State of Rhode Island and Providence Plantations

OFFICE OF THE ATTORNEY GENERAL
150 South Main Street • Providence, RI 02903
(401) 274-4400

Peter F. Neronha
Attorney General

VIA EMAIL ONLY

May 29, 2020
PR 20-48

Mr. Charles L. Payne
Ms. Emily Calandrelli

Peter F. Skwirz, Esquire
Assistant Town Solicitor, Town of Barrington

Re: **Payne, et al. v. Town of Barrington**

Dear Mr. Payne, Ms. Calandrelli and Attorney Skwirz:

The investigation into the Access to Public Records Act ("APRA") complaint filed by Mr. Charles Payne and Ms. Emily Calandrelli ("Complainants") against the Town of Barrington ("Town") is complete. For the reasons set forth herein, we do not find that the Town violated the APRA.

Background & Arguments

The Complainants submitted a multi-part APRA request to the Town seeking numerous records related to a purported change in the timing and method of tax assessments and property valuations:

> 1. Barrington's Property Valuation plan and all updates for the preceding three (3) years;
> 2. Barrington Tax Assessors list of ratable property and valuations for the year 2019, which was produced on or before December 31, 2018;
> 3. Any and all forms of notice given to taxpayers related in any way to the change published generally or directed to individuals, including both before and after the change occurred;
> 4. Records showing date, method of communication and subject matter of any and all communications about the change within the Town's administration, between members of the administration and others including but not limited to citizens, attorneys, and the Town's elected officials;
> 5. Records of any and all meetings where the change was discussed or considered;
> 6. Any and all records related to the timing and rationale for the change;

> 7. Any and all records and communications related to the tax assessor's meeting(s), discussions or other interactions with attorneys representing taxpayers and/or taxpayer's themselves (including me) regarding the change; and
> 8. Any and all other records that relate to the change that might allow a better understanding of what has transpired.

The Town responded to this request by indicating that no responsive records existed for Parts (1), (5), (6) and (7), and that the Town's "tax roll" responsive to Part (2) was publicly available for viewing and/or downloading on the Town's website (the Town provided the link). As to Part (3), the Town requested prepayment in the amount of $1,785 for an estimated one-hundred twenty (120) hours to search, retrieve, and review potentially responsive documents. The Town exempted any records responsive to Part (4) pursuant to the client/attorney privilege exemption, R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). Finally, the Town indicated that Part (8) was "too vague and broad for the Town to conduct a search," and that notwithstanding this objection, no responsive records exist. The Complainants appealed the Town's response to the Town Manager, who affirmed the initial response.

Dissatisfied with the Town's response, the Complainants filed a complaint with this Office identifying three specific alleged violations by the Town: (1) it set "exaggerated and untenable" prices to obtain records; (2) the Town claimed the client/attorney privilege exemption and failed to identify any specific records it claimed were protected; and (3) the Town claimed no records existed for certain requests when "we know that some of these requested records do exist, and we know additional such records must exist as they are required by law and/or regulation."

Assistant Town Solicitor, Peter F. Skwirz, Esquire, provided a substantive response on behalf of the Town, which included an affidavit from Tax Assessor Michael Minardi and all withheld documents for this Office's *in camera* review. The Town maintains that its initial response to the Complainants was proper because the Town does not maintain records responsive to Parts (1), (5), (6), (7), and (8), and moreover it provided a link to the only responsive document to Part (2). The Town also argues that its $1,785 prepayment request to search, retrieve, and review any documents responsive to Part (3) of Complainant's request was reasonable insofar as the Town would have to manually search 450 electronic files categorized by property address to print each responsive notice and "review for any confidential information and prepare for delivery." The Town next argues that the only documents it maintains responsive to Part (4) are exempt from disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). The Town maintains that these withheld documents are email exchanges between the Town Manager and/or the Tax Assessor and the Town Solicitor's office, as well as one memorandum drafted by the Town Solicitor to the Town Manager and Tax Assessor providing legal advice on the proposed tax adjustments. Finally, the Town maintains that Part (8) of the request "was too vague to allow a proper response" and "it is the requestor's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome and to enable the searching agency to determine precisely what records are being requested."

In responding to this Complaint, the Town provided an "Excel spreadsheet prepared by the Tax Assessor used in conducting his adjustments to the valuations." As its reasoning for not producing

this spreadsheet in response to the request, the Town states "this spreadsheet was not responsive to the original request," but the Town is "providing this spreadsheet now in the interest of full transparency."

We acknowledge Complainants' rebuttal.

In a supplemental submission, Complainants contend that a document responsive to Part (1) of their request for "Barrington's Property Valuation plan and all updates for the preceding three (3) years" does in fact exist based on representations made by a Board member at the March 3, 2020 meeting of Barrington's Board of Assessment Review. Complainants argue that the Board member's references to the "manual for tax assessment" at this meeting is evidence that the Town improperly stated that it did not maintain documents responsive to Part (1) of their request. Upon inquiry from this Office, the Town provided a supplemental response and affidavit from Mr. Minardi stating that the "document referenced by the Board member *** is a 2014 document titled the 'Town of Barrington Assessing Department Procedures and Standards for Residential Property Valuations'" ("Procedures Document"). The Town maintains that Complainants "did not ask for the Procedures Document, but instead requested a document of a different name" and that this document does not fit the Complainants' request for "Barrington's Property Valuation plan and all updates for the preceding three (3) years." The Town also indicates that this Procedures Document is available for public viewing and downloading on the Town's Tax Assessor website. Based on this Office's independent research, the Procedures Document is available on the Town's Tax Assessor website and is marked as last revised on May 16, 2014.

Relevant Law & 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.

- Town's Request for Prepayment for Part (3)

The APRA provides that "[a] reasonable charge may be made for the search or retrieval of documents" and expressly allows the responding public body to require prepayment for "costs properly charged." R.I. Gen. Laws §§ 38-2-4(b); 38-2-7(b). In the APRA context, the Rhode Island Supreme Court has explained that 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." *DARE v. Gannon*, 819 A.2d 651, 661 (R.I. 2003).

In connection with Part (3) of Complainants' request for "[a]ny and all forms of notice given to taxpayers related in any way to the change published generally or directed to individuals, including both before and after the change occurred," the Town sought prepayment in the amount of $1,785.00 "for search/retrieval of these documents" based on an estimate of 120 hours. The Town indicated that the responsive documents were retained in electronic format "integrated into the Town's electronic file system," categorized by property address, and that each notice would need to be manually searched for in 450 separate files, printed, and then reviewed. The Town attested that for a single file it took a Tax Assessor Department employee "approximately 16 minutes to

locate the property, locate the file, locate the document, print the document, and place it into a binder *** [t]herefore [the Town] calculated that fulfilling this request would take approximately 120 hours of staff time." Other than Complainants' conclusory assertion that this amount is "exaggerated and untenable," they do not dispute the Town's description of the search and retrieval process and the time that would be required to fulfill the request.[1] 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. Additionally, if actual search and retrieval time is less than the prepayment amount, the excess prepayment must be reimbursed. *See* R.I. Gen. Laws § 38-2-4(b). While the amount of dollars and hours estimated is significant, Complainant's APRA request is broad and, the evidence indicates, would implicate hundreds of responsive documents. Based on the evidence presented, including the breadth of Complainants' request, we conclude that the Town's estimate did not violate the APRA.

- Records Related to Attorney-client Relationship (R.I. Gen. Laws § 38-2-2(4)(A)(I)(a)) Responsive to Part (4)

The APRA states that, unless exempt, all records maintained by a 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). The APRA 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 Providence Journal v. Office of the Governor*, PR 20-08. 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 or her 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. *See id.*

Based on our *in camera* review, all the documents withheld in response to Part (4) of the request, which consist of two email threads and a legal memorandum,[2] were either sent to or generated by

[1] The Complainants assert that the Town could have responded to this request by providing them a list of the names and addresses of recipients and a sample of the different types of notices the Town sent. However, that was not how the request was initially framed and the Town's response notified Complainants that the prepayment estimate was based on searching for individual notices that were sent to taxpayers. *See Harris v. Providence*, PR 17-03 ("it is the requestor's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested" (quoting *Assassination Archives and Research v. Central Intelligence Agency*, 720 F. Supp. 217, 219 (D.D.C. 1989))). The Complainants are free to submit a new, modified request to the Town if they are not already now in possession of the documents they seek.

[2] The Complainants argue that there is a public interest in this memorandum under the public versus privacy interests balancing test. *See* R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). However, that test is inapplicable because the Town withheld documents responsive to Part (4) on the basis of the attorney-client relationship exemption, not the privacy interest exemption. The Complainants also argue that the memorandum was responsive to other parts of their request besides Part (4), and that

Town legal counsel and relate to an attorney/client relationship. The documents contain legal analysis and communications related to requests for legal guidance. As such, we conclude that these correspondences relate to the attorney-client relationship. Moreover, no reasonably segregable portion is available for disclosure. *See* R.I. Gen. Laws § 38-2-3(b). Accordingly, we conclude that the documents withheld from disclosure under Part (4) relate to a "client/attorney relationship" and, thus, the Town did not violate the APRA by withholding these documents. *See* R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).[3]

However, one (1) email dated February 11, 2019 from Tax Assessor Minardi to Town Manager Cunha appears in an email chain and does not itself include legal counsel. This email appears responsive to the APRA request and does not appear to have been either produced to the Complainants or withheld under any other exemption. Although the forwarding of this email to legal counsel comes within the ambit of the attorney-client relationship exemption, this single email was also independently responsive to the APRA request, before it was forwarded to legal counsel. Accordingly, it appears that this email between Mr. Minardi and Mr. Cunha should have either been produced or withheld pursuant to a different exemption (if applicable). We have questions whether failing to produce this email in its original form, before it was forwarded to an attorney, or to cite a basis for exempting it independent of the attorney-client exemption, constitutes a violation of the APRA. The APRA provides that "except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body." R.I. Gen. Laws § 38-2-7(a). The Town is directed within ten (10) business days to produce this email to Complainants or, if the Town believes that this email is exempt from disclosure under the APRA, to present argument regarding why the email is exempt and, if applicable, why the exemption should not be considered waived. If the Town contends that this email is subject to the attorney-client exemption, the Town should provide evidence to that effect. This Office should be

---

the Town waived any right to exempt the memorandum because the Town did not exempt the memorandum in response to the other parts of the request. Given the overlapping, broad nature of the requests at issue here, the fact the memorandum was responsive to Part (4), and the fact that the Town exempted documents responsive to Part (4), we do not find that the Town waived this exemption.

[3] The Complainants contend that with respect to the withheld records, the Town should have identified "(a) when each of these records was created, (b) by whom it was created, (c) where it is stored and (d) with whom it has been shared and/or who has access to it." However, the APRA does not require a public body to provide all these categories of detailed information about withheld documents. Rather, the APRA requires that if a public body denies access to a record, it must do so "in writing giving the specific reasons for the denial[.]" R.I. Gen. Laws § 38-2-7(a). In responding to the request, the Town indicated that the documents being withheld pertained to an attorney-client relationship and that was the reason for the denial. The Complainants' administrative appeal to the Town did not allege that the Town had failed to provide sufficient information about the withheld documents or request this additional detailed information that Complainants now argue should have been provided. Although public bodies are encouraged to provide as much detail as possible regarding withheld documents, in these particular circumstances, we do not find that the Town violated the APRA by not providing the details identified by Complainants in their Complaint.

copied on any correspondence to the Complainants. Within ten (10) business days of the Town's response, if the Complainants believe that the Town violated the APRA by withholding this portion of the document as described above – or if the Complainants believe that the Town's response as directed in this finding violates the APRA – the Complainants are free to file a supplemental complaint.

- Town's Assertion that No Other Responsive Records Exist

The APRA does not require "a public body to reorganize, consolidate, or compile data not maintained by the public body." R.I. Gen. Laws § 38-2-3(h). "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).

The undisputed evidence reveals that the Town does not maintain records responsive to Parts (5), (6), and (7) of Complainants' request.[4] The Complainants do not dispute the Town's contention, supported by an affidavit, that no records exist that are responsive to these parts; rather, the Complainants argue that the Town *should* maintain responsive documents, including because some such documents are "required by Rhode Island law." Whether documents *should* be maintained and whether documents *are* maintained are two different questions and, pursuant to the APRA, this Office's sole focus is whether responsive documents *are* maintained by a public body. Complainants do not present, nor do we find, any evidence to establish that the Town has documents responsive to Parts (5), (6) and (7) that it refused to provide. Indeed, with regard to Part (7), the Complainants acknowledge that "we are not able to determine whether any such records exist." Accordingly, we find no violation in connection with the Town's response to Parts (5), (6), and (7).

In connection with Part (1) of Complainants' request, Complainants argue that the "manual for tax assessment" (what the Town identifies as the Procedures Document) discussed at the March 3, 2020 Board of Assessment Review "is exactly the type of document we sought in our Request #1 for the Town's property valuation plan." Complainants contend that "[p]roperty 'valuation' and 'assessment' are terms of art that are used interchangeably by tax assessors. 'Plan' or 'manual,' this is what we requested and what taxpayers needed to understand their tax appeals." The Town disputes this document is responsive to Part (1) of the request because Complainants' request was

[4] The Town's response to the Complaint explained that its response to the request "only pertained to communications and meetings that occurred prior to the valuation updates recently implemented, as only such communications and meetings went into the consideration of implementing the valuations." As such, the Town did not consider documents post-dating the valuation change as responsive and indicated that in any event, that such documents (which the Town does not specifically identify) would likely be exempt. Although we question the Town's interpretation of the request, we also note the broad nature of the multi-part request and, in these circumstances, cannot say that the Town's interpretation was unreasonable. It is unclear whether Complainants take issue with this interpretation and the issue was not specifically presented in the initial complaint. To the extent this interpretation is inconsistent with the Complainants' intent, they are of course free to submit a new request for documents post-dating the valuation change.

for a "Property Valuation Plan," not the Procedures Document, and the Procedures Document was developed in 2014, not within "the preceding three (3) years" as specified in the request.

We need not resolve this discrepancy. This Office has previously determined it unnecessary for us to consider whether a public body violated the APRA where a complainant receives the subject documents after filing an APRA complaint and where there is no evidence of a willful and knowing or reckless violation. *See Lamendola v. East Greenwich School Committee*, PR 20-10. The reason for this conclusion is because, even assuming a violation occurred, the APRA only provides for two types of remedies and, as explained below, neither remedy would be appropriate in these circumstances. *See* R.I. Gen. Laws § 38-2-9(d).

Here, the undisputed evidence demonstrates that the Complainants now have the Procedures Document. As such, any request for the first type of relief the APRA provides (injunctive relief), i.e., an order requiring the production of the allegedly wrongfully withheld document, is moot. As for the second type of relief the APRA provides (civil penalties for a willful and knowing, or reckless, violation), we were provided with no evidence that the Town's initial denial, even assuming it was improper, would have constituted a willful and knowing, or reckless, violation that would warrant civil penalties. *See* R.I. Gen. Laws § 38-2-9(d). Although Complainants assert that the Town's initial failure to identify the Procedures Documents as responsive to their request was "particularly egregious," no evidence has been presented to support this contention and the Town maintains that it did not consider the document responsive. Considering the issues and arguments presented by the Town, we cannot find that the withholding represented a willful and knowing, or reckless, violation. Also, it is undisputed that the Procedures Document was available for public viewing and or downloading on the Town's website. As such, this Office declines to further address the merits of this allegation.

- The Excel Spreadsheet

In responding to this complaint, the Town provided an Excel spreadsheet entitled "2018 Sales for Mail Merge," which lists "the properties sold in Town in the year," including the sale price, the assessed value, and the difference between those figures. The Town maintains that its counsel only learned of the existence of this spreadsheet "since the Complainants' APRA complaint was filed," and this spreadsheet was not responsive to any of the eight categories of documents requested by the Complainants, but that it provided this spreadsheet to this Office "and to the Complainants now in the interest of transparency."

On rebuttal, the Complainants argue that "[t]he town violated the APRA when it refused to produce a certain Excel spread sheet that clearly falls within our original request." Complainants maintain that this Excel spreadsheet is responsive to Parts (3), (4) and (8) of their request.

As noted above, this Office has previously determined it unnecessary for us to consider whether a public body violated the APRA where a complainant receives the subject documents after filing an APRA complaint and where there is no evidence of a willful and knowing or reckless violation. *See Lamendola v. East Greenwich School Committee*, PR 20-10. Our above analysis applies equally in this context. We also question whether the excel spreadsheet listing properties sold is

responsive to "3. [a]ny and all forms of notice given to taxpayers related in any way to the change published generally or directed to individuals," "4. [r]ecords showing date, method of communication and subject matter of any and all communications about the change within the Town's administration," or "8. [a]ny and all other records that relate to the change that might allow a better understanding of what has transpired."

Conclusion

Although the Attorney General will not file suit in this matter at this time, nothing within the APRA prohibits an individual from instituting an action for injunctive or declaratory relief in Superior Court. *See* R.I. Gen. Laws § 38-2-8(b). We will keep this file open pending the Town's response regarding the single email discussed in this finding.

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