



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

April 28, 2020
PR 20-38

Mr. Eli Sherman

Joseph F. Rodgers, III, Esquire
Legal Counsel, Joint Committee on Legislative Services

Re: Sherman v. Joint Committee on Legislative Services

Dear Mr. Sherman and Attorney Rodgers:

We have completed the investigation into the Access to Public Records Act (“APRA”) complaint filed by Mr. Eli Sherman (“Complainant”) against the Joint Committee on Legislative Services (“JCLS”). For the reasons set forth herein, we find that the JCLS violated the APRA by failing to indicate that it did not possess the documents requested.

Background

The Complainant submitted an APRA request to the JCLS seeking “[a] copy of the list of financial issues and alleged activities about the R.I. Convention Center provided to House Speaker Mattiello.” The Complainant’s request noted that such a list had been referenced in a news article. The JCLS responded indicating that “such documents are exempt from public disclosure in whole pursuant to R.I.G.L. § 38-2-2(4)(M) which exempts ‘correspondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.’” The JCLS also stated that “in balancing the privacy rights of an elected official and their communicants with the public’s right to know, we conclude the materials requested are not public records[.]”

The Complainant subsequently filed a complaint with this Office alleging that the JCLS violated the APRA when it improperly cited Exemption (M) as a basis for withholding the requested records and misapplied the privacy balancing test.

The JCLS submitted a substantive response in affidavit form through its legal counsel, Joseph F. Rodgers, III, Esquire. The JCLS maintains that “no document exists [sic] that is responsive to

[Complainant's] request and had there been a document it would have been exempt in whole pursuant to R.I.G.L. § 38-2-2(4)(M)." Attorney Rodgers also provided an affidavit attesting that "[t]he JCLS is not in possession of any document that satisfies [Complainant's] request and therefore [is] unable to produce same." The JCLS further explains that although a news article referenced a "list," it did not mean that the list was "an actual physical document." Importantly, the JCLS acknowledges that its response to Complainant should have indicated that it did not possess any responsive documents. The JCLS avers that "[t]he original response to [Complainant] inadvertently failed to cite § 38-2-7(c). This was not done willfully or knowingly but was an oversight while responding to this request."¹

We acknowledge Complainant's rebuttal. The Complainant does not contest the JCLS's representation that it does not maintain a responsive document and does not provide evidence to the contrary. The Complainant does, however, contend that the JCLS's failure to state earlier that no responsive documents exist constitutes a willful and knowing violation.

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 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 JCLS's initial denial of the Complainant's request did not state that JCLS 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 JCLS has provided no such argument in this case. Because the JCLS failed to include a statement in its denial that it did not maintain the requested documents, we find that the JCLS violated the APRA. *See* R.I. Gen. Laws § 38-2-7(c).

As the record before us, including the undisputed representations and affidavit from the JCLS, establishes that the JCLS does not maintain responsive documents, we find no violation in connection with JCLS not producing documents in response to the request. *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).

¹ In a footnote, the JCLS opted to "raise but not argue" that the speech and debate clause in Article VI, Section 5 of the Rhode Island Constitution confers on legislators a privilege from inquiry into their legislative acts. Since the JCLS deliberately chose to not present argument or analysis about this issue in the context of this complaint, we do not consider the issue properly before us.

Conclusion

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the complainant, requesting “injunctive or declaratory relief.” *See* R.I. Gen. Laws § 38-2-8(b). Additionally, a court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body * * * found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter * * *See* R.I. Gen. Laws § 38-2-9(d).

Given JCLS’s undisputed representation that it does not maintain responsive documents, injunctive relief is not appropriate. We also do not find sufficient evidence in the record to demonstrate that the violation was willful and knowing, or reckless. JCLS has submitted an affidavit attesting that its failure to indicate that it had no responsive documents was an “oversight” that did not result from negligence or willfulness. We were not presented with evidence, nor do we find evidence, to establish the instant violation was willful and knowing, or reckless. There are also no recent similar violations against the JCLS. This finding serves as notice to the JCLS that its conduct violated the APRA and may serve as evidence in a future similar situation of a willful and knowing, or alternatively reckless, violation.

Please be advised that we are closing this file as of the date of this letter. 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).

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

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