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VIA EMAIL ONLY

March 10, 2022
OM 22-14

Paula Childs
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Thomas More Dickinson, Esquire
Legal Counsel, Bonnet Shores Fire District
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Re: Paula Childs v. Bonnet Shores Fire District

Dear Ms. Childs and Attorney Dickinson:

We have completed an investigation into the Open Meetings Act (“OMA”) Complaint filed by Ms. Paula Childs (“Complainant”) against the Bonnet Shores Fire District (“District”) Nominating Committee (“Nominating Committee”). For the reasons set forth herein, we find that the Nominating Committee is subject to the OMA.

Background and Arguments

The Complainant describes the purpose of the Nominating Committee as being “to interview and choose candidates to put on the ballot for the June 24, 2021 [District] annual meeting and election at the Community Center in Bonnet Shores.” The Complainant alleges that the Nominating Committee violated the OMA by not posting its agenda and meeting minutes on the Secretary of State’s website for May 11, 2021, May 20, 2021, May 26, 2021, and May 27, 2021. The Complainant also alleges the Nominating Committee violated the OMA by meeting via electronic means (via email in May 2021) and by not posting an annual notice.

Attorney Thomas Dickinson submitted a substantive response on behalf of the Nominating Committee. The District disputes that the OMA applies to the Nominating Committee because it asserts that the Nominating Committee is a creature of the District’s Annual Meeting and the Annual Meeting is not subject to the OMA. The District asserts that because the Nominating Committee is part of the Annual Meeting, which is not subject to the OMA, the Nominating Committee does not have to post any meetings to the Secretary of State’s website or make the meetings open to the public. The District notes that the Nominating Committee is elected each

year at the Annual Meeting and is “dormant until the months leading up to Annual Meeting.” The Nominating Committee “is elected each year at the Annual Meeting for the purpose of soliciting candidates to run and then nominating a slate to be considered (along with any candidates nominated from the floor) at the next Annual Meeting.” The District contends that the 2021 Nominating Committee publicly notified eligible voters of the opportunity to be considered for endorsement by methods such as posting on bulletin boards in the District, posting on the District’s website, and “directly emailing approximately 770 eligible voters who have opted-in the E-blast system.” The District asserts that the Nominating Committee also publishes a report of its recommendations.

We acknowledge the Complaint’s rebuttal. Among other arguments, the Complainant asserts that the Nominating Committee includes two elected Fire District Council members and five appointed members, and conducts business by holding meetings, interviewing candidates for elected office, and making its recommendations. Additionally, the Nominating Committee is provided for in the District’s bylaws, which state that the Nominating Committee shall be composed of seven members, two elected and five appointed.

Applicable Law and Findings

When we examine an OMA complaint, our authority is to determine whether a violation of the OMA has occurred. *See* R.I. Gen. Laws § 42-46-8. In doing so, we must begin with the plain language of the OMA and relevant caselaw interpreting this statute.

The OMA is implicated whenever a “quorum” of a “public body” convenes for a “meeting.” *See* R.I. Gen. Laws § 42-46-3; *see also Fischer v. Zoning Board for the Town of Charlestown*, 723 A.2d 294 (R.I. 1999). For purposes of the OMA, a “public body” is defined as “any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government.” R.I. Gen. Laws § 42-46-2(3). As such, whether an entity is a “public body” under the OMA is a threshold inquiry.

We have previously 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 Rowland v. North Kingstown Interview Committee*, PR 19-35; *Lapp v. Fishermen’s Advisory Board*, 19-23.

The Rhode Island Supreme Court examined this issue in *Solas v. Emergency Hiring Council*, 774 A.2d 820, 823 (R.I. 2001), which considered whether the OMA applied to an entity formed by two executive orders of then-Governor Lincoln Almond to “manage and control the state’s hiring practices and its fiscal resources.” The Emergency Hiring 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, the Supreme Court concluded the Council was subject to the OMA:

“[T]he 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.

The Rhode Island Supreme Court again considered the issue of what constitutes a public body in *Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education*, 151 A.3d 301, 307–08 (R.I. 2016). There, the Rhode Island Board Council on Elementary and Secondary Education (“RIDE”) created a Compensation Review Committee (“CRC”), which was tasked with reviewing requested and proposed salary adjustments to Rhode Island Department of Elementary and Secondary Education employees. *Id.* at 302–03. The CRC was described as an “‘informal, *ad hoc* working group with a strictly advisory role’ and with no legal status or authority[,]” and which did not have regular meetings. *Id.* at 303. The Rhode Island Supreme Court held that the CRC was not a public body, stating:

“Unlike the EHC in *Solas*, the CRC in this case does not meet on a regular basis, nor was the CRC created by an executive order. Instead, the undisputed evidence in this case is that the CRC acted as an informal, strictly advisory committee. Although the CRC was composed of a group of high-level state officials and operated under a charter, these two factors alone are insufficient to place them into the ‘public body’ umbrella. Importantly, the CRC’s sole function is to advise the commissioner of RIDE, who in turn has to make a recommendation to the council. At this point in the process, if the commissioner decided to present any proposal to the council for the council’s required approval, the public would have an opportunity to be informed of and object to such proposal.” *Id.* at 308.

In *Finnegan v. Scituate Town Council*, OM 97-05, we concluded that a committee with three “citizen members” appointed by the Town Council President to conduct interviews of finalists for the police chief position was a public body under the OMA. In *Montiero v. Providence School Board Nominating Commission*, OM 02-25, we concluded that the nominating commission for the Providence School Board was not subject to the OMA because it was not a subdivision of state or municipal government. Our conclusion rested upon factors common in our analyses: (1) the commission was formed as a result of recommendations made by a private, non-profit group studying the Providence Public Schools; (2) its five members were nominated by private, non-profit sponsoring organizations who were not subject to a governmental or public approval process; (3) no public money was spent on the commission; and (4) neither city ordinances, the Home Rule Charter, nor any Mayoral executive order, referenced the commission.

After viewing the evidence presented, and guided by Supreme Court precedent, we find that the Nominating Committee is a public body. The Nominating Committee is tasked with soliciting

candidates and then nominating a slate to be considered and voted upon at the Annual Meeting. After reviewing responses from incumbents and any letters of interest from voters seeking a position, the Committee schedules interviews with candidates if necessary and selects candidates to be placed on the ballot. As with the body in *Solas*, the Nominating Committee has authority over the business entrusted to it. Although the qualified electors ultimately vote on the candidates during the Annual Meeting (and candidates can apparently be nominated from the floor), the record before us indicates that the Nominating Committee exercises substantial control over which candidates are selected and appear on the official ballot for the electors' consideration. While the Annual Meeting is itself not subject to the OMA, *see Jenkins v. Bonnet Shores Fire District*, OM 22-13, this instant finding pertains to the various meetings of the Nominating Committee, not the meeting of the electors at the Annual Meeting. The fact that the Nominating Committee members may be elected during the Annual Meeting is of little moment. Unlike *Providence School Board Nominating Commission*, the existence and general makeup of the Nominating Committee is provided for in the District's bylaws and the members are not selected by a private entity. The Nominating Committee is made up of five persons elected at the Annual Meeting and two Fire District Council Members selected by the District Council. For all these reasons, we conclude that the Nominating Committee is a public body and is subject to the OMA.

The District's response did not dispute that the Nominating Committee did not adhere to the requirements of the OMA. Rather, the District asserted that "we do believe that . . . the Nominating Committee should not be subject to the OMA. Should your Department have a different view, we can certainly consider establishing procedures for the 2022 Nominating Committee that conform with those provisions." As such, the chief issue presented in this matter was whether the Nominating Committee is a public body subject to the OMA, and we have determined it is. In doing so, we also conclude that the Nominating Committee violated the OMA by not adhering to the OMA as alleged in the Complaint.

Conclusion

The OMA provides that the Office of the Attorney General may institute an action in Superior Court for violations of the OMA on behalf of a complainant or the public interest. *See* R.I. Gen. Laws § 42-46-8(a), (e). The Superior Court may issue injunctive relief and declare null and void any actions of the public body found to be in violation of the OMA. *See* R.I. Gen. Laws § 42-46-8(d). Additionally, the Superior Court may impose fines up to \$5,000 against a public body found to have committed a willful or knowing violation of the OMA. *Id.*

We note that the Complainant did not specifically seek injunctive relief regarding the particular violations she alleged (although she did seemingly suggest that the violation may be willful or knowing, which will be discussed below). The Complaint in this matter specifically pertained to the Nominating Committee that "[chose] candidates to put on the ballot for the June 24, 2021 annual meeting." As noted above, the membership of the Nominating Committee is generally determined each year at the Annual Meeting and then the Nominating Committee "is dormant until the months leading up to the [next] Annual Meeting." The Complaint in this matter was not filed until a couple of months after the June 24, 2021 Annual Meeting had already occurred. Given that the Complaint in this matter was not filed until months after the Annual Meeting and the election,

this Office's ability to pursue meaningful injunctive relief regarding the activities of the Nominating Committee leading up to that Annual Meeting and election is inhibited. Additionally, requiring the prior year's Nominating Committee to attempt to recreate minutes of their meetings would serve no meaningful purpose since the core work of the Nominating Committee was already revealed by the slate of candidates it put forth at the Annual Meeting, and because the passage of time makes it less likely for the Nominating Committee to be able to accurately recreate minutes, and 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. Similarly, analyzing and potentially pursuing injunctive relief regarding the alleged failure to post an annual notice or regarding an alleged email communication rolling quorum would serve no meaningful purpose because, as explained above, the ultimate work of last year's Nominating Committee was concluded and made public at the Annual Meeting, which occurred before this Complaint was filed. We discern that the chief purpose of the Complaint was to establish that the Nominating Committee is subject to the OMA and that its failure to follow the OMA constitutes a violation. We have now found as much and provided notice in this finding that the Nominating Committee should comply with the OMA going forward.

The violations preceded the June 24, 2021 meeting and the issue of injunctive relief largely became moot once the voters voted on the slate of candidates at the Annual Meeting, which was before this Complaint was even filed. The product of the Nominating Committee's work, namely the slate of candidates for the Annual Meeting, was already made public during the Annual Meeting. We additionally note that based on the record, the Nominating Committee's membership is generally re-determined each year. Given these considerations, the passage of time, and the fact that the prior Nominating Committee's work was essentially completed as of last year's Annual Meeting on June 24, 2021 when the slate of candidates determined by the Nominating Committee was voted upon by the electors – and that injunctive relief declaring actions of the Nominating Committee null and void would necessarily seek to overturn an election – we do not think it appropriate to require injunctive relief related to the specific violations alleged and the activities of the prior year's Nominating Committee.

Nor do we find a willful or knowing violation as the record indicates that the Nominating Committee was operating under a good faith belief that it was not subject to the OMA. The Complainant references *Langer v. Bonnet Shores Fire District Council*, OM 21-04 and notes that this Office has previously advised the District Council that its conduct violated the OMA and that this Office's finding may serve as evidence of a willful or knowing violation in any similar situation, but that prior finding did not pertain to the Nominating Committee. Nonetheless, this Office has now determined that the Nominating Committee is subject to the OMA. As such, the Nominating Committee is on notice of this finding and should comply with the requirements of the OMA going forward. This finding serves as notice to the Nominating Committee that the conduct discussed herein violates the OMA and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court as specified in the OMA. R.I. Gen. Laws § 42-46-8(c). The Complainant may pursue an OMA complaint within “ninety (90) days of

the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later." *Id.* 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.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: Katherine Sadeck
Special Assistant Attorney General