation employs staff and leases office space. It is not unusual for a corporation to, from time to time, review its needs for space and staffing and discuss such needs. ***

In your rebuttal, you appear to quote from the minutes of the August 19, 2015 meeting:

6. Office Space and Staff. Discussed surplus equipment and records currently stored at Corliss office and basement. Suggestion made to put surplus equipment on sale. Possibly sign office furniture over to Corliss at time move made. Suitable office space is yet to be found. Our goal is to find another site for office and records by the end of this year. Ways to reduce number of written records to be stored discussed * * * The subject of payroll and how staff is paid was discussed. Motion made by Lorna Ricci, 2nd by Barbara Henry that Jack contact

⁸ With respect to the August 19, 2015 meeting agenda, while your complaint indicates that “[s]everal agenda items...do not state sufficient information for the public to understand the nature of the business to be discussed,” you only direct our attention to agenda item “Office Space and Staff.” As such, we previously notified you that we will only address the sufficiency of that agenda item.

staff and obtain information on the name of the company who draws up payroll checks and when checks are actually cut for the two week period submitted by staff. Approved unanimously.*** Council members expressed concern that fiscal procedures be understood by all on how payroll is handled.”

In Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), the Rhode Island Supreme Court examined the OMA’s requirement that a public notice contain “a statement specifying the nature of the business to be discussed.” The Court determined that the agenda item “Interviews for Potential Boards and Commission Appointments” did not adequately apprise the public of the nature of the business to be discussed at a Town Council meeting. Specifically, after conducting interviews as indicated on the notice, the East Greenwich Town Council proceeded to vote to appoint various individuals to the planning and zoning boards for the Town. The Court reasoned that, although the standard is “somewhat flexible,” the contents of the notice “reasonably must describe the purpose of the meeting or the action proposed to be taken.” Id. at 797-98. Although the Court provided no bright line rule regarding the specificity of a posted notice, the Court viewed the “totality of the circumstances” and held that the notice was misleading since it implied that merely “interviews” would be conducted, and that a vote or other action would not take place. The Court also observed “that the OMA places an affirmative duty on the public body to provide adequate notice of meetings.” Id. at 799.

The Court concluded that although the standard is “somewhat flexible,” the contents of the notice “reasonably must describe the purpose of the meeting or the action proposed to be taken.” Id. at 797-98. The Court added that a flexible “approach accounts for the range and assortment of meetings, votes, and actions covered under the OMA, and the realities of local government, while also safeguarding the public’s interest in knowing and observing the workings of its governmental bodies.” Id. at 797. Although the Court provided no bright line rule regarding the level of specificity of a posted notice, the Court determined the appropriate inquiry is “whether the [public] notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted.” Id.

The Rhode Island Supreme Court re-examined the Tanner standard in Anolik v. Zoning Board of Review of the City of Newport, 64 A.3d 1171 (R.I. 2013). The relevant facts of that case are as follows. In November of 2008, defendants received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel’s property that had been approved by a previous zoning board decision. Id. at 1172. That previous decision expressly contained a condition to the effect that there be substantial completion of the improvements within two years. Id. The agenda item for the February 23, 2009 meeting stated:

“IV. Communications:

Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel”

At the meeting, the board voted unanimously to approve the request for an extension of time, which required that the “improvements must be started and [be] substantially complete [by] February 23,

2011.” Id. at 1173. On August 21, 2009, the plaintiffs filed a complaint in Superior Court alleging that the agenda item violated the OMA because it was “a ‘vague and indefinite’ notice to the public and one lacking in specificity.” Id. The Superior Court granted defendants’ motion for summary judgment. Id. On appeal, the Supreme Court looked to Tanner and noted that R.I. Gen. Laws § 42-46-6(b) requires the “public body to provide fair notice to the public under the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon.” Id. at 1175 (quoting Tanner, 880 A.2d at 797). The Court held that the agenda item was “completely silent as to which specific property was at issue; the agenda item provided no information as to a street address, a parcel or lot numbers, or even an identifying petition or case number.” Id. (Emphasis in original). The agenda item “fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration.” Id. at 1176.

While we could be persuaded that the “office space” and “staff” related discussions fell within the purview of the posted notice, a review of the minutes indicates that the discussion that took place expanded into the subject-matter concerning payroll and how the staff is paid. Based upon the inclusion of this subject-matter, we conclude that, in light of Tanner and Anolik, the agenda item “Office Space and Staff” was not sufficient to state the nature of the business to be discussed.

You further allege that the RISILC failed to post minutes on the Secretary of State’s website for the May 20, 2015 meeting. In his response, Mr. Ringland states:

The May 20th meeting was not a regularly scheduled meeting of the Council. The agenda notes this is a ‘special meeting’ called to address significant operational issues impacting the Council’s potential conflicts with the Rehab Act and its duties, and in particular to discuss staff performance, office use, membership concerns, and Federal oversight concerns as noted per the agenda.

The OMA requires public bodies “to keep written minutes of all their meetings.” See R.I. Gen. Laws § 42-46-7(a). A “special meeting” of a public body that has a quorum is still subject to the OMA; however, the OMA only requires certain, not all, public bodies to post their minutes with the Secretary of State:

All public bodies within the executive branch of the state government and all state public and quasi-public boards, agencies and corporations, and those public bodies set forth in subdivision (b)(2), shall keep official and/or approved minutes of all meetings of the body and shall file a copy of the minutes of all open meetings with the secretary of state for inspection by the public within thirty-five (35) days of the meeting; provided that this subsection shall not apply to public bodies whose responsibilities are solely advisory in nature. See R.I. Gen. Laws § 42-46-7(d).

Because the RISILC was created by Executive Order under Governor Sundlun, it would appear that the RISILC is part of the executive branch of Rhode Island government. Further, as previously discussed, RISILC membership “is comprised of volunteers appointed by the Governor of Rhode Island.” We note that while 29 U.S.C. § 796d(a) requires all SILCs to “be independent of the DSU

and all other State agencies,” that does not mean that an SILC cannot be a State entity within a certain branch of government. Accordingly, we conclude that the RISILC did have an obligation to post minutes of its May 20, 2015 meeting on the Secretary of State’s website and having not done so violated the OMA.⁹ The RISILC has provided no evidence or argument that it was not required to comply with R.I. Gen. Laws § 42-46-7(d).

In your supplemental complaint, you allege that the RISILC failed to “post” minutes for the June 24, 2015 and June 25, 2015 meetings. Unlike the analysis with respect to the other allegations concerning these two meetings, we conclude here that you are aggrieved with respect to lack of posting minutes. Under Graziano, a person may not be aggrieved by a public body’s failure to post an agenda for a particular meeting if that person attended the meeting, however, we have not extended Graziano to preclude an attendee at a particular meeting from being aggrieved by a public body’s failure to post minutes for that meeting. For purposes of this allegation, we find you are aggrieved and for the reasons discussed in the preceding paragraphs find that the RISILC did have an obligation to keep and post minutes for the meetings held on June 24, 2015 and June 25, 2015.¹⁰ While there is a detailed transcript of both meetings, a transcript does not replace minutes taken during a meeting of a quorum of a public body. See R.I. Gen. Laws § 42-46-7(a); see also R.I. Gen. Laws § 38-2-3.1 (“All records required to be maintained pursuant to [APRA] shall not be replaced or supplemented with the product of a ‘real-time- translation reporter.’). Because there is no evidence presented that minutes were maintained for these meetings, we conclude that RISILC violated the OMA with respect to the allegation.

Also in your supplemental complaint, you alleged that the RISILC failed to “post minutes” of the August 19, 2015 meeting. For the August 19, 2015 minutes, you did not specify where RISILC failed to post those minutes, but based upon similar allegations for different meetings, we will assume that you are alleging the RISILC did not post the minutes on the Secretary of State’s website. After review of the response by the RISILC, it appears that this particular allegation was not addressed.

For the same reasons as discussed above, we conclude that the RISILC did have an obligation to post open session minutes on the Secretary of State’s website, and its failure to do so violated R.I. Gen. Laws § 42-46-7(d). A review of the Secretary of State’s website indicates that draft (unofficial) minutes were posted on October 5, 2015, which is more than thirty-five (35) days from the August 19, 2015 meeting and in violation of the OMA. See R.I. Gen. Laws § 42-46-7(d).

⁹ In fact, a review of the agenda for the May 20, 2015 “Special Meeting” indicates that one of the first orders of business is to “[e]stablish a quorum.”

¹⁰ In Hathaway v. Rhode Island Atomic Ethics Commission, OM 14-08, we found that because the complainant did not request or ask for executive session minutes it was unclear how she was aggrieved. However, the crux of the issue there dealt with whether there was a requirement that those executive session minutes be physically present at the next regularly scheduled meeting, as opposed to the very existence of the minutes themselves as is the case here. See R.I. Gen. Laws § 42-46-7(c).

With respect to meetings held on July 8, 2015, August 5, 2015 and September 2, 2015, you allege that these meetings were held outside the public purview. You further allege that the RISILC also failed to file meeting agendas for these meetings, and failed to post minutes for meetings on July 8, 2015 and August 5, 2015. In response to your allegations, Mr. Ringland states that “[t]hese gatherings were not regularly scheduled Council meetings but gatherings of the ‘executive leadership’ for planning purposes.” The “executive leadership” appears to be made up of four offices – chairperson, vice chairperson, secretary and treasurer. See <http://www.risilc.org/staff.shtml>.

The OMA applies where there is a quorum of a public body has convened for a meeting. See R.I. Gen. Laws § 42-46-2. From the evidence presented, it is unclear whether all four officers attended these meetings, but RISILC presents no evidence to contradict your allegation. As such, it would appear that a subcommittee of the RISILC convened for the purposes of discussing matters over which that subcommittee had supervision, control, jurisdiction, or advisory power, hence convening a “meeting” pursuant to the OMA. See *id.* Subcommittees of public bodies are subject to the OMA if there is a quorum of that subcommittee that convenes “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(1).

Despite our conclusion that the leadership subcommittee is subject to the OMA, we find insufficient evidence that you have been aggrieved by your allegation that the subcommittee failed to post notice for its subcommittee meetings and/or that it convened its subcommittee meetings outside the public purview. On this point, it is important to remember that the Rhode Island Supreme Court has required that “[t]he burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.” Graziano, 810 A.2d at 212.

Here, we have obtained the draft minutes for the subcommittee meetings at issue. The July 8, 2015 draft minutes evince that not only was Mr. Costa present at this subcommittee meeting, but he drafted the minutes. The August 8, 2015 and September 2, 2015 draft minutes both evince that Mr. Costa was not present due to a “vacation” and that Ms. Rockwood was not present due to being “sick.” Based on this information, we find no evidence that Mr. Costa missed a subcommittee meeting due to an improperly noticed subcommittee meeting or that, with respect to him, the subcommittee met outside the public purview. Indeed, the evidence indicates that Mr. Costa was present for one meeting and on vacation for two other meetings. Similarly, we find no evidence that Ms. Rockwood missed a subcommittee meeting due to an improperly noticed subcommittee meeting or that, with respect to her, the subcommittee met outside the public purview. Indeed, the evidence indicates that Ms. Rockwood missed the latter two subcommittee meetings due to sickness. While no evidence has been presented concerning the reason Ms. Rockwood missed the first subcommittee meeting, based upon the totality of circumstances, we find that Ms. Rockwood has failed to satisfy Graziano’s burden of proof to demonstrate that she was aggrieved by the lack of notice. Accordingly, we find no violation of these allegations. Despite this conclusion, no evidence has been presented that the July 8, 2015 and August 5, 2015 minutes were posted on the Secretary of State’s website in a timely manner and we are unaware of

any instances where Graziano was extended to the failure to post minutes. As such, we conclude that this failure violated the OMA.¹¹

In sum, this Department finds that the RISILC and its leadership subcommittee is a public body for purposes of the OMA and this finding, and that the RISILC violated the OMA with respect to your allegations regarding posting minutes to the Secretary of State's website for the May 20, 2015, June 24, 2015, June 25, 2015, July 8, 2015, August 5, 2015 and August 19, 2015 meetings. We also conclude that, since there was no evidence you attended the August 19, 2015 meeting, the agenda item with respect to "Office Space and Staff" was insufficient and violated the OMA.

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General "may file a complaint on behalf of the complainant in the superior court against the public body." See R.I. Gen Laws § 42-46-8(a). "The court may issue injunctive relief" and/or may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members" for a willful or knowing violation. See R.I. Gen. Laws § 42-46-8(d). In this instance, while the evidence clearly demonstrates the RISILC actions violated the OMA, we find no evidence that the RISILC willfully or knowingly violated the OMA. Indeed, we must acknowledge that in January 2014, the Rhode Island Ethics Commission determined that the RISILC was "not a 'state agency' as that term is defined in the Code of Ethics." Further, around the time of this complaint, the RISILC reached out to this office to determine whether it was a "public body" under the OMA, and the evidence shows that the RISILC, for various reasons including the decision by the Ethics Commission, "did not believe its structure and activities rise to the level of the definition of a public body or extension of a state entity as described in the Open Meetings Act." See Response from Mr. Ringland dated December 9, 2015. Additionally, the only action taken on August 19, 2015 was a vote to obtain certain information. This vote is not susceptible to being declared null and void. This finding does, however, serve as notice to the RISILC that this Department does consider it a "public body" as defined under the OMA, and may serve as evidence of a willful or knowing violation in any similar future situation. To the extent possible, the RISILC is directed to recreate and post minutes for the meetings discussed herein that are not presently posted to the Secretary of State's website. In doing so, we recognize that where the passage of time (and/or member turnover) makes it unlikely that the RISILC can produce and post accurate minutes, the RISILC shall not be required to post minutes for the meetings discussed herein. As we have previously observed, in some circumstances the posting of inaccurate minutes may be more detrimental to the public than posting no minutes. See e.g., Block v. Rhode Island State Properties Committee, PR 14-26B.

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

¹¹ The exception to this is the allegation that there were no minutes filed for the September 2, 2015 meeting. As explained via email dated October 5, 2015 from Special Assistant Attorney General Mora, this particular allegation was not ripe pursuant to R.I. Gen. Laws § 42-46-7 and would not be investigated.

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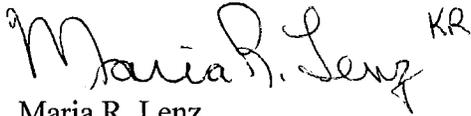
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one hundred eighty (180) days of the alleged violation, whichever occurs later. See R.I. Gen. Laws § 42-46-8. Please be advised that we are closing this file as of the date of this letter.

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

Very truly yours,

 KR

Maria R. Lenz
Special Assistant Attorney General

MRL/kr

Cc: Gail A. Theriault, Esquire

Margaret Molloy, Chairperson