



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

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PR 20-09

Michael J. Marcello, Esquire

David R. Petrarca, Jr., Esquire
Assistant Town Solicitor, Town of Scituate

Re: **Marcello v. Town of Scituate**

Dear Attorneys Marcello and Petrarca:

We have completed our investigation into the Access to Public Records Act (“APRA”) complaint filed by Attorney Michael Marcello (“Complainant”) against the Town of Scituate (“Town”). For the reasons set forth herein, we find that the Town did not violate the APRA.

Background

The Complainant contacted the Town requesting certain documents pursuant to the APRA:

- “1. Any and all communications, emails, phone logs, text messages by and between members of the Scituate Town Council as well as the Town Clerk or Deputy Town Clerk concerning the scheduling, convening, and hold [sic] of the Emergency Meeting of the Town Council on Saturday, July 20, 2019.
2. Any communications, email, phone logs, correspondence, text messages, or similar communication by any member of the Town Council to the Chief of Police or any member of the police department, including but not limited to the Chief of Police, regarding a request for phone records and or billing statement of the Scituate Police Department and/or any inquiry or concerns about the scheduling of details, assignment of detail shifts, or missed details since May 1 to the present.
3. A copy of the Chief of Police's current contract of employment.
4. A copy of any and all letters, communications, or like documents which placed the Chief of Police on Emergency leave effective July 20 or July 21, 2019 and any and all communications (to include emails, text messages, correspondence, phone

logs) by and from the Town Council and its members regarding the decision to place him on Administrative leave.

5. Any and all communications received by any officer, employee, or elected official of the Town of Scituate from the Chief of Police or his agent concerning alleged interference by any town official related to the management, control, or supervision of the Scituate Police Department received within the last 30 days from the date of this inquiry.

6. Any response sent by any official or agent of the town of Scituate in response to any such communication as identified in request No. 5.”

The Town provided a partial response to the Complainant’s APRA request. The Town provided documents responsive to the Complainant’s Requests No. 1, 3, 4, and 5, and expressly indicated that documents responsive to requests No. 4 and No. 5 contained redactions pursuant to R.I. Gen. Laws §§ 38-2-2(4)(A)(I)(a) (records relating to a client/attorney relationship) and 38-2-2(4)(A)(I)(b) (individually-identifiable information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy). The Town also extended its time to respond to the request in order to conduct additional search, retrieval and review of potentially responsive documents, *see* R.I. Gen. Laws § 38-2-3(e), and requested prepayment in the amount of \$150.00 for said search, retrieval and review. *See* R.I. Gen. Laws § 38-2-4.

Dissatisfied with the Town’s response, the Complainant filed his Complaint with this Office.

Arguments

The Complainant alleged that the Town violated the APRA because its response to his Request No. 4 was “heavily redacted” and the Town failed to reference the particular APRA provision upon which it relied in making the redactions.¹ The Complainant also alleged that the Town’s response to his Request No. 5 failed to indicate that no portion of the letter from the Chief of Police to the Town Solicitor was reasonably segregable and that the Chief of Police and Town Solicitor do not share an attorney-client relationship. Additionally, Complainant alleged that the Town’s request for an extension violated R.I. Gen. Laws § 38-2-3(e) because the extension was not “particularized” to his specific request, and that the Town’s request for prepayment in the amount of \$150.00 violated the APRA because “the law limits hourly charges for ‘search and retrieval,’ and not legal review.” We were not presented with evidence that the Complainant provided prepayment.

Assistant Town Solicitor, David R. Petrarca, Jr. provided a substantive response on behalf of the Town, which included affidavits from Ms. Marisa Marmaras, Administrative Assistant to the Town Clerk, and Ms. Abbie Groves, Town Council Vice President, along with the documents provided to the Complainant in response to his request and unredacted copies of the responsive documents for this Office’s *in camera* review. The Town argued that, within the first free hour allotted under the APRA, it produced three (3) documents responsive to Complainant’s Request

¹ Complainant initially indicated that his concern pertained to the Town’s response to his Request No. 3, but, in his rebuttal, clarified that he intended to reference Request No. 4.

No. 4 and cited to two exemptions, R.I. Gen. Laws §§ 38-2-2(4)(A)(I)(a) (records relating to a client/attorney relationship) and 38-2-2(4)(A)(I)(b) (individually-identifiable information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy), to support its redactions. The Town next stated that, in connection with its response to Request No. 5, the Town did not indicate that no portion of the letter from the Chief of Police to the Town Solicitor was reasonably segregable because the Town did not deem the entire email to be “completely exempt from public disclosure,” but rather provided the document with “certain, limited information that *was* reasonably segregable.” (Emphasis in original). The Town also argues that its use of R.I. Gen. Laws § 38-2-2(4)(A)(I)(a), the exemption for records relating to a client/attorney relationship, was permissible because “[t]he Town Solicitor is the legal advisor and attorney for the Town of Scituate, which includes its employees and department heads acting in their town capacities.”

The Town next argues that its prepayment estimate was appropriate and that its request for an extension of time to respond to the Complainant’s APRA request was sufficiently “particularized” to the Complainant’s request, as the extension cited to three reasons supporting the extension.

Relevant Law and Findings

When we examine an APRA complaint, our authority is to determine whether a violation of the APRA has occurred. *See* R.I. Gen. Laws § 38-2-8. In doing so, we must begin with the plain language of the APRA and relevant caselaw interpreting this statute.

Request No. 4

The Complainant alleged that the Town violated the APRA because its response to his Request No. 4 was “heavily redacted” and failed to reference the particular APRA provision upon which the Town relied in making the redactions.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. *See* R.I. Gen. Laws § 38-2-3(a). When a request is denied in whole or in part, the public body must respond “in writing giving the specific reasons for the denial.” R.I. Gen. Laws § 38-2-7(a).

Among other exemptions, the APRA exempts “individually-identifiable records . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). The APRA also exempts “all records relating to a client/attorney relationship[.]” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). At the very least, this exemption encompasses any documents that would be subject to the attorney-client privilege. *See Finnegan v. Town of Scituate*, PR 19-22. It is well established that “[t]he attorney-client privilege protects from disclosure only the confidential communications between a client and his or her attorney.” *State v. von Bulow*, 475 A.2d 995, 1004 (R.I. 1984). The general rule is that communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure. *Id.*

As an initial matter, the Town's letter responding to the request cited the specific APRA provisions pursuant to which it was redacting documents that were responsive to Request No. 4. As such, we do not find that the Town failed to provide a reason for the redactions. *See* R.I. Gen. Laws § 38-2-7(a).

We next consider whether the redactions were permissible. We recently examined a similar request in *Finnegan v. Town of Scituate*, PR 19-22. As we held in that finding, the two e-mails at issue in this complaint fall within the attorney-client privilege, and thus also relate to the attorney-client relationship. The first e-mail, for instance, was sent by the Town Solicitor to a Town employee – the Police chief – and the Town Human Resources Coordinator and pertains to the Police Chief's concerns regarding a legal matter. Moreover, while the Complainant suggests that the Police Chief (and/or other Town Council members) waived the attorney-client privilege and that the Police Chief is presently represented by private legal counsel, in the government context, it is “the Government [that] may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys.” *In re Grand Jury Subpoena*, 909 F.3d 26, 31 (1st Cir. 2018). The second email is likewise protected as it is between the Town Solicitor and Town Council members (and one other Town employee) and pertains to the Town Solicitor's legal advice. We have been presented with no evidence that either e-mail has been disclosed outside the attorney-client relationship.

Additionally, we find that these emails, as well as the third document produced in response to Request No. 4, contain personal information about an individual that implicates privacy interests. For instance, although the third document does not appear to include legal counsel, the redacted portions discuss sensitive personal information about an individual. There is little apparent public interest in the portions of the document that were redacted. As such, we conclude that the privacy interests in the redacted material outweigh any public interest in disclosure. *See* R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).²

Request No. 5

We next turn to Complainant's allegation that the Town's APRA response failed to state in writing that the July 19, 2019 email from Chief Delaere to Solicitor Ruggiero did not contain reasonably segregable public information. Rhode Island General Laws § 38-2-3(b) provides, in relevant part:

“If an *entire* document or record is deemed non-public, the public body shall state in writing that no portion of the document or record contains reasonable segregable information that is releasable.” (Emphasis added).

² The Complainant also asserted his belief that the third document was an email and that information fields typically found in an email, such as when it was sent, were missing and had apparently been redacted. Vice President Groves's affidavit addressed this concern by explaining that the third document was actually a letter that was later put in an email. The email was apparently not produced to Complainant, but the Town indicated that the documents provided may constitute only a “partial” response to Request No. 4 and requested prepayment for completing search and retrieval. No evidence has been presented that prepayment was tendered.

This July 19 email from Chief Delaere was, in fact, produced to the Complainant in response to his APRA request, albeit with extensive redactions. The Town argues that it did not deem the entire email to be completely exempt from public disclosure; therefore, it produced the document providing “certain, limited information,” that was “reasonably segregable.” Since the Town did not withhold the “entire” document and instead chose to produce the July 19 email in redacted form, the requirements of R.I. Gen. Laws § 38-2-3(b) were not applicable.

The Complainant also contends that the July 19 email contained “overzealous redactions.” The Town again cited to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) (records relating to the client/attorney relationship), to support the redactions made to the July 19 email. This email was sent by a Town employee – the Police Chief – to the Town Solicitor and no other persons were included. While the *in camera* nature of our review inhibits our full discussion, it is apparent that this e-mail was sent to legal counsel for the purpose of informing the Town Solicitor of a legal matter. Accordingly, this email also falls within the purview of R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

Town’s Request for Extension

The APRA requires a public body to respond to a request within ten (10) business days but permits the public body “an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body.” R.I. Gen. Laws § 38-2-3(e). The APRA requires that “[a]ny such explanation must be particularized to the specific request made.” *Id.*

The Complainant alleges that the Town’s request for an extension violated R.I. Gen. Laws § 38-2-3(e) because the extension was not “particularized.” The Complainant also argues that the “six categories of documents with limited time frames” he seeks “should be easy to retrieve in a timely manner.”

The Town contends that its request for an extension was proper in accordance with the terms of R.I. Gen. Laws § 38-2-3(e) and this Office’s prior findings.

Based on our review, the Town’s need for additional time was based on the volume of the request, which sought six (6) categories of documents and communications, the need to review the documents for potential redaction and/or withholding, and the “high quantity” of requests then-pending with the Town. These reasons are particular to the Complainant’s request and comply with the permissible reasons for an extension set forth in the APRA. *See* R.I. Gen. Laws § 38-2-3(e). Accordingly, we find that the Town did not violate the APRA in extending the time to respond to the Complainant’s request.

Town’s Request for Prepayment

In addition to extending the time to respond to the Complainant’s request, the Town also sought prepayment in the amount of \$150.00 “for search, retrieval and processing for the remaining information sought by your request, based on an estimate of an additional 10 hours.” The Town indicated that the first free hour allotted under the APRA was exhausted searching, retrieving and

reviewing the documents already produced to the Complainant. The Town stated that it would “not process the remaining parts of the [Complainant’s] request until payment has been received.” The Complainant argued that “the law limits hourly charges to search and retrieval, and not legal review.” (Internal quotations omitted).

The APRA provides that “[a] reasonable charge may be made for the search or retrieval of documents” and expressly allows the City to require prepayment for “costs properly charged.” R.I. Gen. Laws §§ 38-2-4(b); 38-2-7(b). The Rhode Island Supreme Court has explained that other costs not expressly mentioned within the APRA may be assessed, specifically, the “costs of redaction should be borne by the requesting party because it is part of the process of retrieving and producing the requested documents.” *See DARE v. Gannon*, 819 A.2d 651, 661 (R.I. 2003).

On rebuttal, the Complainant concedes that time for redaction is permitted under the APRA; however, he maintains that “the Town has engaged in a pattern of over zealous redactions” and “the charges are unnecessary, unwarranted and are designed to prevent the release of material by artificially driving up the production cost.”

The Town’s request for prepayment not only included an estimate of the time needed to review and potentially redact any responsive documents, but to also complete its search and retrieval of potentially responsive documents. We also note that the Complainant’s APRA request sought six (6) broad categories of documents. As we have previously observed, “estimating the time to search, retrieve, review, and redact documents is an inexact science.” *Farinelli v. City of Providence*, PR 19-04. Based on the evidence presented, we conclude that the Town’s initial estimate did not violate the APRA.

Conclusion

Although this Office has found no violations, nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting an action for injunctive or declaratory relief in Superior Court. *See* R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla E. O’Rourke
Kayla E. O’Rourke
Special Assistant Attorney General