

COMPLAINT AGAINST THE SPECIAL COMMISSION ON REAPPORTIONMENT

POTENTIAL VIOLATIONS: The Rhode Island Special Commission on Reapportionment is subject to the Rhode Island Open Meetings Act.¹ The Commission’s “purpose and responsibility” is 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.”²

This Commission committed at least 36 violations of the Open Meetings Act in five different categories over approximately four months. First, on January 12, 2022, the Commission voted on reapportionment maps without providing adequate notice to the public specifying which maps they would vote on in violation of R.I.G.L. §42-46-6(b). Second, on January 5, 2022, the Commission voted to create maps based on the reallocation of some prison inmates without any notice they would vote on the issue in violation of R.I.G.L. §42-46-6(b). Third, it appears that a majority of Commission members discussed the issue of the reallocation of prison inmates, either directly or through a conduit, outside of an open meeting in order to arrive at a compromise, which was voted on at the meeting of January 5, 2022 in violation of R.I.G.L. §42-46-3. Fourth, the Commission has not provided minutes of 15 meetings, within 35 days of the meeting occurring, in violation of R.I.G.L. §42-46-7(b)(1). Fifth, the Commission has failed to electronically post notices of any of its 18 meetings with the Secretary of State in violation of R.I.G.L. §42-46-6(c). Also, notices for three of these meetings were legally defective for other reasons as well. At various instances, the Commission ignored warnings that it may not be in compliance with the Open Meetings Act.

Based on the large number and variety of violations, its failure to heed warnings, and the importance of the task with which it was entrusted to perform, the Attorney General should determine that: (1) the Commission violated the Open Meetings Act; (2) these violations were willful or knowing, and (3) the Commission should be fined.

FIRST CATEGORY OF VIOLATIONS: SPECIFICITY OF AGENDA ITEM

On January 12, 2022, the Commission voted on reapportionment maps without providing adequate notice to the public specifying which maps they would vote on in violation of R.I.G.L. §42-46-6(b). The notice of the meeting stated “Consideration/Vote: Commission’s Recommendation of Reapportionment Maps” and then listed: (a) “House District Map,” (b) “Senate District Map” and (c) “Congressional Map.” However, the notice did not indicate which version of House District map, Senate District map, or Congressional map would be voted on. At the time the notice was posted on www.riredistricting.org and until the meeting began on January 12, 2022, there were three versions of House District maps, three versions of Senate District maps, and one version of a Congressional map. It was only about the time the meeting began that the new House, Senate and Congressional maps to be voted on were disclosed to the public. These maps differed in important ways from prior versions. For example, House Map D placed a portion in the center of East Greenwich into House District 24 thereby creating a district which is non-contiguous by land. Also, Senate Map D placed a small portion of the Town of Lincoln into Senate District 22.³

¹ 2021 P.L. c. 176, § 3(b); 2021 P.L. c. 177, § 3(b).

² 2021 P.L. c. 176, § 1(b); 2021 P.L. c. 177, § 1(b).

³ See House Map D and Senate Map D on www.riredistricting.org; “Latest RI political redistricting maps stir new controversies” [Providence Journal](http://www.providencejournal.com) (1/12/22). Commissioner Rep. Brian Newberry stated that the changes were being

The failure of the notice to include information as to which specific maps would be voted on violates R.I.G.L. §42-46-6(b). The new maps made changes to prior proposed maps. There was no way for a member of the public to know from reading the agenda what map would be voted upon or how districts would be drawn under a new map. In Clifford v. North Smithfield Town Council OM 17-35, the Attorney General determined that a town council committed an open meetings violation because its agenda item “Adoption of 2017/2018 Budget” provided no indication that an amendment to the budget creating a \$100,000 contingency fund would be considered and voted on. Likewise, in this instance, the Commission posted an agenda item indicating there would be a vote on maps, but gave no indication as to the changes that would be made to these maps. Furthermore, the Rhode Island Supreme Court determined that a zoning board violated the Open Meetings Act when its agenda item was “completely silent as to which specific property was at issue” because “the agenda item provided no information as to a street address, a parcel or lot numbers, or even an identifying petition or case number.” Anolik v. Zoning Bd. Of Review of City of Newport, 64 A.3d 1171, 1175 (R.I. 2013). Likewise, here the Commission stated that there would be vote on House, Senate and Congressional maps but was silent as to which specific map would be voted on. Therefore, the Commission violated the Open Meetings Act.

This violation was knowing or willful. The Rhode Island Supreme Court has stated that the knowing and willful standard is satisfied when “the official either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute.” DiPrete v. Morsilli, 635 A.2d 1155, 1163-64 (RI. 1994). During the meeting, Commission member Senator Gordon Rogers suggested that the Commission delay a vote on the new maps in order to give the public a chance to “weigh in” on the new maps since they had not been disclosed until five minutes before the meeting started.⁴ Co-Chairman Senator Stephen Archambault ignored this suggestion and simply proceeded to a vote. Archambault was not interested in delaying further consideration of the maps. Archambault, who represents Senate District 22, owns property located in the portion of Lincoln that now first time would be included in Senate District 22 under Senate Map D.⁵

SECOND CATEGORY OF VIOLATIONS: NOTICE OF VOTE

On January 5, 2022, the Commission voted to create maps based on the reallocation of some prison inmates without any notice they would vote on the issue in violation of R.I.G.L. §42-46-6(b). The notice of the meeting stated “ACI/Prisoner Issue” and then listed “Updated Data on Impact of State House and Senate Districts” and “Discussion of Reallocation Options.” The notice also stated: “Redistricting” and then stated “Discussion on Inclusion of ACI Data” and “Discussion on Commission’s Next Steps.” Nowhere in the notice did it state that there would be a vote on the reallocation of ACI inmates or for that matter a vote on any issue. Although there was not any mention of the possibility of voting, the Commission voted to have maps created that reallocated some ACI prison inmates from Cranston to other communities.⁶

seen for the “first time tonight” in relation to Senate District 22. Minutes 42 through 47 of the video recording of the 1/12/22 meeting located on www.riredistricting.org.

⁴ Minutes 48 through 50 of the video recording of the 1/12/22 meeting located on www.riredistricting.org; “Latest RI political redistricting maps stir new controversies” Providence Journal (1/12/22).

⁵ See Senate Map D on www.riredistricting.org and Vision Government Solutions website for the Town of Lincoln which lists Archambault as the owner of property on Whipple Road.

⁶ “Cranston loses, Providence gains in new prison redistricting plan” Providence Journal (1/5/22).

The failure of the notice to indicate that a vote would occur on the prison reallocation issue violates of R.I.G.L. §42-46-6(b). The R.I. Supreme Court has determined that an agenda item which did not inform the public that an item was going to be voted on violated the Open Meetings Act. Tanner v. Town of East Greenwich, 880 A.2d 784,797-798 (R.I. 2005). It does not matter if the vote is a preliminary determination or a final decision. See Esposito v. Scituate School Committee and Superintendent Search Subcommittee, OM 17-08. A vote on any “matter over which the public body has supervision, control, jurisdiction, or advisory power” must comply with the Open Meeting Act. R.I.G.L. §42-46-2(1). A vote to create maps is subject to the Open Meetings Act just like a vote on a final map.

This violation was knowing or willful. Prior to the vote, Commissioner member Senator Jessica de la Cruz questioned whether the Commission could vote on creating maps that reallocated some prison inmates because there was no notice that a vote would be taken.⁷ Co-Chairman Archambault gave his opinion that a vote could be taken and an attorney for the Commission agreed with him. No effort was made to pause the meeting to review the Open Meeting Act or any information on the Attorney General’s website. This behavior “showed reckless disregard for the question of whether the conduct was prohibited by [the] statute.” DiPrete v. Morsilli, 635 A.2d, at 1163-64.

THIRD CATEGORY OF VIOLATIONS: ROLLING QUOROM

A majority of Commission members appears to have discussed the reallocation of prison inmates, either directly or through a conduit, outside of an open meeting in order to arrive a compromise which was voted on January 5, 2022. This behavior is a violation of R.I.G.L. §42-46-3. For weeks, individuals and groups testified before or submitted written comments to the Commission in favor of or in opposition to reallocating prison inmates from Cranston to other communities. At the Commission meeting on January 5, 2022, Ryan Taylor of Election Data Services discussed information associated with the possible reallocation of prison inmates. Co-Chairman Archambault made general remarks which touched on the prison reallocation issue and then asked if any commissioners had closing comments before any potential motions. Commissioner Stephen Ucci then mentioned “coming to a consensus” on the prison reallocation issue and stated it sounded like a “good compromise.” Archambault asked if any other commissioner had comments and stated he would recognize Commissioner Harold Metts who he said had a statement and then indicated to Metts a motion was in order. Metts then gave a prepared statement in which he stated that while he agreed with reallocating all the prison inmates he supported “the compromise” and read a motion to reallocate a portion of prison inmates who were expected to be released by April 2022. The motion was seconded and was passed nearly unanimously without any debate.⁸

It appears that a majority of the Commission engaged in series of conversations or communications either directly or through a conduit on the issue of prison reallocation outside of a public meeting in violation of R.I.G.L. §42-46-3. See Apperson v. South Kingstown School Committee, OM 17-30. Before Commissioner Metts made any statement saying he supported “the compromise” or made any motion, Commissioner Ucci discussed “coming to consensus” on the prison reallocation issue which he considered to be a “good compromise.” It is unclear how Ucci knew a consensus

⁷ Minute 33 of the video recording of the 1/5/22 meeting located on www.riredistricting.org; “Cranston loses, Providence gains in new prison redistricting plan” Providence Journal (1/5/22).

⁸ Minutes 25 to 35 of the video recording of the 1/5/22 meeting located on www.riredistricting.org.

was reached or that a compromise had occurred when no motion had been made or debate had occurred.

There was no consensus at the last public meeting before the Commission voted to reallocate some prison inmates. First, there was no consensus among members of the public. At the meeting on December 16, 2021, the City of Cranston opposed the reallocation of any prison inmates while the ACLU wanted all prison inmates to be reallocated.⁹ Second, there was no clear consensus among Commissioners to reallocate prison inmates who were expected to be released by April 2022. For example, at one point in the meeting, Commissioner Representative Katherine Kazarian asked questions about reallocating prison inmates who were expected to be released by April 2022. Commissioner Representative Arthur Corvese stated he would consider reallocating up to 75 percent of prison inmates. Archambault expressed agreement with some of Corvese's comments but stated he struggled with the prison reallocation issue and had not drawn any conclusions.¹⁰ Third, at the outset of that meeting, Kimball Brace of Election Data Services made a presentation on the prison reallocation issue in which he provided the Commission with various options.

For Ucci to reference a "coming to a consensus" and a "good compromise" on the prison reallocation issue prior to any motion being made, and for this compromise to pass without any debate suggests that commissioners engaged in private communications, either directly or through a conduit, to arrive at a consensus to support a compromise, which was to reallocate prison inmates expected to be released by April 2022. Therefore, consistent with its standard practice of investigating an alleged rolling quorum violation, the Attorney General should seek affidavits from the commissioners as well as Mr. Brace and Mr. Taylor to determine if any commissioners privately communicated with each other either directly or through Brace or Taylor on the prison reallocation issue. See Belmore v. Newport City Council, OM 18-13.

Assuming a majority of the commissioners engaged in a rolling quorum, it should be considered a knowing or willful violation. The commissioners knew the prison reallocation issue was a controversial issue. Undoubtedly, the commissioners wanted to avoid a contentious debate by reaching a compromise. However, efforts to reach a compromise through behind the scenes negotiations amongst the commissioners or secretive lobbying by some commissioners on a matter which must be discussed in public violates the Open Meetings Act. These secretive communications demonstrate a "reckless disregard for the question of whether the conduct was prohibited by [the] statute." DiPrete v. Morsilli, 635 A.2d, at 1163-64.

FOURTH CATEGORY OF VIOLATIONS: MEETING MINUTES

The Commission has not provided minutes of 15 meetings within 35 days of the meeting occurring in violation of R.I.G.L. §42-46-7(b)(1). The Commission conducted 18 meetings from September 9, 2021 to January 12, 2022.¹¹ On January 18, 2022, a request was made in writing to the clerk of Commission for the provide a copy of the official and unofficial minutes of all Commission meetings.¹² The Commission clerk failed to provide a copy of the unofficial minutes of any

⁹ Minutes 40 to 46 and 1:30 to 1:45 of the video recording for 12/16/21 meeting located on www.riredistricting.org.

¹⁰ 1:35 to 1:41 of the video recording for 12/16/21 meeting located on www.riredistricting.org.

¹¹ These meetings are listed on www.riredistricting.org.

¹² Sue Cienki sent a request by email to the commission clerk Grant Pilkington, and followed up with a phone call to him on January 18, 2022.

Commission meetings. Fifteen meetings of the Commission have taken place at least 35 days prior to January 18, 2022.

The failure to provide unofficial minutes for meetings which took place more than 35 days ago violates R.I.G.L. §42-46-7(b)(1). In Novak v. Coventry Charter Review Commission, OM 17-01, the Attorney General determined that a charter review commission, an entity with advisory powers only, committed an open meeting violation because it did not make available to the public minutes of a meeting conducted more than 35 days previously. Although entities with advisory powers like the Commission are not required to post their meeting minutes with the Secretary of State, they still must have unofficial minutes of their meetings available to the public within 35 days of the meeting. Although these Commission meetings were recorded, it does not exempt the Commission from keeping minutes of its meetings. Reviewing the minutes of meetings is an efficient option for the public to determine what occurred at the meeting because it takes much less time to review minutes than watching a video of a meeting which went on for many hours.

This violation was knowing or willful. First, there are no minutes available for 15 meetings that have occurred over the course of three months. The failure to have any minutes for any meetings shows a clear disregard for the legal requirements of the Open Meetings Act. Second, none of the Commission notices for its meetings state that the Commission will review and approve any minutes.¹³ Apparently, the Commission simply had no intention of ever keeping or approving any minutes for its meetings. This behavior "showed reckless disregard for the question of whether the conduct was prohibited by [the] statute." DiPrete v. Morsilli, 635 A.2d at 1163-64.

FIFTH CATEGORY OF VIOLATIONS: POSTING NOTICES

The Commission has not electronically posted notices for any of its 18 meetings with the Secretary of State in violation of R.I.G.L. §42-46-6(c). The Commission conducted 18 meetings from September 9, 2021 to January 12, 2022. However, none of the notices for these Commission meetings were posted on the R.I. Secretary of State website.¹⁴ If they were somehow posted, they could not be located on the website like the notices for other entities subject to the Open Meetings Act. Furthermore, the notices for two meetings, one held on December 6, 2021, and the other held on December 13, 2021, were posted on www.riredistricting.org less than 48 business hours before the start of the meeting in violation of R.I.G.L. §42-46-6(b) while the notice for another meeting held on November 8, 2021 appears never to have been posted at all on www.riredistricting.org.¹⁵

The Commission's failure to electronically post notices for all 18 of its meetings with the Secretary of State violates R.I.G.L. §42-46-6(c). In Common Cause v. I-195 Redevelopment District Commission, OM 13-27, the Attorney General determined that a commission, which failed to timely post a notice of meeting on the Secretary of State's website, committed an open meeting violation. In this case, the Commission did not even bother to post notices on the Secretary of State website for any of its meetings. The fact that some Commission meetings were posted elsewhere or reported in the news someplace does not exempt the Commission from posting notices for its meetings on the Secretary of State's website. Some of the Commission's meetings

¹³ Exhibit A which contains the notices of Commission meeting posted on www.riredistricting.org

¹⁴ See www.sos.ri.gov/divisions/open-government. Click on "Find Public Meetings" then search open meetings by the name of the Commission or by any date the Commission conducted a meeting, and no notice will be found.

¹⁵ See Exhibit A.

did not garner news coverage. Also, many media reports did not report when and where upcoming meetings were going to take place. Furthermore, even some of the notices posted on www.riredistricting.org were legally deficient. Two meetings were posted less than 48 business hours before the meeting, and the notice for another meeting appears never to have been posted.

This violation was knowing or willful. At a meeting on October 21, 2021, a member of the public complained that it was difficult to find the notice of the Commission meeting on the Secretary of State website.¹⁶ Apparently after that comment was made, the Commission did not make any effort to ensure that meeting notices were actually being posted on the Secretary of State website. This is inexplicable. The fact that a notice was not posted on the Secretary of State's website for any of these meetings shows a complete disregard for the law. Furthermore, even some of the notices posted on the Commission's website were legally defective and one meeting appears to have never been posted at all. This behavior "showed reckless disregard for the question of whether the conduct was prohibited by [the] statute." DiPrete v. Morsilli, 635 A.2d at 1163-64.

CONCLUSION

This is perhaps the most consequential open meetings complaint the Attorney General has received in many years. The Commission committed numerous open meeting violations in a variety of ways over a short period of time. The Commission committed these violations despite warnings about its conduct. No public body has shown such a disregard for the Open Meetings Act in recent memory.

Furthermore, the Commission is responsible for drawing state legislative and federal congressional districts that will be used for the next ten years. Although the Commission's role is advisory, the maps it draws are usually adopted by the General Assembly with few if any changes. The fact that the Commission undertook this important responsibility in a manner which showed an obvious indifference to the Open Meeting Act is inexcusable.

The Attorney General must hold the Commission accountable by filing a court action.¹⁷ It should determine that the Commission knowingly and willfully violated the Open Meetings Act, and then seek to fine the Commission, its officers, and any commissioners who engaged in a rolling quorum. Soon municipalities across Rhode Island will be redistricting at the local level. If the Attorney General fails to hold the Commission accountable, local officials may decide to ignore the Open Meetings Act as well and point to the Attorney General's inaction on this complaint. If the Attorney General does not hold the Commission accountable, public officials will not worry about whether their conduct is legal or illegal, but whether they can get away with it or not.

¹⁶ 1:37 to 1:42 of the video recording of the 10/21/21 meeting located on www.riredistricting.org.

¹⁷ The Attorney General has filed civil actions against public bodies for failing to post a notice for a meeting on the Secretary of State's website in a timely manner or failing to file minutes from five meetings in a timely manner. See e.g. Kerwin v. RI Student Loan Authority, OM 12-32B, Common Cause v. I-195 Redevelopment District Commission, OM 13-27B, and Block v. RI State Properties Committee, OM 14-26B.