



STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

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VIA EMAIL ONLY

June 6, 2022
OM 22-33

Susan Cienki
RIGOP Chair

Lauren E. Jones

RE: Cienki v. Rhode Island Special Commission on Reapportionment

Dear Chairperson Cienki and Attorney Jones:

We have completed our investigation into the Open Meetings Act (“OMA”) complaint filed by Chairperson Susan Cienki (“Complainant”) against the Rhode Island Special Commission on Reapportionment (“Commission”). The parties dispute whether the OMA applies to the Commission.

This Complaint presents complicated constitutional questions of first impression in Rhode Island that arise as a result of the General Assembly’s decision to pass legislation subjecting the Commission to the OMA, only for the Commission to ignore that provision and argue that the General Assembly’s own legislation was unconstitutional. This about-face regarding OMA compliance perplexes this Office and no doubt also perplexes members of the public who should be able to expect their elected officials to adhere to their own promises of transparency.

At the same time, this Office’s ability to investigate this Complaint was challenged by the conduct of Complainant. While almost certainly aware of the activities of the Commission from start to finish, the Complainant chose to wait until the Commission’s activities concluded before filing the instant Complaint — after it was too late for the Commission to modify or rectify its conduct and after it was too late for any meaningful remedies. Those who truly wish to safeguard transparency and access under the OMA would have acted sooner.

As set forth more fully below, we have determined that, even assuming the OMA applies to the Commission, there would be no appropriate remedy for the alleged violations, due in large part to Complainant’s delay in submitting this Complaint until after the work of the Commission had already been substantially completed. Accordingly, under these circumstances, and consistent with both Rhode Island Supreme Court precedent and this Office’s precedent, we decline to wade into the complicated, constitutional questions of first impression presented by this Complaint where the purposes of the OMA and the public’s interest in transparency will not be advanced or served.

Background

The genesis of this Complaint begins with Rhode Island's constitutional requirement that the General Assembly reapportion districts for the House of Representatives and the Senate after a national census. Specifically, Rhode Island's Constitution provides that the House of Representatives and the Senate shall "be constituted on the basis of population and the representative districts shall be as nearly equal in population and as compact in territory as possible." R.I. Const. Art. 7 § 1; Art. 8 § 1. After "any new census taken by the authority of the United States," the General Assembly must reapportion representation to conform to the state and federal constitutions. R.I. Const. Art. 7 § 1; Art. 8 § 1.

As a result of the 2020 national census and this constitutional requirement, the General Assembly passed an Act creating the Commission in 2021. *See* P.L. 2021, ch. 176; P.L. 2021, ch. 177. The Commission consists of 18 members, 12 of whom are members of the House or Senate, and 6 of whom are members of the public chosen by the Speaker of the House or the Senate President. P.L. 2021, chs. 176 and 177 § 1(a). As set forth in the Act, "[i]t shall be the purpose and responsibility of the commission to draft and to report to the general assembly an act to reapportion the districts of the general assembly and the state's United States congressional districts and to perform the necessary functions incident to drafting such an act" subject to the final 2020 census data. P.L. 2021, chs. 176 and 177 § 1(b). Additionally, the Act provides that "[t]he commission shall report its findings and recommendations to the general assembly on or before January 15, 2022." P.L. 2021, chs. 176 and 177 § 4. Of particular significance to this Complaint, the Act creating the Commission expressly provides that the Commission "shall be subject to the provisions of" the Open Meetings Act. P.L. 2021, chs. 176 and 177 § 3(b).

On January 19, 2022, four months into the Commission's work and after the Commission had already submitted its report to the General Assembly, the Complainant submitted an OMA Complaint to this Office alleging that the Commission had violated the OMA. Despite asserting that the Commission had not been following the OMA since its first meeting in September 2021, nor for any of its subsequent 17 meetings, the Complaint was not filed with this Office until four days *after* the statutory date set for the Commission to report its recommendations to the General Assembly and when the work of the Commission had already been completed. The Complaint asserted that the Commission is subject to the OMA pursuant to the plain language set forth in P.L. 2021, chs. 176 and 177 § 3(b), *see supra*, and that the Commission had committed various violations of the OMA. In particular, the Complainant alleged that the Commission violated the OMA by: 1) voting on reapportionment maps at its January 12, 2022 meeting without providing adequate notice; 2) voting to create maps based on the reallocation of some prison inmates at its January 5, 2022 meeting without providing adequate notice; 3) engaging in a rolling quorum outside the public purview; 4) not providing minutes of 15 of its meetings within 35 days of the meeting in violation of R.I. Gen. Laws § 42-46-7(b)(1); and 5) not electronically posting notices for any of its 18 meetings (dating from September 9, 2021 to January 12, 2022) with the Secretary of State in violation of R.I. Gen. Laws § 42-46-6(c).

This Office immediately opened an investigation and provided the Commission with an opportunity to respond to the Complaint, and then the Complainant with an opportunity to provide a rebuttal. Both parties requested extensions of time to provide their submissions. As neither party raised an objection, this Office granted the requested extensions.

On February 11, 2022, the Commission submitted a substantive response through its legal counsel, Lauren E. Jones, Esq. The Commission declined to address the Complainant’s substantive allegations that the Commission had failed to comply with the OMA, and instead argued that the Commission “is not and cannot be subject to the OMA.” In particular, the Commission argued that it was created by the General Assembly to provide a recommendation on reapportionment and that reapportionment is a legislative activity. As such, the Commission argued that it is not a “public body” as defined in the OMA, *see* R.I. Gen. Laws § 42-46-2(5), and that applying the OMA to the Commission would violate the Speech in Debate clause of the Rhode Island Constitution. *See* R.I. Const. Art. VI, § 5 (“For any speech in debate in either house, no member shall be questioned in any other place, except by the ethics commission as set forth in Article III, Section 8.”); *see also* *Holmes v. Farmer*, 475 A.2d 976, 982 (R.I. 1984) (“The purpose of the speech in debate clause is to ensure the Legislature freedom in carrying out its duties.”). The Commission recognized that the Act creating the Commission “purported to make the [Commission] subject to the OMA,” but argued that applying the OMA to the Commission (as P.L. 2021, chs. 176 and 177 § 3(b) would do) would be inconsistent with the Rhode Island Constitution and with legislative immunity. These arguments also implicated the related doctrine of separation of powers.

The Commission also asserted that it had been “transparent and public in its proceedings” for the 18 meetings it held over an approximately four month period, from September of 2021 to January of 2022. Specifically, the Commission described how all its meeting had been in public, as well as live-streamed on the internet and recorded and made available for later viewing. The Commission also asserted that it posted notices of its meetings on the General Assembly website. The Commission explained that it already had reported its recommendation to the General Assembly, had “completed its work,” and “no longer has any involvement with redistricting/reapportionment.” As of February 11, 2022, when the Commission submitted its response to this Complaint, it indicated that bills regarding redistricting were scheduled for votes on the floors of both the House and the Senate. We note that the General Assembly subsequently passed the legislation related to reapportionment, which has been signed into law by the Governor.

We acknowledge the Complainant’s rebuttal, which was submitted on February 23, 2022.¹ The Complainant maintained that the Commission is subject to the OMA and raised various arguments in response to the arguments asserted by the Commission on that topic, including the argument that legislative immunity was waived by the Act creating the Commission and subjecting it to the OMA. The Complainant did not dispute that the Commission is no longer meeting and has concluded its work, but asserted that the Commission has still not made minutes of its meetings available as required by the OMA. By way of relief, the Complainant seeks only two things: the availability of draft meeting minutes and fines for what she contends was the Commission’s willful or knowing conduct.

¹ When the rebuttal was submitted, the Complainant acknowledged that Attorney Steven Frias had assisted the Complainant with preparing her submissions, but stated that Attorney Frias was not entering his appearance on her behalf in this matter. Counsel for the Commission asserted that pursuant to the Rhode Island Professional Rules of Responsibility, Rule 1.2(d)(1), Attorney Frias should have signed the rebuttal. We do not find that issue material to resolving this matter and note that the parties are free to direct the issue to the appropriate authority if they believe it necessary to do so.

Discussion

The Commission has asserted that it is protected by a constitutional legislative immunity that bars this Complaint. The Complainant responded by arguing that legislative immunity is inapplicable, including because it was waived by the legislation subjecting the Commission to the OMA. The Complainant also asserted in the first instance that this Office should not even consider the constitutional arguments raised by the Commission and should instead simply apply the OMA. We cannot so blithely accept the Complainant's invitation to simply apply the OMA to the Commission. This Office's authority in determining whether a violation of the OMA has occurred is not unbound – it must be carried out consistent with the laws and Constitution of Rhode Island. *See State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008). Thus, *whether* the OMA applies to a particular public body is ordinarily a necessary threshold question for our consideration. Here, there is no doubt that answering that question would require the resolution of vexing constitutional questions. However, as explained below, we need not answer these questions because we find that, even assuming the OMA applied to the Commission, and even assuming the Commission violated the OMA, no relief is warranted.

- Claim of Constitutional Immunity

The Speech in Debate clause, and its analogous federal counterpart, provide immunity to legislators for their legislative acts and serve to protect important public interests that are essential to the functioning of a democratic government. The clause ensures that legislative acts can be carried out freely without threat of retribution or litigation, and without interference by the other branches of government. Such freedom to legislate without outside interference is ultimately intended to benefit the citizens of a democracy and to ensure three co-equal branches of government. Even where the protections of the clause may benefit an individual legislator, the public is still the ultimate beneficiary. For that reason, both Rhode Island and federal courts have interpreted the immunity provided by the Speech in Debate clause broadly, consistent with its purpose to protect the work of the legislature and the separation of powers. *See, e.g., Holmes*, 475 A.2d at 982 (“This freedom ensures the separation of powers among the coordinate branches of government. Further, the fact that the legislators can carry out their duties without being questioned ‘in any other place’ allows the free flow of debate among legislators and the maximization of an effective and open exchange of ideas.”); *Irons v. Rhode Island Ethics Comm’n*, 973 A.2d 1124, 1130-31 (R.I. 2009) (noting that because the Speech in Debate clause ensures legislative freedom, the “people are the intended and ultimate beneficiaries”); *Am. Trucking Associations, Inc. v. Alviti*, 14 F.4th 76, 86–87 (1st Cir. 2021) (“the clause also protects legislators from proceedings that ‘divert their time, energy, and attention from their legislative tasks,’ otherwise ‘delay and disrupt the legislative function,’ or ‘deter[] ... the uninhibited discharge of their legislative duties’”) (internal citations omitted). In *Holmes v. Farmer*, the Supreme Court found that inquiry into the actions and motivations of the legislators and the General Assembly in proposing and passing a reapportionment plan came within the ambit of the Speech in Debate clause, and that the privilege also applied to the commission staff who engaged in legislative activity. 475 A.2d at 984 (“[t]he business conducted at meetings of the Reapportionment Commission, the discussions that took place among groups of individual legislators, and the actions of individuals in carrying out the reapportionment process are areas of legitimate legislative undertakings”).

The Complainant has not presented us with any binding legal authority in support of the proposition that the Rhode Island General Assembly can waive the Speech in Debate clause. At most, the Complainant

points to a United States Supreme Court case where the Court assumed, without deciding, that a member of Congress could waive the federal Speech or Debate clause's protection against being prosecuted for a legislative act. *See United States v. Helstoski*, 442 U.S. 477, 490 (1979) (noting that the Court had twice declined to decide whether Congress could pass a statute that would enable a Congressman to be prosecuted for a legislative act despite the Speech in Debate clause). Indeed, we have found no cases where the Rhode Island Supreme Court has held that waiver of the clause, and of the immunity it confers for legislative acts, is even possible. *See Holmes*, 475 A.2d at 985 (concluding it would be inconsistent with the purpose of Speech in Debate clause to allow an individual legislator to waive the legislature's privilege and declining to address whether legislators can waive their own privilege).

Accordingly, to determine that the Speech in Debate clause was waived in this case, as the Complainant seeks, would be to decide a significant constitutional issue of first impression not previously decided by any Rhode Island court.

It also does not go unnoticed that the unique challenges presented by this Complaint are fully of the General Assembly's own making. Indeed, the General Assembly seemingly recognized the importance of an open and public process not only when it passed the OMA, but also when it passed an Act creating the Commission that expressly made the Commission subject to the OMA. *See* P.L. 2021, chs. 176 and 177 § 3(b). We presume the General Assembly was well aware of its actions when it undertook this legislative act. *See Balmuth v. Dolce for Town of Portsmouth*, 182 A.3d 576, 587 (R.I. 2018) (courts "presume[] that the General Assembly knows the state of existing relevant law when it enacts or amends a statute"); *In Re: Advisory Opinion to House of Representatives*, 485 A.2d 550, 552 (R.I. 1984) (courts "will presume legislative enactments of the General Assembly to be constitutional and valid"). The Complainant notes that the legislators on the Commission themselves voted in favor of the enabling act subjecting the Commission to the OMA.

This Office is hard-pressed to comprehend why the General Assembly would pass an act making the Commission it created subject to the OMA in the interests of transparency, only for the Commission to ignore that provision (and indeed argue the General Assembly's own voluntary act was unconstitutional) as if the law making the Commission subject to the OMA did not exist. Indeed, the Commission did not even attempt to dispute the Complainant's assertions that it did not comply with the OMA. The General Assembly's decision to subject the Commission it created to the OMA and the apparent failure by the Commission and its members to follow the OMA opened the door to this Complaint and to the significant constitutional questions that are implicated.

The General Assembly's about-face notwithstanding, we decline to determine whether the constitutional immunity provisions cited by the Commission would prevent (or not prevent) the OMA from being enforced against the now-dissolved Commission. Doing so would require this Office to opine on significant and novel constitutional questions, with potential ramifications far beyond this case. Opining on these questions would essentially result in this Office issuing an advisory decision without any practical effect. As repeatedly admonished by the Rhode Island Supreme Court, it is inappropriate to unnecessarily decide constitutional questions in the manner requested by the Complainant. *See, e.g., State v. Lead Indus. Ass'n, Inc.*, 898 A.2d 1234, 1239 (R.I. 2006) (describing Supreme Court's "constitutional rule of strict necessity" whereby the Court declines to adjudicate constitutional questions "when a case is capable of decision upon other, non-constitutional grounds"); *Caron v. Town of North Smithfield*, 885 A.2d 1163, 1165 (R.I. 2005) (mem.) ("[T]his Court has on many occasions held that it

will not decide a case on constitutional grounds if it otherwise can be decided.”); *In re Court Order Dated October 22, 2003*, 886 A.2d 342, 350 n. 7 (R.I. 2005) (“[W]e are quite reluctant to reach constitutional issues when there are adequate non-constitutional grounds upon which to base our rulings.”); *State v. Berberian*, 80 R.I. 444, 445, 98 A.2d 270, 270–71 (1953) (“It is, however, well settled that this court will not decide a constitutional question raised on the record when it is clear that the case before it can be decided on another point and that the determination of such question is not indispensably necessary for the disposition of the case.”).

On multiple occasions, this Office has found it unnecessary to analyze the particular allegations asserted and has proceeded to resolve the case on the basis that, *even assuming* the alleged violation(s) occurred, no relief is appropriate. See *Lyssikatos v. City of Pawtucket*, PR 21-04; *Save the Bay v. Rhode Island Department of Environmental Management*, PR 20-62; *Lamendola v. East Greenwich School Committee*, PR 20-11; *Farinelli v. City of Pawtucket*, PR 17-22. Such is the case here. As set forth more fully below, there is no appropriate remedy under the OMA for the asserted violations, in large part due to Complainant’s own delay in submitting this Complaint. Accordingly, we find it unnecessary to pass upon the constitutional questions presented.

- Analysis of Relief

Assuming without deciding that an OMA violation has occurred, we proceed to determine whether there is an appropriate remedy. Our prior findings have observed, consistent with the plain language of the OMA, that there are only two principal remedies available for alleged violations of the OMA: injunctive relief and civil fines. See, e.g., *Childs v. Bonnet Shores Fire District*, OM 22-14; see also R.I. Gen. Laws § 42-46-8(d).

- *Injunctive Relief*

We first consider the issue of injunctive relief. The Complainant did not specifically claim any injunctive relief is necessary to the public interest, except to assert in her rebuttal that “the Commission still has not provided draft minutes to the public.” The Complainant seems to acknowledge that as an entity with only advisory powers, the Commission would not be required by the OMA to post official meeting minutes, but only to have unofficial minutes available to the public within thirty-five days of the meeting. See R.I. Gen. Laws § 42-46-7(b), (d). The Complainant does not dispute the Commission’s assertion that “[e]very meeting [of the Commission] has been recorded, both video and audio.” Further, after every meeting, “every video — complete and unedited — has been posted and is available on the General Assembly’s website through the Capitol TV link and through [the Commission’s] website.” As such, it is undisputed that although the Commission may not have made available “unofficial” meeting minutes, there is public access to full recordings of the meetings themselves.

We have previously recognized that the passage of time can make it less likely for a public body 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*, OM 14-26B. Recently, in *Childs v. Bonnet Shores Fire District*, OM 22-14, this Office found that “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[.]” We additionally reached this conclusion “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.” As with this case, the *Childs* finding involved an entity that had ceased to exist prior to when the Complaint was filed, further complicating any attempt to require the now-dissolved body to recreate its minutes from months prior.²

Consistent with our precedent, we find that requiring the now-dissolved Commission to retroactively recreate its unofficial minutes in this case would serve no meaningful purpose, especially where the Commission has already completed its work and where it is undisputed that full video recordings of the meetings are publicly available. The Commission’s ultimate work was already revealed through its report to the legislature and the Commission has now ceased to exist. Anyone wishing to review the work of the Commission may access the video recordings of its meetings that the record indicates are publicly available and that reflect exactly what occurred at the meetings without the risk of introducing inaccuracies by attempting to retroactively recreate minutes months after the meetings took place.

As noted above, the Complainant has not asserted that any other specific injunctive relief is sought or necessary to protect the public interest. The Complainant does not dispute that the Commission submitted its report to the legislature and concluded its work before this Complaint was even filed on January 19, 2022. Neither does the Complainant dispute that the General Assembly has now already voted upon the issue of reapportionment and the legislation has been signed into law by the Governor — thereby superseding any legal or practical effect of the Commission’s work. The Complainant does not argue that the General Assembly is subject to the OMA or that its actions could be undone based on this Complaint. Indeed, the Complainant expressly noted in her rebuttal that “[a] finding that the Commission violated the Open Meetings Act does not require that the Attorney General to [sic] find that the General Assembly is subject to the Open Meetings Act as well.” The bottom line is that the Complainant waited until after the Commission’s substantive work related to reapportionment had been completed, and just before it was irrevocably executed by the General Assembly, to file this complaint. That choice matters. *Cf. Sinapi v. Rhode Island Bd. of Bar Examiners*, 910 F.3d 544, 548 (1st Cir. 2018) (noting that action had already been “irrevocably executed”); *Edwards v. State Through Atty. Gen.*, 677 A.2d 1347, 1349 (R.I. 1996) (“When a remedy is selected, it must be proportional to the breach and the effect thereof.”). And so, it is no surprise that the Complainant has not sought any injunctive relief, other than with regard to the issue of minutes, which are addressed above. While this Office remains steadfast in reaffirming the importance of the OMA, complainants are reminded that delays in filing a complaint may affect the panoply of remedies that are available and appropriate. Here, the independent action by the General Assembly in passing redistricting legislation and the Governor’s action in signing this legislation into law, make any injunctive relief inappropriate in the circumstances of this case.

² In the *Childs* finding, this Office did analyze whether the Nominating Committee was subject to the OMA, but the record in that case demonstrated that the Nominating Committee was re-formed annually and that the question of whether it was subject to the OMA would imminently reoccur. By contrast, in this case reapportionment only takes place after any new census taken by the authority of the United States, *see* R.I. Const. Art. 7 § 1; Art. 8 § 1, which is generally every ten years, and we have no basis to believe that a subsequent General Assembly would pass an enabling act providing that a future reapportionment commission is subject to the OMA, nor do we have any basis to speculate on what the OMA may require in or about 2031.

○ *Civil Fines*

We next consider the issue of civil fines, which is the other remedy available under the OMA. The Complainant asserts that the conduct of the Commission was willful or knowing and warrants civil fines. See R.I. Gen. Laws § 42-46-8(d). Although the Commission did not dispute that it failed to follow the OMA, it provided evidence of a host of other measures it took to promote the transparency of its proceedings. For instance, it asserts that it posted recordings of its meetings, as well as every document presented to it. The Commission represents, and the record is clear, that it posted notice of its meetings in various places, provided opportunities for public comment, and allowed members of the public access to software used to map out the reapportionment districts. Many of these actions go beyond the transparency measures required by the OMA. On this record, the evidence suggests that the Commission's non-adherence to the OMA was not intended to obscure transparency into its proceedings. In these circumstances, even assuming the Commission was subject to and violated the OMA, we do not find that the violations were willful or knowing such as to warrant civil fines.

As we have determined that there is no appropriate remedy for the violations alleged in this Complaint, we decline to proceed further.

Conclusion

The Attorney General will not file suit in this matter. In cases where the OMA applies, a complainant may file an OMA lawsuit 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(b). Please be advised that we are closing our 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 Connolly Sadeck
Special Assistant Attorney General