VERMONT SUPERIOR COURT
Washington Unit
65 State Street
Montpelier VT 05602
802-828-2091
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 23-CV-00032

Stephen Whitaker v. Central Vermont Public Safety Authority et al

DECISION ON MOTION TO DISMISS

Stephen Whitaker challenges actions of the Central Vermont Public Safety Authority and its Board chair, Dona Bate. Mr. Whitaker claims that the Authority improperly denied his public record requests, failed to record its fully remote meetings or maintain those recordings, defectively warned one of its meetings, and has completely failed to undertake statutory duties to hire a public safety director, undergo annual audits, and fill vacant Board seats. He also seeks to impose a $500 criminal fine on Ms. Bate.

The Authority and Ms. Bate have filed a motion to dismiss the complaint for failure to state claim. They argue that: (1) their remote meetings have been recorded; (2) the Authority had no obligation to make copies of those recordings available to Mr. Whitaker because it possesses no equipment by which reproduce the originals; (3) the Authority has sovereign immunity from any claim that it has failed to appoint a public safety director; (4) there is no statutory private right of action by which to compel them to appoint a public safety director; (5) Ms. Bate in her official capacity should be dismissed because the municipal entity she represents, the Authority, already is a defendant; and (6) Ms. Bate in her individual capacity has qualified immunity (from what is not clear).

The court notes at the outset that the curtly stated arguments in Defendants' motion are predicated on a cramped reading of the complaint as well as their own allegations or inferences of fact. Mr. Whitaker is pro se, and though his unrepresented status does not exempt him from the ordinary operation of the civil rules, it does inform the court's duty to construe the pleadings "as to do substantial justice." V.R.C.P. 8(f). Otherwise, a Rule 12(b)(6) motion will be granted "only if 'it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.'" *Birchwood Land Co. v. Krizan*, 2015 VT 37, ¶ 6, 198 Vt. 420 (citation omitted). The court assumes the truth of the allegations in the complaint, draws reasonable inferences in support of the viability of asserted claims, and disregards all contravening allegations. *Richards v. Town of Norwich*, 169 Vt. 44,

49 (1999).

Mr. Whitaker's complaint is organized into 3 counts. Count 1 broadly addresses the subject matters of (a) whether and how Board meetings have been recorded and (b) Mr. Whitaker's inability to get the Authority (or anyone else) to give him copies of those recordings. The relevant allegations to some extent provide bits of narrative and communications between the parties, but they are incomplete and unclear. As best the court can tell, Mr. Whitaker alleges that the Board has both expressly indicated that it refuses to record its remote meetings precisely to avoid any obligation to store and make recordings available to the public and, at least with regard to one meeting, that the Board was prepared to provide a copy of such a recording to Mr. Whitaker, implying that it possessed the recording. The complaint is clear that some or all the remote meetings have been recorded by a third party ("ORCA Media") and may appear on YouTube. Mr. Whitaker alleges, however, that the Authority has no contract with ORCA, implying that ORCA is not acting as the Authority's agent when recording meetings or maintaining those recordings. Mr. Whitaker claims that aspects of how or whether the Authority's meetings are recorded violate both Vermont's Open Meeting Law, 1 V.S.A. §§ 310–314, and Public Records Act (PRA), 1 V.S.A. §§ 315–319.

In count 2, Mr. Whitaker addresses the allegedly deficient meeting warning. He asserts that the warning had the correct date but wrong day (Thursday rather than Monday). In count 3, he alleges that the Authority has clear, mandatory statutory duties to appoint a public safety director, 24A V.S.A. ch. 901, § 16, undergo annual audits, *id*. § 24, and fill vacant Board seats, *id*. § 13(c), and that it refuses to do so. He presumably seeks to compel it to undertake those duties. The court addresses these claims in turn.

The recordings and copies

Mr. Whitaker's principal interest in the recordings of the Board's meetings appears to be in acquiring copies of them under the PRA, but their existence is a function of the Open Meeting Law. The PRA requires a municipality to make its records available for inspection and copying, but it does not require it to create a record it does not already have. 1 V.S.A. § 316(c)(2), (i). It also does not require a municipality to make copies of its records if it does not have the equipment to do so. *Id*. § 316(g).

Prior to the pandemic, Vermont's Open Meeting Law permitted "one or more" Board members (as relevant here) to attend meetings remotely, though the public could still attend in-person, and there was no requirement that such a meeting, or any meeting, be recorded unless it amounted to a hearing providing a "forum for public comment on a proposed rule." 1 V.S.A. § 312(a)(1), (a)(2)(A). In

January 2022, in response to the pandemic, the legislature temporarily modified open meeting procedures to allow for fully remote meetings. This legislation provided that "Unless unusual circumstances make it impossible for them to do so, the legislative body of each municipality and each school board shall record its meetings held pursuant to this section." 2021, No. 78 (Adj. Sess.), § 2(c). Before Act 78 expired a year later, the legislature adopted 1 V.S.A. § 312A, which makes similar procedures permanently available but only during declared states of emergency. 2021, No. 157 (Adj. Sess.), § 8. The provision requiring recording of fully remote meetings now appears at 1 V.S.A. § 312a(d).

This case involves recordings of meetings that were or should have been made by the Board under § 312a(d) or Act 78 because they were held fully remotely. It appears obvious that § 312a(d) imposes on the Board a duty to record remote hearings. Equally, once the Board makes such a recording, the definition of public record—"any . . . recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business"—makes clear that the recording is a public record for PRA purposes. 1 V.S.A. § 317(b).

The court declines to further analyze Mr. Whitaker's count 1 or the Authority's vague argument that whatever it has done complies with 1 V.S.A. § 312a(d). While the allegations of the complaint are clear that ORCA Media has recorded some or all the Authority's meetings, they are not clear enough for the court to determine whether ORCA's involvement somehow satisfied the Authority's duty to record and whether the Authority has or ever had custody of any such recordings. *See* 1 V.S.A. § 317a(b) (barring records custodians from destroying or giving away public records). Also unclear is the Authority's argument that somehow it cannot not provide copies of the recordings because it does not have the equipment needed to make reproductions (implying that it retains custody of them).[1] The complaint includes no facts addressing this special-equipment argument. The court simply declines to speculate on these matters based solely on the allegations of the complaint.

The deficient meeting warning

The Authority dismisses the error in its meeting warning as "clerical," as though it was immaterial. One principal purpose of such a warning is to say when the meeting will occur. *See* 24A V.S.A. ch. 901, § 41 (warning contents). Warning the meeting for the wrong day is not immaterial. In this case, however, the warning was only partially incorrect, and Mr. Whitaker concedes in the

[1] The Authority does not explain what equipment it would need but does not have. Not knowing otherwise, one might presume that the recordings would exist as some type of easily reproducible computer file, making the Authority's apparent argument that it possesses the recordings but cannot reproduce them curious at least.

complaint that he in fact attended it, so the error caused no injury to him. Thus, Mr. Whitaker is not "aggrieved" under 1 V.S.A. § 314(b)(1) and has no cause of action as to the warning. *See Town of Brattleboro v. Garfield*, 2006 VT 56, ¶ 19, 180 Vt. 90.

Sovereign immunity and statutory private right of action

In the complaint, Mr. Whitaker does not articulate a legal basis for compelling the Authority to undertake its mandatory statutory duties, and neither party has attempted to flesh that out in briefing. As the Authority argues, its enabling statutes do not provide members of the public any sort of private right of action. *See* 24A V.S.A. ch. 901, §§ 1–54.[2] Moreover, there is no claim for compensatory damages of any kind. Mr. Whitaker is seeking to compel the Authority to do what its statutes say it must. The court thus presumes that Mr. Whitaker seeks relief in the nature of mandamus under Rule 75. *See Petition of Fairchild*, 159 Vt. 125, 130 (1992) (elements of mandamus).

The Authority also argues that it has sovereign immunity from "any and all claims." Under 24A V.S.A. ch. 901 § 4, "The Authority shall have the benefit of sovereign immunity to the same extent that a municipality of the State does." Vermont municipalities are not sovereigns, but they continue to have "municipal immunity," sometimes referred to as "municipal sovereign immunity," to claims arising out of the negligent performance of their uninsured "governmental" undertakings, while no such immunity extends to their "proprietary" undertakings. *Civetti v. Turner*, 2020 VT 23, ¶ 7, 212 Vt. 185. Such immunity also can be waived under 24 V.S.A. § 901a(d)(2). There is no tort claim of any kind in this case, and the Authority does not explain why it thinks its municipal immunity might bar Mr. Whitaker's mandamus claim. The court declines to speculate as to how that could be so.

Ms. Bate

The Authority and Ms. Bate argue that the claim against Ms. Bate in her official capacity should be dismissed because the Authority is a named defendant, and that the claim against her in her individual capacity should be dismissed because she has qualified immunity. The U.S. Supreme Court has explained the distinction between official and personal (or individual) capacity suits as follows:

> In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the [government entity] itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official. "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." "[O]fficers sued in their personal capacity come to court as

[2] The Authority refers specifically to whether it can be compelled to hire a public safety director and does not mention the other statutory obligations that Mr. Whitaker has asserted.

individuals," and the real party in interest is the individual, not the sovereign.

Lewis v. Clarke, 581 U.S. 155, 162–63 (2017) (citations omitted).; *accord Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official."); *Karcher v. May*, 484 U.S. 72, 78 (1987) ("We have repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder."); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." (citation omitted)).

Thus, naming Ms. Bate in her official capacity is just another way of naming the Authority itself; it neither adds an additional party nor asserts an additional claim for relief. In short, it is effectively a nullity. Conversely, striking Ms. Bate from the caption in her official capacity changes nothing.

In her individual capacity, Ms. Bate argues that she has qualified immunity. "[Q]ualified immunity serves to protect government employees from exposure to personal tort liability that would: '(1) hamper or deter those employees from vigorously discharging their duties in a prompt and decisive manner, and (2) unfairly subject employees who have a duty to exercise discretion regarding matters of public policy to the judgment of those acting within a judicial system that is ill-suited to assess the full scope of factors involved in such decisionmaking.' " *Czechorowski v. State*, 2005 VT 40, ¶ 12, 178 Vt. 524 (2005) (citation omitted). It is an unusual case in which qualified immunity can be determined as a matter of law based on the allegations in the complaint alone. Here, moreover, Ms. Bate has failed to explain how the doctrine could possibly apply in this case, where there is no claim of tort liability or for compensatory damages of any kind.

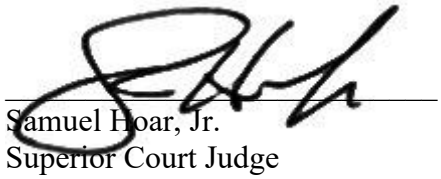
The court need not cast about for an answer to the qualified immunity question, however. Rather, the claim against Ms. Bate fails for a more fundamental reason. The only "claim" asserted against her in her individual capacity is Mr. Whitaker's assertion that the court should levy a criminal fine pursuant to 1 V.S.A. § 314(a). That subsection of the Open Meeting Law provides: "A person who is a member of a public body and who knowingly and intentionally violates the provisions of this subchapter . . . or a person who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any meeting subject to this subchapter shall be guilty of a misdemeanor and shall be fined not more than $500.00." The statute plainly contemplates a criminal fine, as distinguished from a civil penalty. *See Town of Hinesburg v. Dunklin*, 167 Vt. 514, 524–26 (1998)

(distinguishing between civil and criminal penalties). It criminalizes certain conduct and dictates the penalty. There is clearly no intent to create a private right of action to impose a penalty. Though *qui tam* actions, in which a private person may recover a portion of a penalty, still have some limited applicability, *see, e.g.,* 31 U.S.C. § 3730 (action by private person under False Claims Act), they are largely "quaint and of another age[, . . .] something to be avoided in the administration of justice," *Abbadessa v. Tegu*, 121 Vt. 215, 217 (1959). Rather, a private litigant aggrieved by a violation of the Open Meeting Law is limited to seeking "appropriate injunctive relief or . . . a declaratory judgment." 1 V.S.A. § 314(c). Enforcement of the penalty provision lies exclusively in the Criminal Division. *See* 4 V.S.A. § 32(a) (vesting "jurisdiction to try, render judgment, and pass sentence in prosecutions for felonies and misdemeanors"). In short, Mr. Whitaker has failed to state a claim against Ms. Bate in her individual capacity.

ORDER

The court grants the motion to dismiss in part and denies it in part. Count 2 is dismissed, as are all claims against Ms. Bate—the claims in her official capacity as redundant and the claim for a fine failure to state a claim. All other claims remain.

Electronically signed pursuant to V.R.E.F. 9(d): 5/15/2023 5:05 PM



Samuel Hoar, Jr.
Superior Court Judge