



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

December 09, 2019

PR 19-22

Mr. Richard Finnegan

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

Re: Finnegan v. Town of Scituate

Dear Mr. Finnegan and Attorney Petrarca:

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

Background and Arguments

On or about July 24, 2019, the Complainant made the following APRA request to the Town:

[1] Email mentioned in Town Council President James Brady, Jr. July 24, 2019 Press Release, [2] the forwarded email to Town Council Vice President Abbie Groves mentioned in Vice President Groves['] July 24, 2019 Press Release, [3] any and all documents concerning the Saturday evening emergency meeting on July 20, 2019 of the Scituate Town Council including text messages or email between or to any member(s) of the Scituate Town Council. [4] Any and all documents to date concerning the issue addressed in referenced [sic] to the emergency meeting.

The referenced e-mails concern a correspondence sent from the Police Chief to the Town Solicitor on July 19, 2019, and a related e-mail sent from the Town Solicitor to the members of the Town Council (and one other Town official) on July 20, 2019.

The Town timely replied to the APRA request, asserting that documents related to the first and second categories were exempt from public disclosure pursuant to R.I. Gen. Laws §§ 38-2-

2(4)(A)(I)(a), (b). With respect to categories 1 and 2, the Town provided the Complainant with the responsive emails, but in heavily redacted form. Additionally, the Town provided some additional unredacted documents relating to category 3 as a “partial response to your request;” and the Town asserted that documents encompassed within category 4 were included in the documents responsive to categories 1 through 3 that were provided as a “partial response to your request.” The Complainant filed the instant APRA complaint alleging that the Town violated the APRA by making improper redactions and by not providing some of the requested documents.

In its response, the Town claimed that the heavily redacted e-mails were, among other things, privileged attorney-client communications. The Town also attached its August 2, 2019 response to the Complainant’s APRA request, which asserts that the Town’s partial response represented the first free hour of search and retrieval and that it estimated an additional two hours of search and retrieval – representing \$30.00 – were required to complete the APRA request. The Town requested prepayment prior to engaging in additional search and retrieval and there is no evidence that the Complainant provided prepayment. In its response, the Town also provided us with unredacted copies of the emails that were responsive to categories 1 and 2 for our *in camera* review. We acknowledge the Complainant’s rebuttal.¹

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.

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). The APRA exempts, among other documents, “all records relating to a client/attorney relationship[.]” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

At the very least, records “relating to a client/attorney relationship,” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a), encompass any documents that would be subject to the attorney-client privilege. *See also* R.I. Gen. Laws § 38-2-2(4)(E). 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,

¹ The Complainant’s rebuttal raises additional allegations that were not present in the Complaint relating to the search and retrieval charge assessed by the Town. Consistent with our long-standing practice and acknowledgment letter, those additional allegations will not be addressed. As explained in our August 7, 2019 acknowledgment letter (and addressed in numerous prior findings), “[y]our rebuttal ... should not raise new issues that were not presented in your complaint.” *See also Save the Bay v. Department of Environmental Management*, PR 15-19. The reason for this limitation is because a public body’s response is limited to the issues raised in the Complaint, and for this reason, a public body has no opportunity to address these newly raised allegations.

as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure. *Id.*

In *Callahan v. Nystedt*, the Rhode Island Supreme Court identified the elements that must be satisfied in order for the attorney-client [privilege] to apply:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. 641 A.2d 58, 61 (R.I. 1994).

Here, the e-mails at issue fall within the attorney-client privilege, and thus also relate to the attorney-client relationship. The first e-mail, for instance, 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. 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). Our conclusion is supported through the second responsive e-mail. Again, while the *in camera* nature of our review inhibits full discussion, it is clear to us that after the Town Solicitor received the first e-mail, the Town Solicitor forwarded the e-mail chain to the Town Council members (and one other Town employee) along with the Town Solicitor’s legal advice. This email also falls within the purview of R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). We have been presented with no evidence that either e-mail has been disclosed outside the attorney-client relationship. Because we conclude that the responsive emails are exempt from disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a), we need not determine whether these same e-mails are also exempt pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

Lastly, although the Complainant suggests that certain responsive documents have not been provided, the Complainant does not identify these documents and the undisputed evidence reveals that the Town requested prepayment for completing search and retrieval. No evidence has been presented that prepayment was tendered. For these reasons, we find no violations.

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

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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/ Michael W. Field
Michael W. Field
Assistant Attorney General