



State of Rhode Island and Providence Plantations

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**VIA EMAIL ONLY**

May 11, 2020

PR 20-44

Michael J. Grygiel, Esquire  
Greenberg Traurig, LLP

Nicholas Poulos, Esquire  
Assistant City Solicitor, City of Providence

**RE: Amaral v. City of Providence**

Dear Attorneys Grygiel and Poulos:

We have completed an investigation into the Access to Public Records Act (“APRA”) complaint filed by Attorney Michael Grygiel on behalf of *The Providence Journal* reporter Brian Amaral (“Complainant”) against the City of Providence (“City”). For the reasons set forth herein, we find that the City violated the APRA.

**Background and Arguments**

The Complainant requested the following, in pertinent part, from the City:

- “3. Any written communication between JUMP, Social Bicycles, Uber or their representatives about the bikes’ use in crimes or their being compromised, damaged or vandalized.
  
4. Any written communication between JUMP and the City of Providence showing any agreement to pay extra money for the additional 400 bikes that came in earlier this year, and records reflecting if those amounts were paid.”

The City responded that it did not maintain documents responsive to request 4. With respect to request 3, the City provided a redacted email along with its attachment,<sup>1</sup> but withheld three other email threads under R.I. Gen. Laws § 38-2-2(4)(B).

The Complainant presents two issues: (1) whether the City maintained records responsive to request 4; and (2) whether the three withheld email threads were properly withheld under R.I. Gen. Laws § 38-2-2(4)(B).

The City maintains the propriety of its response. It first avers that it does not maintain any records responsive to request 4 because no such payment or agreement to pay existed. It next contends that the documents it withheld in connection with request 3 were properly withheld under R.I. Gen. Laws § 38-2-2(4)(B) because the responsive information in the emails is not the kind that would customarily be released to the public and because JUMP believed that the emails were privileged and confidential.

The City also provided the three withheld email threads for our *in camera* review.

The Complainant did not file a 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. Whether the City Maintained Records Responsive to Request 4

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). The APRA “does not require a public body to disclose records that do not exist or that are not within its custody or control[.]” *Lopez v. City of Providence*, PR 20-03.

Here, request 4 sought communications “between JUMP and the City of Providence showing any agreement to pay extra money for the additional 400 bikes” as well as “records reflecting if those amounts were paid.” The City avers that it does not maintain responsive records because no such payment or agreement to pay existed regarding the subject matter of the request. This is supported by an affidavit from City Director of Special Projects in the Department of Planning and

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<sup>1</sup> The City asserts that it redacted certain personal information from the documents it produced pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). The Complainant does not take issue with those redactions.

Development, Martina L. Haggerty. It is also supported by a Memorandum of Understanding between the City and JUMP that the City provided.

The Complainant did not offer any evidence or argument to dispute the City's averments. Indeed, the Complainant requested this Office to review this issue primarily to "ensure that the City does not, in fact, maintain custody or possession of such documents or materials." Based on the undisputed evidence, we find that the City did not maintain records responsive to request 4. Therefore, the City did not violate the APRA by so indicating. *See* R.I. Gen. Laws § 38-2-7(c). We find no violation.

## 2. Whether the Three Email Threads Were Properly Withheld Under Exemption (B)

We turn next to the three email threads responsive to request 3 that were withheld under R.I. Gen. Laws § 38-2-2(4)(B). The APRA provides that all records maintained by public bodies are subject to public disclosure unless the document falls within one of the twenty-seven (27) enumerated exemptions. *See* R.I. Gen. Laws § 38-2-2(4)(A)-(AA). Among the records exempt from disclosure are "[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature." R.I. Gen. Laws § 38-2-2(4)(B).

We recently detailed the contours of Exemption (B) in *Finnegan v. Scituate Board of Canvassers*, PR 20-17. We need not repeat that analysis but will instead summarize it. In *Providence Journal Co. v. Convention Center Authority*, 774 A.2d 40 (R.I. 2001) the Rhode Island Supreme Court adopted the test set forth in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). Our Supreme Court explained that with respect to financial or commercial information provided to the government on a voluntary basis, such information is exempt from disclosure "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Convention Center Authority*, 774 A.2d at 47.<sup>2</sup> We also noted that Exemption (B) serves the policy aims of ensuring that the government receives necessary information so that it can make informed decisions and protecting the individual submitting such information from competitive disadvantage if it were to be disclosed. *Finnegan*, PR 20-17.

Here, the City withheld three email threads between City employees and JUMP employees. Based on our *in camera* review, we observe that large portions of the emails do not pertain to the subject matter of request 3. Not only are these portions of the emails nonresponsive, but they also contain "commercial information" that was "obtained from a person, firm, or corporation" "on a voluntary basis" and would not customarily be released to the public, thus implicating Exemption (B). As such, we find that the City did not violate the APRA by withholding those portions of the emails that were not responsive to the request, i.e., that were not about "the bikes' use in crimes or their being compromised, damaged or vandalized." *See Markey v. South Kingstown School Department*,

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<sup>2</sup> As the evidence indicates that in both *Convention Center* and this case the information in question was voluntarily provided to the government, we need not consider in the context of this case whether a different test would apply under Rhode Island law for information that an individual or entity was obliged to provide to the government.

PR 18-37 (finding no violation and noting that redactions largely concerned non-responsive information).

We next consider the portions of the email threads that are responsive to Complainant's request for communications between the City and JUMP about the bicycles' use in crime and about damaged or vandalized bicycles.

Although the *in camera* nature of our review limits our ability to comment, we observe that portions of the withheld documents pertain to topics such as vandalism incidents that do not constitute "[t]rade secrets and commercial or financial information," and thus do not fall under Exemption (B). See *Center for Investigative Reporting v. U.S. Customs and Border Protection*, C.A. No. 18-2901, 2019 WL 7372663, at \*13 (D.D.C. Dec. 31, 2019) ("[T]he confidentiality interest cited by the defendants might be too narrow to cover all the withheld information."). We are mindful that "not every bit of information submitted to the government by a commercial entity qualifies for protection[.]" *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Vandalism incidents that reveal little about a company's "basic commercial operations" do not qualify as "commercial information." See *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 136 (D.D.C. 2017) (quotations omitted).

To be sure, if responsive portions of the withheld emails detailed the way that JUMP implemented certain security measures in response to the vandalism incidents, those emails may be "sufficiently instrumental to the compan[y]'s operations to qualify as 'commercial.'" *Id.* at 137 (quotations omitted). But we do not find such information here. And, in any event, as noted by the Complainant, some of the company's response to vandalism has been publicly broadcast, thus casting doubt that the information is of that "kind that would customarily not be released to the public by the person from whom it was obtained." *Convention Center Authority*, 774 A.2d at 47; see also <https://www.wpri.com/news/local-news/providence/jump-pulling-all-bikes-from-providence-temporarily/>.

In sum, our *in camera* review indicates that there are some reasonably segregable portions of the withheld emails that are responsive to the Complainant's request and that do not implicate Exemption (B). By failing to provide access to the reasonably segregable portions, the City violated the APRA. See R.I. Gen. Laws 38-2-3(b) ("Any reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after the deletion of the information which is the basis of the exclusion.").

### 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).

Here, based on the evidence presented, we find no evidence of a willful and knowing, or reckless, violation. We acknowledge the City's assertions that it withheld the emails based on a good faith belief that they were exempt in their entirety. However, this finding serves as notice to the City 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.

Although injunctive relief may be appropriate, we will allow the City twenty (20) business days to respond to the Complainant's APRA request consistent with our finding. The City should review the three email threads and determine the portions that are reasonably segregable and responsive that should be disclosed and provide those portions to the Complainant. Consistent with this finding, the City may redact the portions of the emails that are not responsive to Complainant's request for communications "about the bikes' use in crimes or their being compromised, damaged or vandalized." The City may not assess any charge for the production. *See* R.I. Gen. Laws § 38-2-7(b) ("All copying and search and retrieval fees shall be waived if a public body fails to produce requested records in a timely manner; provided, however, that the production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under section 38-2-4."). If the Complainant does not receive a response as described in this finding, this Office should be notified. If the City wishes, it may contact this Office with specific questions regarding the production and/or redaction of the documents at issue.

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). This file remains open pending the City's response and any response from the Complainant.

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