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VIA EMAIL ONLY

May 10, 2022
OM 22-25

Nicole Solas
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Re: Nicole Solas v. South Kingstown BIPOC Advisory Committee

Dear Ms. Solas and Attorney Henneous:

We have completed an investigation into the Open Meetings Act (“OMA”) Complaint filed by Ms. Nicole Solas (“Complainant”) against the South Kingstown BIPOC Advisory Committee (“BIPOC Committee”).¹ For the reasons set forth herein, we find that the BIPOC Committee is not a “public body” under the OMA.

Background and Arguments

- The Complaint

The Complainant contends that the BIPOC Committee is in violation of the OMA as it is a public body under R.I. Gen. Laws § 42-46-2(5) and is not holding open meetings pursuant to the OMA. The Complainant asserts that the BIPOC Committee is completely funded with public funds and “held secret meetings to revise and audit South Kingstown School District curriculum, hiring and firing policies, athletic policies, discipline policies, all employment contracts, and all school guidance.” The Complainant acknowledges that it “may be true” that “[p]olicy decisions happen at public policy sub-committee meetings where recommendations are made to the School Committee, and then discussed publicly in School Committee meetings,” “but the BIPOC

¹ We understand BIPOC to refer to Black, Indigenous and People of Color. The BIPOC Committee has changed its name over time but for ease of reference will be referred to in this finding as the BIPOC Committee. It is also sometimes referred to as the “Board” in the parties’ submissions that are referenced in this finding.

Advisory Committee nevertheless is publicly funded and held secret meetings to produce their recommendations to the school committee.” The Complaint attached documents showing that Robin Wildman, on behalf of “Nonviolent Schools RI” (“NSRI”), signed an agreement with the South Kingstown School Department to provide services, including “Facilitation of the BIPOC Advisory Board” for 25 meetings. The agreement specifically identified NSRI as an independent contractor, not an employee of the School Department and not a partner or joint venturer with the School Department. The Complaint also included a chart (seemingly related to the independent contractor agreement) showing pricing for different projects and listing the “BIPOC Advisory Board” as having a “unit price” of \$200/meeting for a total of \$5,000.

- School Committee’s Response

Attorney Andrew Henneous submitted a substantive response on behalf of the South Kingstown School Committee (the “School Committee”), which included an affidavit from the facilitator of the BIPOC Committee, Robin Wildman. The School Committee states that the BIPOC Committee was approved by the School Committee at a meeting dated July 22, 2020. The School Committee contends that the BIPOC Committee is not a public body subject to the OMA and “therefore is not required to advertise and hold its meetings in public.”

The School Committee asserts that the purpose of the BIPOC Committee is “to advocate for equity in the education of students who identify as Black, Indigenous, and People of Color (BIPOC) in South Kingstown schools.” The School Committee explains that the BIPOC Committee meets to discuss member’s personal experiences and “reviews current School Committee policies through the lens of inclusivity and equity.” The School Committee states that if the BIPOC Committee finds facts to lead it to believe that the policy being reviewed does not meet the goals of inclusivity and equity, “they bring those concerns to the School Committee Policy Sub-Committee” and “[i]f the Policy Sub-Committee does not approve of changes, they are not made.” The School Committee asserts that the School Committee Policy Sub-Committee is a public body, and its meetings are conducted in accordance with the OMA.

The School Committee argues that the BIPOC Committee is not like the Hiring Council in *Solas*² v. *Emergency Hiring Council*, 774 A.2d 820 (R.I. 2001), which the Rhode Island Supreme Court determined to be a public body. In particular, the School Committee asserts that the BIPOC Committee “has absolutely no power other than to review policies and suggest revisions.” The School Committee asserts that like the body in *Ashaway Volunteer Fire Association*, OM 98-33, the BIPOC Committee members “do not receive a salary, medical benefits, or a pension for their services.”

Ms. Wildman states that she is not a member of the BIPOC Committee, but only facilitates its meetings. She describes the BIPOC Committee as a voluntary group who were gathered together “by word of mouth” and states that the members, along with NSRI, “informally” create the agenda for meetings. Ms. Wildman represents that the BIPOC Committee initially consisted of about 15

² The plaintiff in that case was Gregory Solas, not the Complainant in this case.

people who met once a week to share their personal stories and to outline goals and a mission statement, and then dropped to “about 7-8 regular members.” Ms. Wildman also attests that the BIPOC Committee’s “officers were not elected by the public or appointed by a subdivision of state or municipal government, but instead were volunteers elected by the members of the [BIPOC Committee] themselves.” The BIPOC Committee reviews policies and includes two members who sit on the School Committee Policy Subcommittee and who bring the BIPOC Committee’s suggestions to the Policy Sub-Committee’s public meetings. Ms. Wildman states that the BIPOC Committee “has no decision-making authority whatsoever” and the Policy Sub-Committee has no obligation to consider suggestions made by the BIPOC Committee. Ms. Wildman attests that the BIPOC Committee “does not possess significant supervisory and executive veto power,” and “does not and has not reviewed ‘employment contracts’ and ‘all school guidance’ as alleged.”

- Rebuttal and Supplemental Submissions

We acknowledge the Complainant’s rebuttal and supplemental submissions, some of which were submitted by legal counsel on her behalf. The Complainant asserts that under the plain language of the OMA and cases interpreting it, the BIPOC Committee is a public body “that was established and funded by the School Committee, a political subdivision, for the express purpose of meeting ‘to discuss’ matters over which the [BIPOC Committee] has ‘advisory power’.” The Complainant argues that “[b]y the School Committee’s own admission, the purpose of the Board is ‘to review policies and to suggest revisions’ to those Committee-wide policies. . . . In other words, the express purpose of the Board is to act in an advisory capacity to the Committee.”

The Complainant provided a screenshot of a blog post with comments attributed to a voting member of the Policy Subcommittee who is also a member of the BIPOC Committee, who described how the BIPOC Committee:

“reviewed policies ranging from discipline and suspension to coaching & hiring. We are hard at work crafting a framework for all of these policies, which we are calling the Anti-Racism and Anti-Discrimination Policy. This policy will guide the language, process and the enforcement of all of the changes we make to all of the other policies. We are also working on opportunities for BIPOC representation in the hiring process, for mentorship and for cultural awareness within the district. All of this work has been a massive undertaking, a very heavy lift that the entire BIPOC Advisory Board has embraced and met weekly to work on, over the past eight months.”

The Complainant also cites examples and argues that the “School Committee is also clearly implementing the Board’s advice in revising its policies.” The Complainant also contends that the BIPOC Committee’s mission is a matter of significant public concern, the members are public officials, the BIPOC Committee has regular and recurring meetings, and the BIPOC Committee is

funded by public funds. The Complainant additionally argues that the School Committee has no authority to appoint an “informal advisory” body like the BIPOC Committee.³

The Complainant provided an additional submission consisting of a vendor RFP provided by NSRI which included a description of some of the BIPOC Committee’s work: “the [BIPOC Committee] has written an Antiracism/Anti-discrimination policy for the district, has provided recommendations for editing the Coaches and Suspension policies, and has chosen three Board members to be voting members of the district’s Policy sub-committee.” According to the RFP, the BIPOC Committee has also performed work on projects that will be implemented at a later date, such as an after-school “empowerment” club, and “[t]hrough NSRI’s facilitation, members of the Advisory Board have been productive during the weekly Zoom meetings, which are attended by BIPOC students, teachers, parents, and community members[.]” This document also identifies various members of the BIPOC Committee by name⁴ and states that “[t]he Advisory Board will assist and advise in rewriting curriculum to uplift BIPOC throughout South Kingstown, the state, the country, and the world.”

The Complainant provided additional supplemental submissions including a video clip of a BIPOC Committee member indicating that “I was invited by [school] administrators” to join the BIPOC Committee, which the Complainant asserts shows that the BIPOC Committee is a public body.

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.

For the OMA to apply, a “quorum” of a “public body” must convene for a “meeting” as these terms are defined by the OMA. *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). As a threshold issue, we must determine whether the BIPOC Committee is a “public body” within the meaning of 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[.]” R.I. Gen. Laws § 42-46-2(5).

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.” *GoLocalProv v. Providence City Council*, OM 20-15.

³ This Office’s authority under the OMA is to investigate alleged violations of the OMA. We do not opine on whether the School Committee has the authority to appoint an advisory body as that issue is outside of our purview under the OMA.

⁴ This seems to conflict with the statement in Ms. Wildman’s affidavit that she “promised [the members] that I would never release their names or any other information to anyone.”

The Rhode Island Supreme Court 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 RIDE 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:

“[T]he 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.

Although the Complainant cites *Solas* and argues that “‘a council’s exercise of advisory power,’ like the Board exercises here, is by itself ‘enough to bring it under the act’s umbrella,’” *Pontarelli* demonstrates that an entity that has an advisory role is not necessarily a public body.

Other, non-exhaustive, factors to consider when determining whether an entity is a public body subject to the OMA were set forth in *Oliveira v. Independent Review Committee*, OM 04-10. These factors include the authority under which the entity was established, “the scope of its stated 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 [Office].” *See Oliveira v. Independent Review Committee*, OM 04-10; *see also Arditi v. Governor’s State Equity Council*, OM 21-32.

Applying these considerations to the BIPOC Committee is not straightforward because different considerations point in different directions.

Here, unlike in *Pontarelli*, the record indicates that the BIPOC Committee meets on a regular basis. Based on the evidence provided, from at least February 15, 2021 to August 31, 2021, the BIPOC Committee was scheduled under NSRI’s contract to meet twenty-five (25) times for ninety (90) minutes; typically these meetings occurred once a week. The BIPOC Committee was created by a vote of the School Committee during its July 22, 2020 meeting and its mission, i.e. to “advocate for equity in the education of students who identify as [BIPOC][.]” was set forth by the School Committee. The School Committee clearly has a role in the creation and direction of the BIPOC Committee. Additionally, NSRI receives public funds to facilitate the meetings and work of the

BIPOC Committee. These factors all weigh in favor of the BIPOC Committee being considered a public body.

Conversely, other factors are ambivalent or indicate that the BIPOC Committee is not a public body. In *Pontarelli*, the group was composed of high-level state officials, whereas here, the BIPOC Committee is comprised of volunteers, including former students and parents, and does not appear to have a set membership. Indeed, based on the record, even the number of members fluctuates over time. However, we do note evidence that some of the members are also members of the School Committee Policy Sub-Committee. Although NSRI is paid to facilitate these BIPOC Committee meetings, the members themselves do not receive pay or benefits related to their membership. See *Schmidt v. Ashaway Volunteer Fire Association*, OM 98-33 (finding entity to not be a public body and noting that members do not receive a salary or benefits for their services).

The evidence regarding the work of the BIPOC Committee is also mixed. Some of the evidence describes the BIPOC Committee as an informal group that gathers to discuss their personal experiences and ideas for improving their community. Other evidence characterizes the BIPOC Committee as having a somewhat formal function of engaging in rigorous work to review a wide variety of policies and to propose policy changes and implement new programs. The School Committee asserts, however, that the “[BIPOC Committee] has no decision-making authority whatsoever.” “[T]he [BIPOC Committee] reviews current School Committee policies through the lens of inclusivity and equity. If the [BIPOC Committee] finds facts to lead it to believe that [the] policy being reviewed does not meet these goals, they bring those concerns to the School Committee Policy Sub-Committee[.]” The record indicates that the BIPOC Committee does not itself have the authority to expend public funds or to implement policy changes, and instead presents its proposals to the Policy Sub-Committee, which is a public body and which has authority to vote on the proposed changes. The BIPOC Committee’s mission as described by the School Committee, i.e., to “advocate for equity in the education of students who identify as Black, Indigenous, and People of Color (BIPOC) in South Kingstown schools, inspiring a healthier and just community and school system for everyone,” is also more focused on promoting general advocacy than on carrying out any particular role or authority that has been designated to it.

Our review of the School Committee minutes supports the notion that the BIPOC Committee presents its recommendations to the Policy Sub-Committee and the School Committee, which has ultimate authority over what, if any, actions to take. For example, at its February 25, 2021 meeting, the Policy Sub-Committee minutes note that the Policy Sub-Committee discussed and reviewed feedback related to the anti-racism policy and discussion followed regarding other policies that may potentially need revisions. At the same meeting, the Policy Sub-Committee minutes note that “the BIPOC Advisory Board will revisit the policy and will bring the *suggested* edits back to this committee.” (Emphasis added). Additionally, the Policy Sub-Committee noted that “[n]ew or revised policies will come before this committee first. Once approved, this committee will vote to move them forward to the school committee for a first reading. If feedback is received the policy will come back to this committee for revision, otherwise, it will be moved for a second read by the school committee.” This example supports the School Committee’s representation that the BIPOC Committee is an advisory group that can make recommendations to the Policy Sub-Committee,

but the Policy Sub-Committee has the authority to discuss and decide the proposed revisions that will eventually be submitted to the School Committee for final approval. Ms. Wildman attests that “the Policy Sub-Committee has no obligation to consider [the BIPOC Committee’s] suggestions at all,” and the School Committee asserts that if the Policy Sub-Committee does not approve of the suggested changes, then the changes are not made. The record thus indicates that the BIPOC Committee only makes suggestions and does not have authority over implementing its suggestions, or over whether its recommendations will even be considered.

During its April 15, 2021 meeting, the Policy Sub-Committee reviewed the anti-racism draft policy and a motion was made “to recommend the Anti Racism, Anti Discrimination, and Anti Harassment Policy to the School Committee.” At the same meeting, the Policy Sub-Committee made a motion “to recommend deleting the Anti Discrimination and Anti Harassment Policy as stand-alone policy to the School Committee.” On May 20, 2021, the School Committee’s meeting minutes show that the School Committee took a unanimous vote to retire the Nondiscrimination and Anti-harassment policy and held discussion/first reading of the new Anti-racist, Anti-discrimination, & Anti-harassment Policy.

These illustrative examples support the School Committee’s representation that the BIPOC Committee does not itself have authority delegated to it, but rather is an advisory group that can make recommendations to the Policy Sub-Committee, which will in turn make recommendations to the School Committee, and then the School Committee has ultimate authority over implementing these policies and suggestions.

The evidence that the BIPOC Committee does not have any independent authority over any particular matter or issue, but rather reviews and makes general recommendations about a variety of matters, weighs in favor of it not being considered a public body. *See, e.g., Pontarelli*, 151 A.3d 301 (finding CRC, which was a strictly advisory body without authority, did not constitute a public body); *Howard v. Portsmouth Senior Center Focus Group*, OM 21-22 (finding that a focus group that makes proposals that are subject to approval by the Town Council at open meetings is not subject to the OMA); *Arditi v. Governor’s State Equity Council*, OM 21-32 (finding group that has no governmental decision-making authority but instead serves as a “strictly advisory group” to not constitute a public body).

Here, based on the totality of the facts presented, the BIPOC Committee acts as an advisory group that makes recommendations but lacks any specific authority. We nonetheless emphasize that an advisory body can still be subject to the OMA. *See Solas v. Emergency Hiring Council of State*, 774 A.2d 820, 825 (R.I. 2001); *see also* R.I. Gen. Laws § 42-46-7(d) (referencing public bodies whose duties are “solely advisory in nature”). However, here the BIPOC Committee more closely resembles the advisory body in *Pontarelli* that reviewed certain matters but lacked any authority and was not a public body. *See* 151 A.3d at 303.

By contrast, in *Solas*, the “EHC” council at issue in that case had “been granted significant influence and veto power over creating positions in state government, promoting employees to existing positions and filling existing vacancies.” 774 A.2d at 824. Thus, “at the very least, the

EHC functions in an influential advisory capacity with veto power over a subject of significant public interest.” *Id.* The Rhode Island Supreme Court described the authority of the EHC as follows: “The EHC was created by executive order on January 6, 1995, *to manage and control* the state’s hiring practices and its fiscal resources. Pursuant to this directive, no new positions, vacant positions, or promotions *could be created or filled without authorization from the EHC*. In creating the EHC, the Governor stated that the intent of the order was *to insure that ‘no person or persons other than the Council shall have the authority to make any determinations in this regard.’*” *Id.* at 823-24 (emphases added). Although the EHC was considered advisory in nature and appears to have been ultimately subject to the authority of the Governor (we note that the majority of its members were designated by the Governor), the EHC nonetheless had significant advisory influence over the matters within its purview.

As such, the EHC was an advisory body but one that had been delegated specific authority over a particular issue, including “veto” power over creating positions in state government. Although the BIPOC Committee clearly has some degree of influence and makes recommendations to the School Committee Policy Sub-Committee, there is insufficient evidence presented to this Office that the BIPOC Committee possesses the same type of authority or influence as the EHC that was the subject of the *Solas* decision.

Additionally, the EHC consisted of certain designated members, whereas the record indicates that the BIPOC Committee does not have a set number of members and that the individuals who make up the BIPOC Committee vary over time. The OMA applies when a quorum of a public body convenes for a meeting, *see Fischer v. Zoning Board for the Town of Charlestown*, 723 A.2d 294 (R.I. 1999), but here where there is no set membership or number of members, it is difficult to see how it could even be determined whether a quorum exists at any given time and whether a meeting is taking place. This further weighs against the BIPOC Committee being a public body.

Weighing the factors, we find that on balance the BIPOC Committee is not a public body under the OMA. As such, the OMA does not apply to the BIPOC Committee, and we find no violation. We note, however, that the OMA is a floor and not a ceiling. Even if an entity is not legally obligated to comply with the OMA, we encourage entities to adopt the types of measures set forth in the OMA when it is appropriate to do so to increase transparency.

Conclusion

Although the Attorney General has found no violation and 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