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SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

OFFICE OF OPEN GOVERNMENT, Plaintiff, v. MICHAEL YATES, Defendant.	Case No. 2016 CA 007337 B Judge John M. Campbell

ORDER

This is before the Court on the defendant's motion to dismiss or for summary judgment, and the plaintiff's cross-motion for summary judgment. The common issue raised concerns the scope of the enforcement authority wielded by the District of Columbia Office of Open Government.

The Office of Open Government (OOG) is an independent D.C. office within the Board of Ethics and Government Accountability. The OOG was established by statute in 2012, *See* D.C. Code §2-591 *et seq.*, and granted specific authority to bring suit to enforce the provisions of the Open Meetings Act of 2011. *Id.* §2-593. The Open Meetings Act ("OMA" or "the Act") imposes a number of requirements on meetings held by public bodies, including requirements related to advance public notice of any such meeting, public access, the making of a record, and the public availability of that record. *See* D.C. Code §2-571 *et seq.* Section 2-579 within the Open Meeting Act specifically authorizes the OOG to bring an action for injunctive or declaratory relief in this Court for violations of the Act.

The defendant, Michael Yates, is the Chair of the Mayor's Advisory Commission on Caribbean Community Affairs, or MACCCA. He is sued here in his official capacity. The

plaintiff OOG alleges that MACCCA is a "public body" within the meaning of the Open Meeting Act and is therefore subject to its requirements. OOG alleges that during a period of eight months between January 2016 and September 2016, the defendant committed numerous violations of the OMA. Count I focuses on the alleged failure to publish timely notices and draft agendas of upcoming meetings of MACCCA, as required by D.C. Code §2-576. Count II focuses on the alleged failure to make electronic recordings of the meetings or to make either such recordings or detailed minutes publicly available afterwards. The Complaint asks the Court to issue a declaratory judgments that these actions contravened the OMA, and to fine the defendant (in his official capacity) $250 for each such violation.

Defendant Yates filed a motion to dismiss or for summary judgment. First, he challenges OOG's statutory authority to seek fines as a penalty for any violations of OMA. Second, he argues that OOG's claims are moot, since the defendant and MACCCA are now in full compliance with the statute. Finally, he disputes on factual grounds the allegations in Count II concerning MACCCA's failure to create electronic records of meetings and to make them available for public inspection.[1]

OOG, for its part, seeks summary judgment in its favor. OOG argues that it plainly does have statutory authority to seek fines, whether because the defendant's persistent failures effectively rendered MACCCA's meetings "closed" with the meaning of D.C. Code §2-579(e) (allowing fines for a "pattern or practice" of "willfully participating" in "closed meetings"), or because there is independent authority and good reason for imposing fines in this circumstance. As to Count II, OOG argues that there is no factual dispute that the defendant could have

[1] The defendant also seeks dismissal on the ground that he cannot be sued in his official capacity. The Court rejects this argument.

recorded the meetings but did not; and that he did not post recordings or minutes to any public website, therefore failing to make such records "available for public inspection" within the meaning of the statute. Finally, OOG argues that the defendant's belated compliance does not moot this lawsuit.

I. The Merits

As to Count One, the Court understands the defendant to essentially concede the six violations alleged. In other words, the defendant concedes that on six occasions in 2016, he failed to provide advance notice and draft agendas for upcoming MACCCA meetings. He disputes both the availability and the appropriateness of the remedies sought (fines and a declaratory judgment), but not the violations themselves. These issues are considered in Parts II and III of this Order.

Count Two is less obvious. Its resolution depends on the meaning of certain statutory language as it applies to these facts. D.C. Code §2-578(a) requires that meetings be electronically recorded when "feasible." Section 2-578(b) requires that records of meetings (electronic when feasible, or detailed minutes when not) be "made available for public inspection." It is not disputed that the defendant did not make audio recordings of five separate MACCCA meetings in 2016. It also is not disputed that the defendant failed on several occasions to post minutes and records of the meetings to online calendars or websites that the OOG apparently has created for this purpose. The questions, rather, are whether recording the meetings was "feasible" or not under the circumstances, and whether, in any event, failing to post minutes online amounts to not making them "available for public inspection."

The word "feasible" arguably does not describe a standard that is precise enough to support regulatory intervention. The use of the word in the statute invites speculative and

subjective argument about what was and was not "feasible," whatever that means, in a given situation. The problem is eliminated in the present case, however, by the record before the Court. In support of its motion for summary judgment, the plaintiff submitted a declaration from Traci Hughes, the Director of the OOG. Ms. Hughes' declaration establishes a number of pertinent facts. First, in November 2015, she personally trained defendant Yates in how to use electronic recording equipment in the hearing room of the Board of Ethics and Government Accountability (BEGA), at 441 4th Street, N.W. Hughes Decl., ¶17. The MACCCA in facts met regularly in that hearing room from April 2014 through 2016, including on several of the six occasions involved in this lawsuit, and successfully operated the recording equipment on earlier occasions. *Id.* at ¶¶ 19, 20, 22, and 23. On the single occasion in April 2016 when the room was not available, Ms. Hughes notified Mr. Yates of this in writing ahead of time, and specifically reminded him to bring a digital recorder to the meeting (which had been moved to a different room). *Id.* at ¶ 24. In fact, in November 2015, Mr. Hughes had given the defendant a digital recorder, with instructions on its use, for this purpose. *Id.*

In opposition to this factual showing, the defendant filed two declarations of his own. Notably, they fail to contradict Ms. Hughes. In his first declaration, Mr. Yates asserted conclusorily that he was not "feasibly able" to record meetings, but provided no factual support. Yates January Decl. at ¶¶ 5, 6. In a second declaration, responding to Ms. Hughes' filing, he could say only that he did not recall receiving the recording device in November 2015, that he did not recall that anyone suggested using such a device to record meetings, and that he did not recall receiving training on how to use such a device before late 2016. Yates February Decl. at ¶¶ 9, 14. He does not deny, however, that any of these things happened.

This is insufficient to raise an issue of fact. Ms. Hughes' declaration establishes that, under any reasonable definition, it was surely "feasible" to have recorded the 2016 meetings at issue here. Mr. Yates was trained in how to use the recording equipment installed in the BEGA hearing room, and in fact used it on earlier occasions; he was given a handheld device to use when the hearing room was unavailable; and he was trained in how to use that device.

The Court concludes, therefore, that recording the meetings was feasible, but that the defendant nevertheless did not record them. This is a violation of the OMA.

The second issue concerns the defendant's alleged failure to make draft or final minutes of meetings "available for public inspection," within the meaning of the OMA, D.C. Code §2-578(b). Each side quarrels with the other's reading of this phrase. The plaintiff's factual contention is that it (the OOG) went out of its way to make an online "Central Meeting Calendar" available to the MACCCA and other public bodies and to train people in how to post meeting records to it, but that the defendant nevertheless failed to post minutes of the relevant meetings of the MACCCA. This, according to the OOG, means that the minutes were not "available for public inspection." The defendant counters that records were "available," if anyone had asked for them, but that there is no evidence anyone did. The defendant emphasizes that the statute says "make available," not "publish" or even "make available on a public website." The plaintiff counters that the statute also does not say, "make available ... upon request." The OOG contends that the only reasonable way to read the statute, particularly in light of the OOG's own interpretation of it, is that the statute must require public posting.

The Court cannot resolve this on summary judgment, and arguably not on any supplemented record. In particular, the Court cannot find, on the present record, that failing to post meeting records on a public website violates a statutory command to "make available for

public inspection." The statutory phrase is too general and too vague to support such a conclusion.

In sum, the Court concludes, on the merits, that the defendant plainly violated the OMA (a) by failing to publish advance notice and draft agendas for six MACCCA meetings, and (b) by failing to make recordings of five MACCCA meetings (as well as, necessarily, failing to have those non-existent recordings available for public inspection). The Court declines to find any violation for failure to publish draft and final minutes of several meetings to a public website.

This brings the Court to the question of remedies.

II. Authority to Levy Fines

As much as this Court might recognize the usefulness from either an enforcement or a policy perspective of OOG's having the power to seek civil fines for violations of the Act, and for this Court to be able to impose them, the fact is that the statute does not grant such authority. Plainly, the legislature could have provided for this, had it chosen to do so. Indeed, the statute specifically authorizes the court to impose fines up to $250 per violation against "a member of a public body [who] engages in a pattern or practice of willfully participating in … closed meetings." But the limitation of this authority to "pattern or practice" violations that are "willful", and to a particular subclass of violations involving holding "closed meetings," is tellingly specific. The same is true of the absence of any comparable authority to impose fines for any other kind of violation of the statute.

The Court is unpersuaded that the additional grant of authority for "such additional relief as [the Court] finds necessary to serve the purposes of the subchapter," D.C. Code §2-579(f), in fact can be read to permit it to levy the sorts of fines sought by OOG. For better or worse, the focus of the enforcement authority laid out in section 579 is entirely on "injunctive or declaratory

relief," as stated plainly in subsection (a) of that provision. Even when, in subsection (d), the court is given leeway to "order an appropriate remedy" for official action taken in contravention of the OMA, all examples offered are declaratory or injunctive in nature. The sole exception, as noted, is he $250 fine for a pattern of willfully holding closed meetings. In light of the plainly limited nature of the enforcement powers granted by the legislature, the Court declines to order any relief in the form of other fines.

OOG seeks to avoid this issue by arguing that the MACCCA meetings at issue were, in effect, "closed" because of the lack of required notice to the public. But this argument is undercut by the plain language of the statute. OMA defines an "open meeting" as one where either the "public" or the "news media" is "permitted to be physically present," or where the event is televised. D.C. Code §2-575(a). There is no allegation here that either the public or the media were <u>not</u> "permitted" to be present. Moreover, the lack of notice of meetings does not change this conclusion, primarily because the statute requires notice both for open <u>and</u> for closed meetings. In other words, advance notice is not a distinctive feature of an "open" meeting, and the lack of it cannot convert an open meeting into a closed one within the meaning of OMA.

In sum, the Court concludes that there is no statutory or other authority for the OOG's request for fines here. Summary judgment is granted to the defendant on that score.

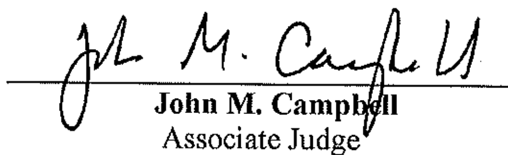
III. <u>Declaratory Relief as to Both Counts</u>

Besides fines, the plaintiff also seeks declaratory relief for the violations of the OMA that it alleges occurred. The Court agrees fully with the plaintiff that declaratory relief is both available and appropriate here, and that the need for and efficacy of such relief are not mooted by the defendant's having now come into compliance.

First, the Court concludes that past violations constitute, not just a procedural error that, once remedied, can be forgotten, but a real and articulable injury to the public interest. Agreeing to comply in the future does not moot this injury – it happened. Just as important, it could happen again. This is the very definition of a violation that is capable of repetition yet evading review. The Court also considers that the OOG's clear statutory purpose is to seek and to obtain declaratory judgments regarding violations of the OMA. It would indeed render the OOG toothless if its explicit authority to bring suit could so easily be mooted. "We promise not to do it again," followed by "okay, never mind," is not the scope of remedy envisioned by the statute. The OOG's statutory purpose is to seek public declarations by the court that particular violations have occurred, both to inform the public of injury done and to defer future violations. It is difficult to conceive of any other logical result.

The Court directs the plaintiff to submit a proposed order granting in part its motion for summary judgment on the terms set out here.

So ordered, this 27th day of September 2017.



John M. Campbell
Associate Judge

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