STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

PHOENIX-TIMES PUBLISHING COMPANY, D/B/A/ EAST BAY NEWSPAPERS, JOSH BICKFORD, RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION, INC. AND STEVEN BROWN,
Plaintiffs

v.

BARRINGTON SCHOOL COMMITTEE, JAMES HASENFUS in his official capacity as a member of the Barrington School Committee; ROBERT E. SHEA, JR., in his official capacity as a member of the Barrington School Committee; PATRICK GUIDA, in his official capacity as a member of the Barrington School Committee; THOMAS R. FLANAGAN, in his official capacity as a member of the Barrington School Committee; and AMY PAGE OBERG, in her official capacity as a member of the Barrington School Committee,
Defendants

C.A. No. 09-4665

MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Plaintiffs Phoenix-Times Publishing Company, d/b/a East Bay Newspapers, Scott Pickering, Rhode Island Affiliate, American Civil Liberties Union, Inc. ("RI ACLU"), and Steven Brown submit this memorandum in support of their objection to the Barrington School Committee (the "Committee" or "Defendants") and its members' Amended Motion To Dismiss Or, In The Alternative, For Summary Judgment. For the reasons that follow, Defendants' Motion should be denied.

INTRODUCTION

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Tanner v. The Town Council of the Town of East Greenwich*, 880 A.2d 784 (R.I. 2005) (quoting James Madison, *The Complete Madison, His Basic Writings* 337 (Letter to W.T. Berry, August 4, 1822) (1953)). According to the Rhode Island Supreme Court, "[t]his principle has been recognized by the General Assembly, and is embodied in the *Open Meetings Act*, G.L. 1956 chapter 46 of title 42." *Tanner v. The Town Council of the Town of East Greenwich*, 880 A.2d 784 (R.I. 2005).

Plaintiffs' Amended Complaint raises several issues of paramount importance in a free and open democratic society. First, Plaintiffs challenge Defendants' assertion of the litigation exception contained in the Open Meetings Act, R.I. Gen. Laws § 42-46, *et seq.* (the "OMA") to justify meeting in Executive Session on February 26, 2009. The Committee's ostensible reason for convening in executive session was a letter from the RI ACLU outlining its policy concerns about a blanket breathalyzer policy then under preliminary consideration by Defendants. The Committee claims the letter was a threat of litigation. The letter, however, did not mention litigation, suit, court action or anything remotely connected to threatened litigation. No litigation was even ***possible*** at the time the letter was sent. The Committee had not yet adopted or even drafted any policy. The RI ACLU's letter merely commented on a matter of public policy then under general consideration and debate. The letter was no different than the thousands of letters sent by interested citizens to public officials every year on matters of public concern.

If this overbroad and improper use of the "litigation" exception is endorsed by the Court, then the exception will swallow the rule. Any comment about a proposed public policy could provide the basis for secret debate by elected officials relying on phantom and wholly hypothetical "litigation."

Second, Plaintiffs challenge Defendants' failure to specify in any way the matters which were to be discussed in Executive Session on February 26, 2009. The only explanation provided was "litigation." Nothing more. The OMA requires the Committee to specify the nature of the business to be discussed.

Third, Plaintiffs challenge the sufficiency of the public notices provided by the Committee about its meetings. The Committee routinely fails to specify on its published agendas the nature of the business to be discussed as required by the OMA. Instead, month after month after month, these public notices repeat the same broad and non-descript phrases — "Discussion School Department Policy" and "Executive Session … for Personnel and Collective Bargaining and Litigation." The vague, boilerplate and rote terminology used by the Committee in meeting agendas fails to provide the public with any meaningful indication of what will be discussed at its meetings even though, in many cases, the minutes from the preceding meeting specifically identify issues that will be addressed. Further, no notice of two meetings appeared on the Secretary of State's website as required by law.

I. STANDARD OF REVIEW

In Rhode Island, a court reviewing a motion to dismiss pursuant to Rule 12(b)(6) must examine the allegations contained in the Plaintiff's Amended Complaint, assume them to be true, and view them in the light most favorable to the plaintiff. *Barrette v. Yakavonis*, 966 A.2d 1231, 1234 (R.I. 2009) (citing *Palazzo v. Alves*, 944 A.2d 144, 149 (R.I. 2008). "The grant of a Rule 12(b)(6) motion to dismiss is appropriate only 'when it is clear beyond a reasonable doubt

that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Palazzo v. Alves*, 944 A.2d 144, 149-150 (R.I. 2008). "Our Supreme Court has cautioned that such a motion should not be granted 'unless it appears to a certainty that [the plaintiffs] will not be entitled to relief under any set of facts which might be proved in support of [their] claim.'" *Id. (quoting St. James Condo Ass'n v. Lokey,* 676 A.2d 1343, 1346 (R.I.1996)).[1]

Because "the sole function of a motion to dismiss is to test the sufficiency of the complaint," the court's review is confined to the four corners of the complaint. *Barretta*, 966 A.2d at 1234 (quoting *Rhode Island Affiliate, ACLU, Inc. v. Bernasconi*, 557 A.2d, 1232 (R.I. 1989)). When ruling on a Rule 12(b)(6) motion, the Court may consider any documents attached to the pleadings. *Heritage Healthcare Servs. v. Beacon Mut. Ins. Co.*, 2004 R.I. Super. LEXIS 29, *7-8 (R.I. Super. Ct. 2004) (citing *Bowen Court Assocs. v. Ernst & Young*, 818 A.2d 721, 725, 726 (R.I. 2003)). However, under Rhode Island law, unlike federal law, a court should not rely on documents not attached to a pleading. "The mere fact that a pleading mentions or refers to a document — without attaching it to the pleading — does not cause that document to be incorporated by reference as if the pleader had appended it to the pleading." *Id.* Here, Defendants do not refer to documents referenced in the Amended Complaint but rather submit conclusory and untested affidavits of witnesses not yet deposed. The Court should not consider these supplemental filings in ruling on Defendants' 12(b)(6) motion.

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[1] Defendants invite this Court to adopt the new "plausibility" standard recently created by the United States Supreme Court in *Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 555 (2007)* and *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009). This case, however, is governed by Rhode Island Rule 12(b)(6) of the Superior Court Rules of Civil Procedure and the Supreme Court cases interpreting that rule. As Judge Silverstein has recently noted when declining this same invitation., our Supreme Court has continued to apply its traditional Rule 12(b)(6) standards, even after *Twombley. Siemens Financial Services, Inc. v. Stonebridge Equipment Leasing, LLC*, 2009 R.I. Super. LEXIS 147, at *7.

Rule 56

"A motion to dismiss for failure to state a claim is 'treated as one for summary judgment when 'matters outside the pleading are presented to and not excluded by the court.'" *Tidewater Realty, LLC v. State*, 942 A.2d 986, 992 (R.I. 2008) (citing *Franklin Grove v. Drexel*, 936 A.2d 1272, 1275 (R.I. 2007). Rule 12(b)(6) provides:

> "If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, ***and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56."*** Super. R. Civ. P. 12(b)6. (Emphasis added.)

Simultaneously, with the filing of this objection, Plaintiffs have filed a separate motion seeking denial of Defendants' Motion for Summary Judgment on the grounds that many factual disputes exist and summary judgment is premature. Alternatively, Plaintiffs motion seeks a reasonable opportunity to conduct discovery pursuant to rules 12(b)(6) and 56(f). "Summary Judgment is an extreme remedy and should be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party in entitled to judgment as a matter of law. *Napier v. Epoch Corp.*, 896 A.2d 739, 741 (R.I. 2006).

Here, plaintiffs have not yet had the opportunity to serve interrogatories or conduct depositions. No answer has yet been filed. Before the Court considers Defendants' premature motion for summary judgment and the untested affidavits submitted therewith, Plaintiffs should be allowed time to test the assertions in their various extraneous filings, as set out in further details in Plaintiffs' accompanying motion.

II. FACTS

For purposes of this motion, the following facts, taken from Plaintiffs' Amended Complaint, must be deemed to be true:

Improper Executive Session

1. In or about December 2008, the Barrington School Committee was asked to consider the adoption of a policy requiring mandatory breathalyzer testing of all students attending school dances. Amended Complaint ("Am. Compl."), ¶ 13.

2. Plaintiff Steven Brown, on behalf of Plaintiff RI ACLU, sent the Committee a letter dated December 26, 2008 (the "Letter") urging the rejection of any policy that required universal breathalyzer testing. Am. Compl ¶ 14. That Letter is attached as Exhibit A to the Amended Complaint.

3. That Letter does not threaten litigation. It does not mention any proposed or contemplated legal action at all. Instead, it offers policy arguments to the Committee as to why they should reject any universal, mandatory breathalyzer testing. Am. Compl., Exh. A.

4. At the time the Letter was sent to the Committee, no formal proposal had even been made with respect to such a policy. Am. Compl., ¶¶ 21, 2, Exhibit D.

5. Because no policy had been adopted, approved, or even drafted when the Letter was sent, no litigation was possible at that time. *Id.*

6. Two months after the RI ACLU sent the Letter, the Committee held one of its regular meetings. The Meeting Agenda for the February 26, 2009 Committee meeting (the "Agenda") includes the topic: "Public Comments Re: Breathalyzer Testing." Am. Compl. ¶ 16.

7. This same Agenda includes the following vague statement at the end of the enumerated agenda items: "Executive Session pursuant to Sections 42-46-5(a)(1) and 42-46-5(a)(2) for Personnel and Collective Bargaining and Litigation." Am. Compl. ¶ 17.

8. The Agenda failed to provide any further public notice or description of the topics to be addressed by the School Committee in Executive Session. Am. Compl. ¶ 18-19.

9. During the February 26, 2009 meeting, public comments were heard regarding the merits of pursuing a mandatory breathalyzer policy. Am. Compl. ¶ 24.

10. Up to and including the date of that public meeting, no formal proposal had been made with respect to any breathalyzer policy. The Official Committee minutes for the February 26, 2009 meeting state:

> A lengthy discussion took place regarding whether or not to make breathalyzer testing mandatory at high school dances for all students. ***Mr. Hasenfus emphasized that there is no formal proposal at this time*** and that we want to give all due consideration in order to properly handle this issue. Much input was given by members of the audience with regard to the pros and cons of this initiative. ***More discussion will take place before any decision is made regarding this issue.*** Mr. Hasenfus urged members of the audience to contact the School Committee or administration with their views.

Am. Compl., ¶ 21, Exhibit D. (Emphasis added.)

11. Accordingly, at the time of that February 26, 2009 meeting:

- no formal Breathalyzer proposal existed;
- no draft Breathalyzer proposal existed;
- the Committee was not sure whether it would even adopt a breathalyzer policy; and
- the Committee had publicly declared that more discussion would take place before it made any decision respecting any breathalyzer policy. *Id.*

12. At the time of that meeting, no litigation was pending with respect to breathalyzer testing. Indeed, no litigation would have even been possible at that time. *Id.*

13. At the end of the February 26, 2009 Committee Meeting, the Committee unanimously voted to go into executive session pursuant to Rhode Island Gen. Laws §§ 42-46-

5(a)(1) and 42-46-5(a)(2) "specifically for Personnel and Litigation" and further voted to seal the resulting minutes. Am. Compl. ¶ 27.

14. The Committee failed to identify at the meeting itself any specific "litigation" that it would be discussing in the closed session. Am. Compl. ¶ 28.

15. Thereafter, Plaintiff, Josh Bickford, editor of The Barrington Times, publication of Plaintiff East Bay Newspapers, filed a complaint with the Rhode Island Attorney General ("RIAG") challenging the Committee's use of the litigation exception to convene in Executive Session on February 26, 2009 and also the Committee's vote to seal the minutes resulting from the executive session. Am. Compl. ¶ 34.

16. In response, the Committee claimed that the RI ACLU's December 26, 2008 Letter commenting on the possible adoption of a mandatory breathalyzer testing policy justified the Committee convening in Executive Session as it was an express threat of litigation. Am. Compl. ¶ 36.

17. Several other citizens objected during the Committee meeting to the implementation of a mandatory breathalyzer testing policy but their objections have not been similarly identified as threats of litigation. Am. Compl. ¶ 37.

18. On June 18, 2009, four months after convening in executive session the Committee held another meeting on this issue. The June 18, 2009 Barrington School Committee meeting minutes state that a draft of a proposed breathalyzer policy was finally provided to the Committee. Am. Compl. ¶ 42, Exhibit E. The June Minutes also state that the Committee voted to support the "*updated procedure for breathalyzer testing proposal submitted this evening ... contingent upon feedback and approval from legal counsel.*" Am. Compl. ¶ 43, Exhibit F (emphasis added.).

The School Committee's Pattern of Insufficient Meeting Agendas

19. Plaintiffs have attached as Exhibits B, C, and G to the Amended Complaint, School Committee Agendas and the corresponding minutes for the following meetings: January 29, 2009, February 26, 2009, March 19, 2009, April 2, 2009, April 23, 2009, June 18, 2009, and August 4, 2009.

20. A review of those exhibits demonstrates that Committee agendas published by the school committee in advance of its meetings routinely fail to provide adequate notice of the matters to be discussed. Instead, the Agendas contain the same repetitive, rote, formulaic, vague and overbroad language. Am. Compl. ¶ 45, Exh. G.

21. Each and every agenda attached to the Amended Complaint includes the exact same reference to an Executive Session using the same thirteen words: "Executive Session pursuant to Sections 42-46-5(a)(1) for Personnel and Collective Bargaining and Litigation." Exhibits B, C. and G.

22. Despite the identical reference to an Executive Session on each Agenda, what actually took place varied from meeting to meeting and was different from the stated agenda:

- At three meetings, January 29, 2009, April 2, 2009 and August 4, 2009, there were no Executive Sessions at all;
- At the February 26, 2009 meeting, an Executive Session was held to discuss personnel and litigation only;
- At the March 19, 2009 meeting, an Executive Session was held to discuss litigation only;
- At the April 2, 2009 meeting, an Executive Session was held to discuss contract negotiations only; and
- At the June 18, 2009 meeting, an Executive Session was held to discuss personnel only.

Id.

23. Each and every Agenda attached to the Amended Complaint, with the exception of the August 4, 2009 meeting, lists as an agenda item "Discussion School Committee Policies." No further explanation is ever provided. No particular policy is identified *Id.*

24. Despite the exact same cookie-cutter reference to "Discussion School Committee Policies" on each agenda, the minutes for the meetings demonstrate that at times no policies were "discussed" at all, and at other times the Committee took concrete actions well beyond simply "discussing" policies:

- January 29, 2009 – no policies were discussed;
- March 19, 2009 – the discussion of School Committee policies, the Fund Balance Policy, surveys and food allergies policies were tabled to the next meeting;
- April 2, 2009 – there were first readings of the Fund Balance Policy and the Food Allergies Policy; the Survey Policy was deferred and not discussed;
- April 23, 2009 – the Survey Policy was presented for first reading; the Fund Balance and Food Allergies policies approved by the Committee; and
- June 18, 2009 – the Student Survey Policy was tabled and not discussed. *Id.*

25. At the August 4, 2009 meeting, the Agenda listed the topic, "Discussion of Breathalyzer." Despite the notice referencing only a "discussion" of this policy, the minutes of this meeting show that the Committee actually endorsed the Breathalyzer policy that included "suspicionless testing for all students" and voted to suspend the prior Committee policy, JICH – Use of Alcohol Sensor Device approved October 6, 2005. Exhibit G to Am. Compl..

26. The Agenda for School Committee Meetings noticed for June 4 and July 15, 2009, were not posted on the electronic town crier website maintained by the Secretary of State. Am. Compl., ¶ 44.

27. Rhode Island Gen. Laws § 42-46-6(f) states, in relevant part:

> (f) All notices required by this section to be filed with the secretary of state shall be electronically transmitted to the secretary of state in accordance with rules and regulations which shall be promulgated by the secretary of state.

Am. Compl. ¶ 72.

III. PLAINTIFFS HAVE STANDING TO CHALLENGE ALLEGED VIOLATIONS OF THE OPEN MEETINGS ACT

Defendants assert that Plaintiffs lack standing to challenge the propriety of convening in executive session under the "litigation" exception contained in the OMA and also the sufficiency of the Notices and Agendas identified in the Amended Complaint. However, the Rhode Island Supreme Court has repeatedly and unequivocally declared that standing under the OMA is broad. *Tanner v. The Town Council of the Town of East Greenwich*, 880 A.2d 784 (R.I. 2005); *Solas v. Emergency Hiring Council*, 774 A.2d 820 (R.I. 2001); *See, also, Ohs v. North Kingstown School Committee*, 2005 R.I. Super. LEXIS 132 (2005).

In *Tanner*, the Supreme Court found that the plaintiff had standing to challenge the sufficiency of the public notice provided by the town council's published agenda by virtue of his residency in East Greenwich. *Tanner*, 880 A.2d at 793. The Court held that "A party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing." *Tanner*, 880 A.2d at 792. The Open Meetings statute confers a broad grant of statutory standing:

> Any citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may ... retain private counsel for the purpose of filing a complaint in the Superior Court *** against the public body which has allegedly violated provisions of this chapter. *Id.* quoting R.I.G.L. § 42-46-8(c).

In turn, the plain language of the OMA demonstrates that the purpose of the Act is "to protect the public's right to participate in the political process." Standing is established by a plaintiffs allegation that their right to be "'advised of and aware of the performance, deliberations, and decisions of government entities was, or may be, violated." *Tanner*, 880 A.2d

at 793. Thus, to be aggrieved under the statute does not require plaintiff to allege some harm to his economic or property interests. *Id.*

The *Ohs* court, relying upon *Tanner*, observed that standing to bring suit under the Open Meetings Act is broadly conferred upon members of the public to challenge a public body's failure to give proper notice under the OMA. *Ohs*, at *42.

> "Such persons are 'aggrieved,' within the meaning of the Act, by definition, because they claim that their statutory right to receive notice has been violated. They are 'aggrieved' simply by alleging that a public body, in contravention of the express provisions of the Act, failed to ensure that its 'public business be performed in an open and public manner' or that their right 'to be advised of and aware of the performance, deliberations, and decisions of a [public body] was, or may be, violated."

Ohs, at 43 (citing *Tanner*) (some internal quotations omitted).

Here, Plaintiffs allege they were "aggrieved" by Defendants' repeated and diverse violations of the OMA. Plaintiffs allege the Committee, without proper basis or proper notice, convened in executive session and deprived plaintiffs of their right to observe Defendants' deliberations and performance and their right to require that "public business be performed in an open and public manner." Plaintiffs allege that the Committee routinely violates the notice provisions of the OMA by rotely repeating the same buzzwords in each public agenda without regard to whether those buzzwords actually relate to the intended content of the meeting. These deprivations, if proven, render these Plaintiffs aggrieved.

Defendants rely on *Graziano v. R.I. Lottery Commission*, 810 A.2d 215 (R.I. 2002) and assert that Plaintiffs lack standing because they were aware of the meeting and had an opportunity to express their views during the public portion of the meeting. This reliance is unavailing, unsupportable and misplaced. It extends the holding of *Graziano*, whose reasoning was questioned in *Tanner, Ohs*, at *41-48, too far. *Graziano* simply held that, in some circumstances not applicable here a person who attends a meeting — and can show no other

prejudice, such as an inability to prepare or ability to respond — cannot complain about a defect in notice. *Id.*, at 222. Fatal flaws in notice, however, which do not adequately inform the public of the business to be discussed are not waived by simple attendance at the meeting.

The North Kingstown School Committee made the same argument, unsuccessfully, in *Ohs*. As the *Ohs* court stated, to find that the plaintiffs lacked standing because they were at the meeting "would eviscerate the Open Meetings Act." *Ohs*, at *47. The *Ohs* court continued:

> If a citizen is not allowed to challenge a failure by a public body to live up to its notice obligations under the law when the public itself or the media gives notice to the public instead, then the avowed purpose of the Open Meetings Act to ensure that "public business be performed in an open and public manner" could be thwarted, ... and the notice provisions of the Act could be rendered meaningless; a public body could be relieved improperly of its legal obligation to give notice; that body might be encouraged to give inadequate notice or no notice at all, especially with respect to the most controversial issues, leaving that task, if accomplished at all, to the media and members of the public; and a plaintiff could be deprived of a vehicle to enjoin potential future violations of the Act.
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> *Ohs*, *47-48. (internal statutory citation omitted).

Likewise, Defendants' repeated assertion that Plaintiffs were not "injured" because the public had an opportunity to speak before the allegedly improper executive session demonstrates a basic misunderstanding of the Act. The Open Meetings Act protects not just the right of the public to speak, but also the public's right to observe the conduct of its public officials, to listen to their discussion and observe their deliberations. That right was violated, and Plaintiffs were aggrieved, when the Committee shielded its activities in an invalid executive session.

The Open Meetings Act codifies the public policy to foster and ensure open government and an informed citizenry. To maintain and foster these policy goals and legislative directives, the Open Meetings Act has conferred a broad statutory right upon Rhode Island

citizens to seek redress in the Superior Court when their public officials fall short of their obligations under the OMA. Plaintiffs filed their Amended Complaint seeking to redress violations, and to enforce the mandates, of the OMA. They clearly have standing to enforce the rights granted by that statute.

IV. DEFENDANTS IMPROPERLY CONVENED IN EXECUTIVE SESSION WHERE NO LITIGATION WAS POSSIBLE OR THREATENED AND WHERE THE RI ACLU MERELY COMMENTED ON PUBLIC POLICY

A. Public Comment on Public Policy Issues Cannot Provide The Basis For Asserting The "Litigation" Exception To Open Meetings — Especially Where No Litigation Is Even Possible

Defendants' entire argument presumes the existence of "threatened litigation." Given the policy and strictures discussed above, the Court must closely examine that claim. Here it is not an overstatement to say that the Defendants' claim in this context is not just baseless but in fact antithetical and offensive to the very concepts of public debate and public participation in governmental decisions.

The jumping off point for this litigation and this controversy is the Letter written by the Rhode Island ACLU in December 2008. Exhibit A to the Am. Compl. Plaintiffs urge the Court to review the content of that Letter closely and also to consider the context and timing of that Letter. Tellingly, Defendants do not cite a single word or portion of that Letter to the Court. They do not direct the Court to the language they allege constitutes the threat of a lawsuit. That is because there is none.

The Letter does not mention or even intimate the possibility of a lawsuit. It does not "reserve" the author's "rights." It does not mention that the author had retained or consulted with counsel. Instead, it offers the RI ACLU's views on the wisdom of a ***possible*** mandatory breathalyzer policy. It points out civil liberty concerns, as well as other viable options to consider. It discusses technical and practical issues that might arise with such a program. It

acknowledges the efforts of the Committee to address a serious social problem. It closes with an invitation, not a threat: "If you have any questions about our position, please feel free to let me know. Thank you for your attention to our views." Am. Compl., Exhibit A.

Nor should the Letter be read in a vacuum. It should be analyzed in light of the time and context in which it was written. At the time the Letter was written, there was no policy drafted, no concrete proposal under review or consideration. Rather, there was only public discussion of a very important and controversial idea. Ironically, the Committee itself ***invited*** public comment on the topic of mandatory breathalyzer testing at school dances. It claims it wanted public input. That kind of input is precisely what it got from the RI ACLU. Yet it now points to such input as a "threat of litigation" warranting an Executive Session of the Committee.

Further, at the time the Letter was written, litigation ***was not even possible***. There was no drafted — much less adopted — policy to challenge in court. Indeed, the Committee stated at the very meeting in which it claims there was a possible threat of litigation warranting a secret session that no decision had been made as to whether the Committee would even adopt any policy. The minutes state: "More discussion will take place before any decision is made regarding this issue." Exhibit D.[2]

Public officials *should* hear open and vigorous debate over whether to require mandatory breathalyzer testing at the school house door — the pros and the cons. They should hear opposing views on health care reform, abortion rights, controversial public tax deals. That kind of public debate on matters of public concern is necessary, inevitable and should be encouraged. To allow that kind of public input to be characterized as a threat of litigation,

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[2] Those same minutes reflect that the Board received substantial public comments, both pros and cons, respecting possible mandatory breathalyzer testing. Did all public comments opposing the proposed, possible policy constitute threats of litigation? Or only some such comments? Which were perceived as threats and why? Was there something unique or threatening in the RI ACLU's letter? Was it just the RI ACLU that was singled out as "threatening"? If so, that raises a whole host of free speech, First Amendment, and content-based discrimination issues that are even more troubling than the instant claims.

especially when no litigation is even possible, and then used as the basis for a public body to meet in secret would turn the Open Meeting Act on its head. An act designed to facilitate public discussion would turn into a mechanism to avoid it.

For this reason, courts have held that attorney advice on the legal implications of ***policy issues*** is and should be public:

> A meeting may be closed pursuant to the attorney-client exception when a governing body seeks legal advice concerning litigation strategy, but not when the discussion focuses on the underlying merits of a proposed action that might give rise to future litigation.

Star Tribune v. Board of Education, 507 N.W. 2d 869, 871 (Minn. App. 1993).

Chemical Industry Council of Delaware, Inc. v. State Coastal Zoning Industrial Control Board, 1994 Del. Ch. LEXIS 70, is directly on point. There the Board held executive sessions "to receive advice from counsel concerning whether the then-proposed version of the Regulations, and its later evolutions, complied with the Act." *Id.* at *33. The Board anticipated litigation over any newly adopted regulations. It therefore convened in Executive Session to formulate regulations that would be legally defensible, claiming such discussions fell within the Delaware open meetings law litigation exception. *Id.* The Court rejected this claim, stating pointedly, "... this interpretation of the 'legal advice' exception is fundamentally flawed." *Id.* at *34. The Court reasoned that the exception was not meant to apply to the crafting of regulations that might survive litigation — that discussion was more properly done in public. It concluded that "[i]f the Board's interpretation of § 1004(b)(4) were adopted, that narrow exception would swallow-up the 'open meetings' rule." *Id.* at *35-36.

The *Chemical Industry Council* Court had it right. So, too, did the Court in *Prior Lake American v. Moder*, 642 N.W.2d 729 (Mn. 2002). There, a city council resorted to executive session in the context of a dispute over a permit to extract gravel — in particular, whether to require the applicant to provide an additional environmental assessment. Unlike in

this case, there the council had received a letter from one of the interested parties stating that it "may seek legal action" if things did not go its way before the council. *Id.* at 733. The council was concerned that its decision on whether to require the additional environmental assessment would prompt litigation and met with its attorney to assess that risk. *Id.* at 733-734. The Court noted that this kind of legal assessment was not the type of advice that qualified for an open meetings exception:

> While Ryan might sue if the Council required an EAW, the denial of an EAW might lead another party, such as the SMSC, to sue. Given the contentious nature of many land-use proceedings, we are concerned about the ramifications of holding that open meetings may be closed to allow council members to meet with an attorney about how to view a threat of litigation relating to a public matter that has yet to be decided. Such a holding might well eviscerate the Open Meeting Law. No doubt public bodies frequently face threats of litigation associated with their decisions. Threats of litigation notwithstanding, the public has a right "to be informed of all actions and deliberations" that affect the public interest.

Id. at 739-740.

The Court elaborated on its reasoning, noting that when a public body is deciding a matter within its jurisdiction, "the threat that litigation might be a consequence of deciding the matter one way or the other does not, by itself, justify closing the meeting." *Id.* at 740. Rather, the exception should apply when "a public body seeks legal advice concerning litigation strategy." *Id. See, also Caldwell v. Lambrou*, 391 A.2d 590 (N.J. Super. 1978) (holding executive session to consult with legal counsel regarding the power of board to make modifications to a proposed site plan was improper).

Here, the Committee could not possibly have been seeking legal advice on litigation strategy. There was no litigation. None was possible at that time. There was no decision. There was no policy. There was no "adversary." There was simply the Committee's deliberation of a potential new policy. Even assuming the Committee interpreted the RI ACLU's Letter a threat of possible litigation — and assuming the Committee ultimately decided its policy

debate one way instead of the other — that would not justify secret deliberations about the future course of their considerations. Indeed, if the Committee interpreted the Letter at issue here as a threat and actually took this supposed threatened litigation into account as part of its deliberations on what policy to adopt, that is precisely the type of information the public is entitled to observe, assess and judge.

B. The Statutory Language And Prior Decisions Under The OMA Make Clear That The Commission's Claimed "Threatened Litigation" Was Insufficient To Justify Meeting In Executive Session

The Legislature expressly set forth the purpose of the statute in R.I.G.L. § 42-46-1, so that there would be no mistake:

> **Public policy.** — It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that to into the making of public policy. (Emphasis in original.)

It then declared that "Every meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46.5." Subsection 4 discusses the procedure for properly closing meetings.[3] Subsection 5 provides the specifically enumerated grounds for which meetings may be closed. Defendants here rely upon R.I.G.L. § 42-46-5(a)(2): "Sessions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation."

On its face this language is limited and not "broad" as Defendants argue. Defendants' Memorandum at 13. The exception refers to meetings and work sessions. It refers to "litigation" only — not more broadly to pending or threatened litigation or "legal advice" generally. Just litigation.

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[3] These provisions were also violated by the Committee, as discussed, *infra*, in Section V.

The Supreme Court has repeatedly made clear that these exceptions are not to be construed broadly. Instead, the Supreme Court recently pronounced:

> To effectuate the OMA's remedial and protective purpose, these enactments should be broadly construed and interpreted in the light most favorable to public access.

Tanner, 880 A.2d at 791 (internal quotations omitted); quoting *Solas*, 774 A.2d at 824. *Cf., Providence Journal Co. v. Sundlun*, 616 A.2d 1131, 1136 (R.I. 1992) (exemptions to APRA "are to be construed narrowly 'so as to further the legislative purpose of facilitating public access to governmental records.'") In fact, the legislature amended the OMA to make clear that the burden of proof is on the public body to prove that the meeting was properly closed. R.I.G.L. § 42-46-14.

Based on decided jurisprudence and declared public policy, then, this Court should apply the relevant statutory exception as written. As written, the exception applies only to "litigation" and not pending or threatened litigation. Here there was no "litigation." There was, therefore, no proper basis for Defendants to move into Executive Session. *State v. DiCicco*, 707 A.2d 251, 253 (R.I. 1998) (when a statute's language is clear and unambiguous, construction is at an end and the court must apply the statute as written).

Should the Court be inclined to go beyond the plain meaning of the statute — it should not — it must tread very carefully. Courts around the country have highlighted the particular dangers posed by the adoption of a broad attorney-client privilege exception to open meetings laws. Indeed the very cases cited by Defendant make this point. In *Minneapolis Star and Tribune Co v. HRA,* 251 N.W.2d 620, 626,(Minn. 1976), cited in Defendants' Memorandum at p. 15, the Court declared:

> The attorney-client exception discussed herein would almost never extend to the mere public body in its capacity as a public agency. We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated, for this court has consistently emphasized that

> respect for and adherence to the First Amendment is absolutely essential to the continuation of our democratic form of government.

See, also, Illinois ex re Hopf v. Barger, 332 N.E.2d 649, 660 (Ill. App. 1975) (cited in Defendants' Memorandum at p. 15 and cautioning that a liberal application of this exception could thwart the policies underlying Open Meeting Acts).

Similarly, the Supreme Court of Tennessee, noted the potential for abuse stemming from a vague litigation standard:

> We are aware of the potential misuse of this exception in order to circumvent the scope of the Open Meetings Act. A public body could meet with its attorney for the ostensible purpose of discussing pending litigation and instead conduct public business in violation of the Act.

Smith County Education Ass'n. v. Anderson, 676 S.W. 2d 32, 335 (Tenn. 9184).

Indeed, each of the cases cited by Defendants in their memorandum that discuss litigation exceptions to Open Meetings Acts make clear that more is required to invoke that exception than the Letter the Committee relies on here.

At the outset, it should be noted that Defendants do not cite a single case standing for the proposition that a letter written by a member of the public and commenting on a matter of public policy under consideration by a public body, but not yet drafted or enacted, constitutes a "threat of litigation" justifying a meeting in executive session. Nor have Plaintiffs found one. Rather, Plaintiff has found substantial case law, cited above, rejecting the application of the exception to policy considerations. *See,* cases cited in Section IV.A, *supra,* at 14-18.

Defendants do cite to two Massachusetts cases allegedly standing for the proposition that "threatened litigation" may justify executive sessions. *Doherty v. School Committee of Boston,* 436 N.S. 2d 1223 (Mass. 1982), actually involved a case where the school board and unions "were involved in extensive litigation" and a complaint related to the subject matter of the executive session was already pending. In light of extensive, already ongoing and

pending related litigation, the Court found the anticipation of further litigation between the same parties on a related issue reasonable.

Perryman v. School Committee of Boston, 458 N.E. 2d 748 (Mass. App. 1983), involved an Executive Session called to discuss the suspension of two teachers indicted for welfare fraud. At the Committee's public meeting, before the committee went into executive session, an attorney for the teachers told the Committee: "This is a matter that certainly will come before a Superior Court judge this week on a restraining order." *Id.*, at 751. A case involving an attorney representing specific teachers about to be suspended who expressly threatens to sue within the week offers no support at all for the actions of the Committee in this case.

Minneapolis Star & Tribune v. HRA, has been quoted already for the proposition that the attorney-client exception "would almost never extend to the mere request for general legal advice or opinion..." *Id.* at 626. That case involved an executive session by the HRA for the express purpose of discussing litigation strategy in an action "***then pending***" in the U.S. District Court. *Id.*, 251 N.W. 2d at 621.

Oklahoma Ass'n. of Municipal Attorneys v. State of Oklahoma, 577 P.2d 1310, 1315 (Okla. 1978), adopted a litigation exception, but one that was limited and would exclude the Committee's claim here:

> ... executive sessions may be held for confidential communications between a public body and its attorney, but only if the communications concern ***a pending*** investigation, claim, or action, and disclosure of the matters discussed would seriously impair the ability of the public body to process the claim or conduct the pending investigation, litigation or proceeding in the public interest. (Emphasis added.)

The Committee does not meet the threshold requirement found necessary by the Oklahoma Supreme Court that a ***pending*** investigation, claim or action exist.

Illinois ex rel Hopf v. Barger, 332 N.E. 2d 649 (Ill, App 1975), held that in certain circumstances, the exception might apply to foreseeable litigation. In that case, however, the defendants attempted to apply this exception to a meeting to discuss the acquisition of property at which councilmen, the council's attorneys, private parties and their attorneys all attended. The Court rather pointedly rejected the application of such a possible exception to the facts of that case where no prospective litigation was discussed and no need for confidentiality was demonstrated. *Id.* at 660. The Court also cautioned that the litigation exception "may be used as a device to thwart the liberal implementation of the policy that the decision-making process is to be open and that confidentiality is to be strictly limited." *Id.*

There may be cases where a court might be called upon to limn the exact reach of the litigation exception in the Rhode Island OMA. There may be a case where the spectre of litigation was real enough, imminent enough — or even possible — so as to prompt the Court to consider whether the statutory reference to "litigation" includes pending or threatened litigation, even though the statute does not contain those words. This is not that case. This case is not even close.

V. DEFENDANTS IMPROPERLY FAILED TO PROVIDE PROPER NOTICE AND DISCLOSURE BEFORE CONVENING IN EXECUTIVE SESSION

The OMA spells out the procedure by which public bodies may hold a meeting closed to the public. R.I.G.L. § 42-46-4. There must be a public vote. Further, the statute provides:

> The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement ***specifying the nature of the business to be discussed,*** shall be recorded and entered into the minutes of the meeting. (Emphasis added.)

On its face then the statute requires not only a citation to the relevant subdivision, but also some further statement ***specifying*** the nature of the business to be discussed.

Here the Committee cited to "Sections 42-46-5(a)(1) and 42-46-5(a)(2) for Personnel and Collective Bargaining and Litigation." The minutes of the meeting indicate that the further specification of the nature of the business to be discussed was: "specifically, for Personnel and Litigation." Am. Compl., Exhibit D.

Repeating the words "personnel" and "litigation" in no way specifies the nature of the business to be discussed beyond citation to the statute which bears those very same words. Indeed, several courts have made clear that regurgitating the very words in the relevant OMA statute simply does not suffice to provide the public with the necessary information for them to weigh the propriety and need for executive sessions. *See, e.g., O'Neil v. Town of Middletown*, 2007 De. Ch. LEXIS 41, at 25-26. ("A general listing of several of the potential grounds for an executive session provided for in § 10004(b) 'is insufficient notice and would contravene the purpose of FOIA.'"); *The Free Press v. Cty of Blue Earth*, 677 N.W. 2d 471, 475-476 (Minn. App. 2004) ("Contrary to the county's argument, 'attorney-client privilege,' as recited in section 13D.05, subdivision 3, does not suffice as 'the subject to be discussed'")

The notices and disclosures required in the OMA are not perfunctory hurdles to be checked off. They have a meaning and a purpose. "In giving notice to the public under the Open Meetings Act, a public official should not ask 'what is the minimal amount of notice I can get away with?' but 'what is the best notice I can give to fairly inform the public of the workings of its government?'" *Ohs v. North Kingstown School Committee*, 2005 R.I. Super. LEXIS 132. The notice provided for the Executive Session on February 26, 2009 was perfunctory and deficient. The Session was improperly called.

The Committee's contention that it need not disclose anything beyond "litigation" as the litigation was not yet public, Defendant's Memorandum, at 18, is downright Orwellian. The Committee argues it need not "reveal" the threatened RI ACLU lawsuit in its call for an Executive Session because the "threatened lawsuit" was not yet filed. The Letter was a public record. The RI ACLU's opposition to any mandatory policy was public. The vigorous debate over the breathalyzer was public. The only thing that was not public was the Committee's wholly subjective — and it is submitted wholly unreasonable — interpretation of that Letter as a threatened lawsuit.

This argument reveals the tremendous breadth and danger underlying Defendants' interpretation of the OMA. The Committee can decide whether some public comment constitutes a "threat" of litigation. It can, according to the Committee, do so even when the public comment does not reference possible legal action. As argued above, if the Letter at issue here can reasonably be interpreted as a "threat of litigation," so can just about any substantive commentary on any pending or controversial policy issue by members of the public. In turn, on any important public issue, there will literally always be some constituent letter or comment that raises objections and concerns on one side or the other of an issue, or both. There will always, therefore, be the opportunity for the public body to seize on that commentary as "threatened litigation." As these threats — like the one here — can and often do arise before any policy is actually adopted, no lawsuit could possibly be filed. Therefore, the "threatened lawsuit" will never be "public" and never disclosed in the context of calls for closed meetings.

For Defendants to cite *Tanner* in support of such an argument is impossible. *Tanner* declared:

> The explicit purpose of the OMA that "public business be performed in an open and public manner and [**24] that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy," § 42-46-1, clearly demonstrates the

> Legislature's intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved.

Tanner, 800 A.2d at 796. Tanner required "such notice, based on the totality of the circumstances, as would fairly inform the public of the nature of the business to be discussed or acted upon."

Finally, looking at the "totality" of the circumstances here, the Committee has not explained why further elucidation of the mystery litigation was not possible. What was secret? What confidential information needed to be preserved that more specific disclosure would have revealed? The Committee does not explain why it could not tell the public it was going into Executive Session to discuss "litigation regarding breathalyzer policy," "threatened litigation over breathalyzer policy" or even "threatened litigation by the RI ACLU over breathalyzer policy." Surely, if the RI ACLU intended to sue, it knew that when it wrote the Letter. The public knew the Committee was considering a breathalyzer policy, so revealing the subject matter of the supposed threatened lawsuit would not reveal any confidential information. The public even knew that the breathalyzer debate was vigorous, with strong opinions on all sides. This is not a case involving an unproven allegation involving an unknown employee. There was no need for secrecy as to the grounds for this secret meeting.

The Committee's argument that it can keep secret for no reason, not only the content of any executive session, but also the reason for the secret meeting — especially on these facts — spells disaster for the Open Meetings Act and must be rejected.

VI. THE AGENDAS SUBMITTED BY THE DEFENDANTS ARE ROUTINELY DEFICIENT, VAGUE AND FAIL TO MEET THE REQUIREMENTS OF THE OMA

A. The Agendas Generally

Section V of Defendants' Memorandum argues that Count III of Plaintiff's Complaint, concerning the insufficient supplemental notice routinely provided by the Committee, should be dismissed as the meeting agendas "fully comply with the requirements of the OMA." Defendants' Memorandum at 19. In support of their argument, Defendants cite *Tanner* and argue that a "flexible standard" is embodied in the OMA which requires a reviewing court to determine whether the "notice, based on the totality of the circumstances, … would fairly inform the public of the nature of the business to be discussed or acted upon." *Id.* (citing *Tanner* at 797). While the Defendants identified the correct standard, their reliance on *Tanner* in support of their contention that the Committee's agendas "fully comply with the OMA" could not be more misplaced.

In *Tanner*, the court held that the East Greenwich Town Council's agenda was misleading and failed to comply with the OMA because it listed "interviews" of potential board appointees but not the action the council ultimately took at the meeting – voting on the potential appointees. *Id.* at 798. "The posted notice clearly implies that the purpose of the meeting was to conduct interviews only … . The posted notice neither states nor implies that the town council would vote to appoint these potential board members … ." *Id.* "It goes without saying, that 'misleading' notices never can comply with the statutory purpose of the OMA that 'public business be performed in an open and public manner and the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy.'" *Id.* at footnote 16 (quoting the OMA).

Astonishingly, Defendants also represent to this Court that *Ohs v. North Kingstown School Committee* also supports dismissal of Plaintiffs' Am. Complaint. Defendants' Memo at p. 20. The school committee in *Ohs* listed "school budget" as a discussion item under old business when in fact school closure and consolidation were addressed at the meeting. *Id.* at 56. The court noted that the agenda "merely indicated a continuation of discussions regarding the school budget ... without highlighting the issues of school closure and consolidation ... ." *Id.* "The notice ... fails to give fair notice to the public that the School Committee, within its broader budget discussions, will be discussing issues of school closure and consolidation ... ." *Id.* at 57. The court found that the notice was similar to the notice at issue in *Tanner* in that it was "not only inadequate and incomplete, but misleading." *Id.* at 61. According to the *Ohs* court, even absent a statutory mandate to include certain information in the supplemental notice, "such an obligation exists where the absence of that information would be misleading or fail to inform the public, under all of the circumstances, of the business at hand." *Id.* at 63.

Finally, Defendants attempt to craft an argument concerning the burdens of what they perceive the Plaintiffs to be requesting from this Court. Defendants assert that Plaintiffs seek to impose an "onerous burden on public bodies" requiring "narrative detail identifying each of the specific portions or section of the school policies which might be discussed." Defendant's Memorandum at 20. Plaintiffs reject these arguments outright as the relief requested is simply to require that the Defendants comply with the requirements of the OMA. Plaintiffs attached to their Amended Complaint examples from other school committees in this state that routinely provide more detail — or more accurately, ***any*** detail — in their posted Agendas. Am. Compl., Exhibit H. Further any perceived burdens created by reasonably informing the public of the Committee's activities are the product of the Legislature. Plaintiffs do not seek to create new law – only ensure compliance with existing law.

In light of the fact that the *Tanner* and *Ohs* courts found that the notice at issue did not fairly inform the public, it is inconceivable that Defendants can maintain that a boilerplate reference to "Discussion School Committee Policies" or "Executive Session … for Personnel and Collective Bargaining and Litigation" fairly informs the public of anything meaningful. The subjects that fall under the broad category "School Department Policies" are diverse indeed. As such, listing "Discussion School Committee Policies" as old business fails to meet the "flexible standard" required by *Tanner* in that it fails to "fairly inform the public of the nature of the business to be discussed." *Tanner* at 797. The Committee's agendas are routinely and impressively vague given the number and type of policies that may fairly be described as "School Department Policies."

Further, as the Statement of Facts, ¶¶ 19-25, makes clear, the Agenda items listed are not only rote, vague and repetitive, they are more often than not inaccurate. Routinely, broad topics are listed that never get discussed. Other actions are taken — like ***voting*** to rescind the Breathalyzer policy on August 4, 2009 — that were never mentioned in the Agenda. Still other Agendas fail to mention items identified in prior minutes as subjects for discussion at the next meeting.

The Agenda and Notice requirements of the OMA are not meant to be boxes to check so that a public body has the necessary "cover" to discuss whatever might or might not come up at a particular meeting. These Agendas and Notices are meant to be, as the *Ohs* court (cited by Defendants) declared, "the best notice I can give to fairly inform the public of the workings of its government." *Ohs*, 2005 R.I. Super. LEXIS 132. Defendants' Agendas do not approach this standard.

B. Notice of The June 4 and July 15 Agendas

Rhode Island Gen. Laws § 42-46-6(f) states, in relevant part:

> (f) All notices required by this section to be filed with the secretary of state shall be electronically transmitted to the secretary of state in accordance with rules and regulations which shall be promulgated by the secretary of state.

Am. Compl. ¶ 72. Despite this provision of State Law, no notice of Agendas from June 4 or July 15 appeared on the Secretary of State's website.

Defendants do not dispute that. Instead, they argue that they "believe" they transmitted the Agenda for the June 4 meeting to the Secretary of State's Office and cannot explain why notice did not appear on that website. They argue that there was no July 15 meeting. Plaintiffs have not had the opportunity to confirm these claims through discovery. If true, Plaintiffs will likely voluntarily withdraw any claim for relief with respect to these claims. Defendants append no documentary support for either claim. It may exist. Plaintiffs simply have not seen it.

At present, this matter is properly before the Court on a motion to dismiss. In that regard, the allegations of the Amended Complaint must be considered true. If the meetings took place and no notice was sent to the Secretary of State's Office, Plaintiffs have stated a claim for relief under the clear mandate of the statute. Any other resolution must await further discovery and factual development.

VII. CONCLUSION

For all of the above reasons, the Court should deny Defendants' Motion to Dismiss, or In the Alternative for Summary Judgment.

PHOENIX-TIMES PUBLISHING COMPANY, D/B/A/ EAST BAY NEWSPAPERS, JOSH BICKFORD, RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION, INC.

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DATED: December 31, 2009

CERTIFICATION

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO DISMISS was sent by first class mail, postage prepaid, on this 31st day of December, 2009 to:

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