



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

March 31, 2016

OM 16-06

PR 16-13

Ms. Nancy Grieb
110 Thayer Drive
Portsmouth, Rhode Island 02871
Nancy.grieb@gmail.com

Re: Grieb v. Aquidneck Island Planning Commission

Dear Ms. Grieb:

The investigation into your Open Meetings Act (“OMA”) and Access to Public Records Act (“APRA”) complaint filed against the Aquidneck Island Planning Commission (“Commission” or “AIPC”) is complete. By email correspondence dated March 23, 2015, you alleged the Commission violated the APRA when it failed to completely respond to your APRA requests dated January 19, 2015 and March 3, 2015. You also alleged the Commission violated the OMA when the agenda for its February 24, 2015 meeting was posted less than forty-eight (48) hours prior to its meeting.

Additionally, you contend that in February 2015, the Commission signed a contract for strategic planning and an executive director search with Third Sector. You allege this was done, however, contrary to the December 16, 2014 board vote to contract only for the executive director search. You submit that this subject was not discussed at the January 13, 2015 meeting nor was the December decision revisited during the January 13, 2015 meeting. As such, you allege discussions regarding the employment of Third Sector for strategic planning occurred outside the purview of the public. You also allege that the Commission violated the OMA when it met for an unannounced meeting on March 28, 2015. More specifically, you relate the Commission met for a “retreat,” yet discussed and voted upon public business, including strategic planning, outside the public purview. Lastly, you complain that the Commission violated the OMA when the agenda for its March 10, 2015 meeting was posted less than forty-eight (48) hours prior to its meeting.

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In response to your complaint, we received a substantive response from the Commission's legal counsel, Jeremiah C. Lynch III, Esquire, who also provided an affidavit from the Interim Executive Director of the Commission, Ms. Sarah Atkins. Attorney Lynch states, in pertinent part:

"In order to provide the appropriate context for the allegations made by Mrs. Grieb, it is important to note that the [AIPC] is a joint planning commission established by the City of Newport, the Towns of Middletown and Portsmouth, and the Newport Naval Station, pursuant to Title 45, Chapter 22.1 of the Rhode Island General Laws. The Commission provides recommendations and planning tools to each of the municipalities and Naval Station. In general, there is very little public participation in the Commission's meetings. Mrs. Grieb and her husband have been the only regular attendees at the Commission meetings. * * * The day to day operations of the Commission had been handled by [Ms.] Tina Dolen. She had experience with compliance with the Open Meetings Act and Access to Public Records Act. Mrs. Dolen resigned as the Executive Director in July, 2014. The new staff did not have the same level of experience with the OMA and APRA that Mrs. Dolen had. The new staff is learning about the OMA and APRA and how to comply."

Ms. Atkins states, in pertinent part:

"I am the Interim Executive Director of the Aquidneck Island Planning Commission;

In response to Item #1, I responded to Mrs. Grieb's request for copies of the December 16, 2014 Minutes on or about January 23, 2015 and provided her with the revised 12/16/14 Minutes. I informed her that Mr. Reilly, a Commission member, did not request the letter be included in the minutes; and therefore, did not produce a copy of the letter;

In response to #2, the notice of the February 24, 2015 [meeting] was mistakenly published 3 hours and 12 minutes late. In regards to the March 10 meeting, the agenda was posted 49 minutes late;

In response to #3, the Commission voted to hire Third Sector New England to provide an Interim Executive Director and conduct a search for a new executive director on December 16, 2014. It was the Commission's and the consultant's understanding that the strategic planning process was part of the executive director search;

In response to Item #4, the Commission approved the execution of the contract with Third Sector New England on or about February 24, 2015. The contract was executed on February 22, 2015;

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* * *

In response to Item #6, the Commission did not go into a closed meeting on March 28. The Commission participated in a strategic planning exercise with a representative [of] Third Sector as part of the executive director search. The Commission did not conduct any formal business, nor take any votes. The sole activity conducted at that meeting was an evaluation of AIPC's future role and identify skills needed in a new executive director;

In response to Item #7, I failed to timely post the notice of the March 10 meeting on the Secretary of State's web-site. * * * As a result of the late notice, the meeting was cancelled. [Ms.] Allison McNally sent an email to Mrs. Grieb notifying her that the meeting was cancelled;

In response to Item #8, I notified Mrs. Grieb by email on January 2, 2015, that all minutes would be uploaded to the Secretary of State's web-site. Unfortunately, the minutes were not uploaded until March 22, 2015. I did not respond to Mrs. Grieb's request about the December minutes because I thought I provided her a copy of those minutes, with the correction of the absence of [Ms.] Diane Skaggs, on January 23."

We acknowledge your reply.

At the outset, we note that in examining whether a violation of the OMA or the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA and the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Commission violated the OMA or the APRA. See R.I. Gen. Laws §§ 42-46-8; 38-2-8. In other words, we do not write on a blank slate.

The OMA provides that only "aggrieved" citizens may file a complaint regarding an alleged violation. See R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island Lottery Commission, 810 A.2d 215 (R.I. 2002), the trial court found that the Lottery Commission's notice was deficient due to its failure to post a meeting notice within the forty-eight (48) hour time frame pursuant to R.I. Gen. Laws § 42-46-6(b). 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 Supreme Court explained that:

"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

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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. (Emphases added).

In accordance with the plain language of the OMA, as well as Rhode Island Supreme Court precedent, we must address the aggrieved issue. Similar to Graziano, because you attended the meetings in question, you have not demonstrated that you are aggrieved as a result of the alleged improper notice. Specifically, there is no question that you attended the meetings on February 24, 2015 (you spoke at this meeting) and the so-called retreat on March 28, 2015. With respect to the latter meeting although you adamantly contend that this meeting was convened in “secret” and that you learned of this meeting only through overheard conversations – and while the Commission contends that “the meeting agenda [] did not post due to some glitch with the [Secretary of State] website” – based upon your actual attendance, respectfully, we need not resolve this discrepancy. See e.g., Grieb v. Aquidneck Island Planning Commission, OM 15-16. It suffices that in no way do we mean to suggest that lack of improper public notice is not an important OMA requirement, nor should the Commission view our finding as this Department’s reluctance to enforce the OMA; nonetheless, this Department is constrained to enforce the OMA consistent with its plain language and Graziano. Based upon the OMA and Graziano, this Department has simply been presented with no evidence that you were aggrieved based upon your actual attendance at the meetings in question. See to R.I. Gen. Laws § 42-46-8(a). Therefore, we do not reach the merits of these allegations. You also claim that the Commission violated the OMA when it posted notice for its March 10, 2015 meeting less than forty-eight (48) hours before the meeting, but the evidence reveals that the Commission canceled its March 10, 2015 meeting. By virtue of this cancellation, even assuming that your allegation is accurate, the Commission could not have violated the OMA.

You also contend that the Commission violated the OMA when it discussed a different subject-matter outside the public purview. We find no violation and explain below.

You contend that on December 16, 2014, the Commission voted to enter into a contract with Third Sector “only for the executive search.” You allege that this subject-matter was not discussed during a January 2015 meeting and because the Commission must have voted to hire Third Sector “for strategic purposes” during its February 24, 2015 meeting, the Commission discussed this subject-matter outside the public purview. You add that a contract had been executed prior to the February 24, 2015 meeting with Third Sector and that Third Sector “was even on the February 24th agenda to start the strategic planning process at that meeting and they were in attendance,” even though the vote to hire them occurred at the February 24, 2015 meeting. The Commission denies these allegation and Ms. Atkins affirms that:

“the Commission voted to hire Third Sector New England to provide an Interim Executive Director and conduct a search for a new executive director on

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December 16, 2014. It was the Commission's and the consultant's understanding that the strategic planning process was part of the executive director search."

In large part, your allegation is based on your belief that during its December 16, 2014 meeting, the Commission voted to hire Third Sector only to conduct a search for an executive director and, at least implicitly, you contend that the Commission did not discuss the strategic planning aspect during its December 16, 2014 meeting. The December 16, 2014 agenda and minutes, however, reveal that the Commission did discuss strategic planning.

Specifically, the December 16, 2014 agenda reveals that the Commission held various consultant presentations and then – from 7:40 to 7:55 – the Commission's agenda indicates "Initial discussion regarding strategic planning." While you focus on the Commission's actual vote, the Commission's December 16, 2014 minutes indicate, in relevant portion:

"Initial Discussion regarding strategic planning:

Discussion regarding next steps included general agreement that the board was able to propose a motion and vote.

Motion to hire Third Sector to provide an Interim Executive Director and conduct Executive Director search made by Gladys Lavine and seconded by J. Timothy O'Reilly. All approved."

Based on the foregoing, we have little trouble concluding that the Commission discussed not only hiring Third Sector to conduct an executive director search, but also hiring Third Sector to conduct strategic planning. It may be true that the December 16, 2014 minutes evince that a vote by itself to hire Third Sector was limited to the executive director search, but in no way does this vote suggest that the Commission must have discussed the strategic planning aspect outside the public purview prior to its February 24, 2015 vote to formally engage "Third Sector New England (TSNE) to facilitate strategic planning process and provide assistance for Executive Director recruiting." See February 24, 2015 minutes. Indeed, on this point, the evidence is directly contrary to the suggestion that the Commission never discussed the strategic planning aspect in a public meeting prior to February 24, 2015. See December 16, 2014 meeting (under the subject heading "Initial discussion regarding strategic planning" minutes reveal "[d]iscussion regarding next steps included general agreement that the board was able to propose a motion and vote"). While you also suggest that the Commission's actions – engaging Third Sector to conduct strategic planning prior to February 24, 2015 – may have been inconsistent with its December 16, 2014 vote, this allegation does not implicate the OMA. Lastly, although a contract was apparently executed with Third Sector on February 22, 2015, no evidence has been presented that this contract was executed by a quorum of the Commission. Rather, the evidence demonstrates that the Commission approved or ratified the contract during its February 24, 2015 meeting. Accordingly, we find no violation.

With respect to the APRA, it appears you made a request for records on January 19, 2015. In relevant part, this request related:

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“[p]lease email me a copy of the approved AIPC board minutes for the meeting held on December 16, 2014. . . . These minutes should contain a copy of the letter from the Newport School Board’s Attorney, since Mr. O’Reilly read the complete letter at the public AIPC board meeting.” (Ellipsis in original).

It appears on January 23, 2015, you received via email a copy of the “revised” December 16, 2014 minutes. In its response to your APRA request, the Commission responded to you on January 23, 2015, indicating:

“[b]ased on RI General Law, additional materials, e.g. the letter from the school committee that you mention, are put into the minutes at the request of the public body – the members of the board. Beyond votes and attendance, the minutes can include ‘any other information relevant to the business of the public body that a member of the public body requests included.’ R.I. Gen. Laws § 42-46-7(a). There was no such request so the minutes only include a brief description of the update given by Tim O’Reilly that night.”

The OMA requires public bodies “to keep written minutes of all their meetings.” See R.I. Gen. Laws § 42-46-7(a). Additionally, R.I. Gen. Laws § 42-46-7(b)(1) requires that “[t]he minutes shall be public records and unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier.” The APRA provides that all requests for records must be responded to within ten (10) business days. R.I. Gen. Laws § 38-2-7.

With respect to your complaint that the Commission violated the APRA when it failed to provide you a copy of a letter, we find no violation. The reason for our conclusion is that a plain reading of your January 19, 2015 APRA request finds that you did not request a copy of a letter. Rather, your APRA request related “[p]lease email me a copy of the approved AIPC board minutes for the meeting held on December 16, 2014...These minutes should contain a copy of the letter from the Newport School Board’s Attorney, since Mr. O’Reilly read the complete letter at the public AIPC board meeting.” (Ellipsis in original)(emphasis added). Had your January 19, 2015 request sought a copy of the letter independent of the minutes, we may very well have viewed this matter differently; however, this is not the case. Rather, your January 19, 2015 email sought a copy of the approved minutes, and related that “[t]hese minutes should contain a copy of the letter.” The Commission’s January 23, 2015 response makes obvious that it was responding to the plain language of your January 19, 2015 APRA request. Specifically, the Commission related that pursuant to the OMA a public body must include in its minutes, among other things, “any other information relevant to the business of the public body that a member of the public body requests included,” see R.I. Gen. Laws § 42-46-7(a), and that “[t]here was no such request so the minutes only include a brief description of the update given by Tim O’Reilly that night.” On this basis, we find that the Commission did not violate the APRA when it failed to provide you a copy of the letter. See Assassination Archives and Research v. Central Intelligence Agency, 720 F.Supp. 217, 219 (D.D.C. 1989)(“it is the requester’s responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested.”).

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Turning to your complaint that the Commission violated the APRA when it failed to provide you the “approved” minutes in response to your January 19, 2015 APRA request, we also find no violation. Here, the evidence demonstrates that on January 19, 2015, you requested “a copy of the approved AIPC board minutes for the meeting held on December 16, 2014.” By email dated January 23, 2015, the Commission responded to your request and provided you “the revised minutes of the 12/16/14 minutes.” You complain that the “minutes provided by AIPC were not the revised minutes,” but rather you received the “unrevised minutes.” (Emphasis in original).

Because it was unclear from the record precisely what minutes you had received on January 23, 2015, this Department requested that you provide a copy of the minutes you had received through this APRA request. You provided a .pdf copy of the December 16, 2014 minutes, which contained the file name “AIPC Board – Minutes 12 16 2014 – Revised per 1.13.15.” Moreover, your March 28, 2015 email to this Department attached the December 16, 2014 minutes, as received on January 23, 2015, and advised, in relevant part, “[n]ote that this was the first approved version of these minutes (not the last) and is exactly what you requested.” (Emphasis added).

Based on the foregoing, we must conclude that the Commission provided you responsive documents on January 23, 2015; specifically, the Commission provided you approved minutes from its December 16, 2014 meeting. It is noteworthy that our review of the Commission’s January 13, 2015 minutes reveals that during the January 13, 2015 meeting, the Commission appears to have approved the December 16, 2014 minutes and amended the December 16, 2014 minutes to remove a particular person from attendance. The minutes you received on January 23, 2015 does not list this person as having attended the December 16, 2015 meeting, and therefore, appears to be the minutes, as approved or revised, during the Commission’s January 13, 2015 meeting. While you contend that the Commission subsequently further amended the Commission’s minutes, there is no evidence that any of these subsequent approvals or revisions occurred before your January 19, 2015 APRA request, and accordingly, the Commission could not have violated the APRA by failing to provide you documents that it had not yet created as of the date of your January 19, 2015 APRA request. See R.I. Gen. Laws § 38-2-3(h). With respect to this last point, after the January 13, 2015 meeting (where the December 16, 2014 minutes were approved/revised), there is no record of the Commission convening again until after you submitted your January 19, 2015 APRA request.

Finally, by email dated March 3, 2015, you requested the approved minutes for the Commission’s December 16, 2014 and January 13, 2015 meetings. You complain that the Commission never responded to this APRA request. The Commission has presented no evidence to contradict this assertion, and accordingly, we find it violated the APRA.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***.” See R.I. Gen. Laws § 38-2-9(d).

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Here, neither remedy is appropriate. Specifically, no evidence has been presented of a willful and knowing, or reckless violation. Also, it is our understanding that you now have access to both sets of approved minutes requested through your March 3, 2015 APRA request. Accordingly, injunctive relief is not appropriate. This finding serves as notice to the Commission that its failure to respond violated the APRA and may serve as evidence of a willful and knowing, or reckless, violation in a future similar situation.

Nothing within the OMA or APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws §§ 38-2-8(b) and 42-46-8(c). The OMA allows the complainant to file a complaint 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. See id. We are closing your file as of the date of this finding.

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

Very Truly Yours,



Lisa Pinsonneault
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LP/pl

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