



State of Rhode Island and Providence Plantations

OFFICE OF THE ATTORNEY GENERAL

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VIA EMAIL ONLY

June 8, 2020

PR 20-23B

Mr. Albert Brien

Ms. Bethany Noonan, Esquire
Legal Counsel, City of Woonsocket

Mr. John J. DeSimone, Esquire
Solicitor, City of Woonsocket

RE: Brien v. City of Woonsocket

Dear Mr. Brien and Attorneys Noonan and DeSimone:

We have completed our supplemental investigation into the Access to Public Records Act (“APRA”) complaint filed by Mr. Albert Brien (“Complainant”) against the City of Woonsocket (“City”). For the reasons stated herein, we do not find the City’s conduct amounted to a knowing and willful, or reckless, violation of the APRA.

Background

The Complainant filed a Complaint with this Office regarding the City’s response to his APRA request seeking:

- “(1) Income & Expense information submitted by Cumberland Hill Realty 846 Cumberland Hill Road Plat 42F Lot 8 File 28
- & (2) Rationale for decline in assessment from \$688,400 to \$635,000.”

As set forth more fully in our prior finding, *Brien v. City of Woonsocket*, PR 20-23, the City responded to the request by providing certain records but asserting that other records were “confidential” and not subject to disclosure under the APRA. The City’s response did not cite any specific APRA exemption.

In our prior finding, PR 20-23, we concluded that the City violated the APRA by failing to timely provide “specific reasons for the denial” of certain records responsive to Complainant’s request. *See* R.I. Gen. Laws § 38-2-7(a) (“[a]ny denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial”).

We directed the City to:

1. Provide this Office any responsive documents for *in camera* review. *See* R.I. Gen. Laws § 38-2-7(b).
2. Address whether the City’s belated assertion of R.I. Gen. Laws § 38-2-2(4)(B) as a basis for exempting the documents should be deemed waived. *See* R.I. Gen. Laws § 38-2-7(a).
3. Address whether the APRA violation found in PR 20-23 should be considered knowing and willful, or reckless, in light of the APRA requirements and this Office’s precedent. *See* R.I. Gen. Laws § 38-2-9(d).

We received supplemental submissions from both parties.

Supplemental Submissions

Pursuant to our finding issued on March 30, 2020, the City was required to provide responsive documents for *in camera* review to allow this Office to determine whether such documents were permissibly withheld from disclosure.¹ After seeking an extension of time to provide its supplemental response, the City provided a submission to this Office on May 12, 2020, stating that the documents it initially asserted were exempt from disclosure do not exist. The City states that “no requested documents were provided for an *in camera* review or withheld because they never existed.” (Emphasis in original). While “[t]he City regrets that this information was not conveyed with better clarity” it maintains that “the City responded timely and completely to Complainant’s first request.”

The City’s assertion that no responsive documents exist is supported by a supplemental affidavit from City Acting Tax Assessor Elyse M. Pare, wherein Ms. Pare attests that “I and the City have provided all requested documents and did not withhold any responsive documents at any time.” Ms. Pare explains that “Cumberland Hill Realty never submitted Income & Expense information (‘I&E’) to the City” that would be responsive to the first request. Ms. Pare attests that any I&E forms would be retained by the Tax Assessor’s office and put into storage and that, under her direction, the City’s Tax Assessor records were searched for any I&E forms for Cumberland Hill Realty. Ms. Pare asserts that she also personally searched those records and based on these searches, concluded that no responsive I&E records exist. Ms. Pare acknowledges that in her initial affidavit responding to the Complaint, she “should have explicitly stated that the City had no record of a completed I&E from Cumberland Hill Realty after a search of the records in the Tax Assessor’s office and that the City does not possess any other responsive documents to the

¹ The City had failed to respond to this Office’s request to provide documents for *in camera* review during the complaint process.

Complainant's first request." With regard to Complainant's second request, Ms. Pare attests that she initially provided Complainant with certain responsive records based on her understanding of the request and provided additional records when responding to the Complaint. Ms. Pare maintains that "there are no other documents responsive to that request."

We acknowledge the Complainant's supplemental submission in which he notes that the City's response "totally contradicts the City's history with respect to this issue from the outset." Although the Complainant takes issue with the belatedness of the City's revelation that it does not have responsive records, he does not offer argument or evidence to contradict the Tax Assessor's sworn statement that the City does not maintain any additional documents responsive to the request.

Supplemental Findings

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 copy such records. *See* R.I. Gen. Laws § 38-2-3(a). "A public body that receives a request to inspect or copy records that do not exist or are not within its custody or control shall *** state that it does not have or maintain the requested records." R.I. Gen. Laws § 38-2-7(c).

Here, it is undisputed that the City's initial denial of the Complainant's request did not state that the City did not have or maintain the requested records. While there may very well be circumstances when a public body need not cite R.I. Gen. Laws § 38-2-7(c), but instead provides a substantive denial, *see* R.I. Gen. Laws § 38-2-2(4), the City has provided no such argument in this case. Rather, the City advised the Complainant, and argued to this Office several times, that "Income and Expense data, as indicated on the letter/form, are confidential and not subject to the provisions of the Access to Public Records Act." Throughout the pendency of this matter, the City gave contradicting and unclear statements to this Office regarding the existence of responsive documents.² Although not raised in the initial Complaint (because at that time the City maintained that the responsive records were exempt), the City's failure to "state that it does not have or

² As noted in our initial finding in this matter:

"[a]lthough the City's initial response to the complaint contended that the documents it provided Complainant 'are the only documents we possess that are relevant to his request,' the City's September 17, 2018 and October 4, 2018 responses to the Complainant both indicated that documents were being withheld. Additionally, the City has not provided any evidence in the form of a sworn affidavit or otherwise to demonstrate that it does not maintain any additional responsive documents or to explain why it asserted an exemption if it does not maintain additional documents. Indeed, Ms. Pare's affidavit that was provided in response to further inquiry by this Office reiterates the City's argument that certain information requested by the Complainant is exempt." PR 20-23.

As explained above, the City has now provided an affidavit that it does not possess additional documents and explained the search process used to arrive at this conclusion.

maintain the requested records” in its initial denial violated the APRA. *See* R.I. Gen. Laws § 38-2-7(c); *see also* *Sherman v. Joint Committee on Legislative Services*, PR 20-37 (finding violation where response asserted exemption but failed to state that no responsive records existed).

Although the City was previously equivocal about whether it maintained responsive records, the City has now done what it did not do when responding to the Complaint, namely provide a sworn affidavit describing its search efforts and attesting that no responsive records exist. As the current record before us, including the undisputed representations and affidavit from the City, establishes that the City does not maintain additional responsive documents, we do not find that the City violated the APRA by not producing records that it does not maintain and we have no occasion to determine whether such records, if they did exist, would be exempt. *See Lopez v. City of Providence*, PR 20-03 (“Because the APRA does not require a public body to disclose records that do not exist or that are not within its custody or control, we find no violation[.]”); *see also* R.I. Gen. Laws § 38-2-7(c). For that reason, we also find no need for injunctive relief.

We now turn to considering whether the City’s violation of the APRA was knowing and willful, or reckless. The Rhode Island Supreme Court has held that the knowing and willful standard is satisfied when “the official either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute.” *DiPrete v. Morsilli*, 635 A.2d 1155, 1163-64 (R.I. 1994).

Whether this Office files a civil lawsuit and seeks monetary fines for APRA violations requires the consideration of the totality of the evidence. *See e.g., Moses Afonso Ryan, Ltd. v. City of East Providence*, PR 17-11B. Applying this standard in this case, we decline to file a lawsuit. We have reviewed the City’s supplemental response and the evidence presented, and acknowledge the City’s concession that its “response to Complainant’s request could have been worded more clearly” and Ms. Pare’s representation that her 2018 responses to the Complainant “should have stated at the time that no such records existed.” Although a close question, we decline to find that the violation in this instance was willful and knowing, or reckless. We also note that our review has found no other recent APRA violations by the City involving the same issue.

Nonetheless, we note that the City’s delay in stating that no responsive records exist caused the expenditure of significant time and resources on the part of the parties, and this Office, that could have been avoided if the City had simply and clearly stated that no additional responsive records existed when responding to the request, or when responding to this Complaint. The City is on notice that the conduct discussed herein violates the APRA and may serve as evidence of a willful and knowing, or reckless violation in any similar future situation.

Conclusion

Although this Office has determined that it will not file suit in this matter, nothing within the APRA prohibits the Complainant from filing an action in Superior Court seeking injunctive or declaratory relief. *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