



State of Rhode Island and Providence Plantations

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**VIA EMAIL ONLY**

May 8, 2020

PR 20-41

Mr. Richard Finnegan

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

**RE: Finnegan v. Town of Scituate**

Dear Mr. Finnegan and Attorney Petrarca:

We have completed an 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 violated the APRA by not providing for an administrative appeal.

**Background and Arguments**

The Complainant requested a copy of a document that Town Councilman Timothy McCormick read from during a Town Council meeting. The Town responded: “Please see Councilman McCormick’s response in the attached document.” The Town’s response included an attached email chain between Town Clerk Gloria Taylor and Councilman McCormick where Ms. Taylor forwarded the Complainant’s request to Councilman McCormick. Councilman McCormick responded that his comments at the meeting “came from my personal notes that I prepared ahead of the meeting. It’s my understanding that my personal notes are exempt from public access.”

The Town’s response concluded with the following:

“Since the Town does not have a Chief Administrative Officer under APRA, no appeal to the local chief administrative officer under § 38-2-8(a) is available. As such, if you are aggrieved by this decision, you may file a complaint with the Rhode Island Attorney General pursuant to § 38-2-8(b).”

When the Complainant asked for further clarification of the reason for nondisclosure, the Town forwarded an email from Councilman McCormick stating, “It’s my understanding that my personal notes are exempt from public disclosure pursuant to RI Law 38-2-2(4K) [sic].”

The Complainant filed the instant complaint, alleging that the Town improperly denied his request by failing to cite the statutory exemption, thus waiving the exemption. The Complainant also alleges that the requested notes constitute a public record and that the Town failed to indicate the procedures for appealing the denial.

In a substantive response that includes affidavits from Ms. Taylor and Councilman McCormick, the Town maintains that nondisclosure of Councilman McCormick’s personal notes was permissible. Although the Town acknowledges that it did not initially cite the specific statutory exemption, the Town nonetheless maintains that it provided sufficient reason for the denial to the Complainant. The Town also contends that the personal notes at issue were not “submitted” at the public meeting and are thus exempted from disclosure by R.I. Gen. Laws § 38-2-2(4)(K). Finally, the Town maintains that its appeal language comported with the APRA’s requirements because the Town does not have a chief administrative officer. The Town also provided a copy of the withheld notes for our *in camera* review.

We acknowledge the Complainant’s rebuttal.

### Relevant Law and Finding

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.

#### *1. Alleged Failure to Cite the Statutory Exemption*

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). 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).

This Office has previously found that general denials of access and statements that the requested records are “not public information” are insufficient to comply with the APRA’s mandate. *See Constantino v. Smithfield School Committee*, PR 13-24. However, nothing in the APRA requires a denial to cite a specific APRA exemption, although doing so provides additional specificity. *See Piskunov v. City of Cranston*, PR 16-41.

Here, the Town denied access to the document by referring an attached email in which Councilman McCormick responded that his comments at the meeting “came from my personal notes that I prepared ahead of the meeting. It’s my understanding that my personal notes are exempt from public access.” This language generally corresponds with the APRA exemption found at R.I. Gen.

Laws § 38-2-2(4)(K), which exempts “[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products[.]”

Although the Town’s response could have been clearer, we find that the Town’s response generally referencing the language of Exemption (K) did not violate the APRA. *See* R.I. Gen. Laws § 38-2-7(a). Fairly read, the Town’s response conveyed that it was denying the request because the requested records constitute notes that it contends are exempt from the definition of public records. We found a similar type of response to satisfy the APRA’s requirements in *Piskunov*, PR 16-41, where the City likewise did not cite the specific statutory provision but nonetheless provided a specific reason for the denial that tracked the applicable exemption language. We also note that when the Complainant asked for further clarification, the Town indicated that it was withholding the document under Exemption (K). We find no violation. Nonetheless, we encourage public bodies to cite and explain the specific APRA exemption(s) being relied upon with as much detail as possible and public bodies that do not cite the specific APRA exemption do so at their own peril.

## *2. Allegation that the Notes Are Public Records*

The Complainant also argues that the requested notes constitute public records because they were used in the transaction of official business. *See* R.I. Gen. Laws § 38-2-2(4) (“Public record” . . . shall mean all documents . . . made or received . . . in connection with the transaction of official business by any agency.”). The APRA specifically exempts from the definition of “public records,” however, “[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products . . . provided, however, any documents submitted at a public meeting of a public body shall be deemed public.” R.I. Gen. Laws § 38-2-2(4)(K).

The Town’s substantive response argued that the withheld document consists of a Councilmember’s personal notes that were not “submitted” during the Town Council meeting. In his rebuttal, the Complainant does not dispute that the withheld document constitutes “notes” under Exemption (K), but instead contends that the notes were “submitted” at the meeting because “Councilman McCormick put [their] contents forward for consideration.”

Based upon the lack of disagreement among the parties, there appears to be no dispute that the withheld document constitutes “notes” under Exemption (K). For this reason, we need only examine whether these “notes” were “submitted” at a public meeting. We have previously noted that “R.I. Gen. Laws § 38-2-2(4)(K)’s mandate that documents *submitted* at a public meeting [are public] is not implicated when a public body ‘discusses’ a particular subject matter.” *See The Providence Journal v. Rhode Island Office of General Treasurer*, PR 14-15 (emphasis in original); *see also Flaherty v. Rhode Island Department of Transportation*, PR 15-22 (finding document discussed at public meeting was not “submitted” under Exemption (K)).

Here, although the Councilmember may have read off the notes during a meeting, we were not presented with any evidence that the Councilmember’s personal notes were “submitted” at the public meeting. *See The Providence Journal*, PR 14-15 (defining “submitted” as “to present for the approval, consideration, or decision of another others” or as “to offer for consideration,

examination, a decision etc.”). Indeed, Councilman McCormick avers that he did not “introduce or share the specific contents of the document with any member of the Town Council” and that he did not “open, file or otherwise distribute said document with the Town Clerk, her office or any other Town official.” Accordingly, based on the undisputed facts before us, we find that the withheld personal notes were not “submitted” at a public meeting. We find no violation.

*3. Alleged Failure to Indicate the Procedures for Appealing the Denial*

Lastly, we turn to the Complainant’s allegation that the Town failed to indicate the procedures for appealing its denial.

Under the APRA, a public body denying a request for records must “indicat[e] the procedures for appealing the denial.” R.I. Gen. Laws § 38-2-7(a). The APRA provides that an individual denied the right to inspect a record may file an appeal with the chief administrative officer who “shall make a final determination whether or not to allow public inspection within ten (10) business days after the submission of the review petition.” R.I. Gen. Laws § 38-2-8(a). The “chief administrative officer” means “the highest authority of the public body.” R.I. Gen. Laws § 38-2-2(2). Independent of the administrative appeal to the “chief administrative officer,” an individual can also file a complaint with the Office of the Attorney General. *See* R.I. Gen. Laws § 38-2-8(b).

Here, the Town’s response to the Complainant’s request included appeal language but indicated that the Town “does not have a Chief Administrative Officer under APRA, no appeal to the local chief administrative officer under § 38-2-8(a) is available.”

We have been provided no factual evidence or legal arguments to support the Town’s conclusion. Specifically, we note that the APRA’s plain language contemplates that an individual whose request was denied can appeal to a chief administrative officer who can review the APRA determination and make “a final determination on whether or not to allow public inspection[.]” *See* R.I. Gen. Laws § 38-2-8(a). The APRA defines “chief administrative officer” as simply “the highest authority of the public body.” R.I. Gen. Laws § 38-2-2(2). Thus, the APRA specifically contemplates that an aggrieved person may file an administrative appeal. Indeed, other APRA provisions likewise contemplate that each public body will have a “chief administrative officer.” *See* R.I. Gen. Laws § 38-2-3.16 (“[T]he chief administrator of each agency and each public body shall state in writing to the attorney general that all officers and employees who have the authority to grant or deny persons or entities access to records under this chapter have been provided orientation and training regarding this chapter”).

To be clear, we make no determination for the Town, or the Town Council, who should fill this role. And, depending on who a public body identifies as the “chief administrative officer,” it is entirely possible that the person denying an APRA request may also be the “chief administrative officer.” While a public body has some leeway to determine how it should fulfill its statutory obligation, it may not do what the Town did here: assert that it has no “chief administrative officer” and as such, an aggrieved person may not file an APRA administrative appeal with the public body that denied the APRA request. By failing to provide a procedure for appealing an APRA denial, the Town violated the APRA.

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). 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).

We have determined that the Town violated the APRA by not providing an option for an administrative appeal to the chief administrative officer. Injunctive relief is not appropriate here because the Complainant submitted a complaint to this Office and this Office has already reviewed the Town’s substantive response. We also do not find sufficient evidence of a willful and knowing, or reckless, violation. Our conclusion is supported by the fact that the Town does not have any recent similar prior violations. Nonetheless, this finding serves as 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.

Although the Attorney General will not file suit in this matter, 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). 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/ Sean Lyness

Sean Lyness  
Special Assistant Attorney General