



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

May 14, 2020
PR 20-46

Mr. Justin Katz

Michael J. Marcello, Esquire
Town Solicitor, Town of Tiverton

Re: Katz v. Town of Tiverton

Dear Mr. Katz and Attorney Marcello:

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

Background

The Complainant submitted an APRA request on October 21, 2019 to the Town seeking “(1) all minutes of all closed/executive sessions of the Tiverton Town Council for all meetings held between November 7, 2006 and October 21, 2019, and (2) all audio recordings for all such sessions.” The Complainant’s request cited to an “Open Government and Release of Executive Session Records Policy [“Policy”] adopted by the Council by a vote of 6-0 on August 26, 2019,” which the Complainant contends unsealed “all closed/executive session minutes.”

The Town responded to the request by asserting that “the records are exempt from disclosure under RIGL 38-2-2(4)(J)” and stating “upon information and belief the requested records may contain the additional categories of information made exempt from disclosure” under various other APRA exemptions listed in the response.¹ The Town also indicated that the August 26, 2019 vote to unseal minutes was made “subject to policy, and all other applicable law” and that pursuant to the Policy adopted on August 26, 2019, any unsealing was subject to an “administrative review period” of “between six months and five years,” depending on the reason for the executive session,

¹ Specifically, the Town listed exemptions (A), (B), (D), (E), (F), (G), (H), (I), (K), (L), (M), (N), (O), (P), (Q), (S), (X), and (Y).

in order to review said minutes, make redactions if necessary, and weigh other potential legal issues. The Town asserted that the records remained sealed during the administrative review period and that on October 28, 2019, the Town repealed the Policy. The Complainant submitted an administrative appeal to the Town Administrator, who reaffirmed the denial.

The Complainant subsequently filed a complaint with this Office, alleging that the Town violated the APRA when it cited Exemption (J) as a basis for withholding the requested records. The Complainant argues that he filed his APRA request on October 21, 2019, after the August 26, 2019 vote to unseal, and that the Policy was not rescinded until October 28, 2019. Thus, the Complainant argues the subject records were unsealed at the time he made his APRA request. He also argues that the Policy was not properly rescinded because not all the voting Town Council members had been properly sworn in.

The Town submitted a substantive response through its Solicitor, Michael J. Marcello, Esquire. Because the Complainant raises allegations with respect to the Town Charter and swearing in new members, the Solicitor submits that these issues fall outside of the authority vested with this Office with respect to the APRA. However, the Solicitor also argues that the minutes were properly withheld under Exemption (J) because the Policy expressly withheld release of audio records, and also kept the subject minutes sealed during an administrative review period, which by any measure had not expired by the time of the request or by October 28, 2019, when the Policy was repealed. The Town's response is supported by an affidavit from Town Clerk Nancy Mello, attesting that from August 26, 2019 when the Policy was enacted to October 28, 2019 when it was repealed, she had not engaged in an administrative review as contemplated by the Policy.

We acknowledge Complainant's rebuttal.

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, 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 other exemptions, the APRA permits nondisclosure of "minutes of a meeting of a public body that are not required to be disclosed pursuant to chapter 46 of title 42." R.I. Gen. Laws § 38-2-2(4)(J). Chapter 46 of title 42 refers to the Open Meetings Act ("OMA"), which permits a public body to vote to keep the minutes of a closed session meeting sealed. *See* R.I. Gen. Laws § 42-46-7(c). The OMA does not contain a sunset provision that properly sealed executive session minutes become unsealed or otherwise become public after the expiration of a certain period of time.

Here, the Town principally invoked Exemption (J) to withhold the requested documents. It is undisputed that the subject records are minutes (and the accompanying audio) from

executive/closed meetings that were sealed pursuant to the OMA. The Complainant does not contest that the APRA permits nondisclosure of sealed executive session minutes. The relevant analysis, then, turns on whether the subject records were effectively unsealed through the promulgation of the Policy such that Exemption (J) is inapplicable.

Here, our review of the Policy indicates that the relevant records were not automatically unsealed by virtue of the Policy's promulgation.² Rather, the Policy contains language contradicting the Complainant's argument that the subject records were unequivocally unsealed on August 26, 2019, when the Policy was promulgated. For instance, the Policy states a "general" "intent" to release executive session minutes "when the subject matter has concluded," contains language that disclosure would be "subject to an administrative review period," and advises that disclosure is subject to "conforming with applicable law and balancing against protecting Town interests and administrative workload."

Significantly, the Policy provides for an administrative review period prior to possible release, stretching from a minimum of six months to a maximum of two years. The administrative review period is intended for the Town Clerk and solicitor to "gather and review all minutes and related records to prepare for [sic] them for release, proposing any redactions which may be needed to comport with applicable law." The Policy also provides that during the review period, the Council members may review and offer feedback regarding redactions. Additionally, the Policy notes matters that concluded prior to the adoption of the Policy are "subject to the administrative period." Based on our review we conclude that as opposed to unsealing the records as of the date of promulgation, the Policy instead outlines a process for reviewing sealed executive session minutes and, after an administrative review period, allows for the unsealing and release of executive session minutes, in whole or in part.³

Since the Policy was implemented on August 26, 2019, and the instant APRA request was made on October 21, 2019, at a minimum, the administrative review period would not have expired until

² The Town raised a question regarding this Office's jurisdiction to resolve this matter, especially with regard to the Complainant's allegations regarding the Town Charter and the swearing in of new members. For the reasons explained below, we do not find it necessary to reach the issues regarding the Town Charter and swearing in of new members. To resolve the APRA issue presented to us, it is necessary for us to determine whether the requested minutes were sealed at the time of the request, and thus whether Exemption (J) applies. As such, we review and interpret the plain language of the Policy within the context of the Complainant's APRA request.

³ The Complainant attempts to distinguish between the unsealing and releasing the minutes, arguing that the minutes were unsealed during the administrative review period even if they were not yet released. That argument is unavailing. The Policy makes clear that decisions about redactions, i.e., what portions of the minutes would not be unsealed, would be made during the administrative review period. This demonstrates that the minutes were not yet unsealed during the administrative review period; if they had been, then the minutes would be public in full, and providing a time period to review and assess redactions would be futile.

at least February 26, 2020. While we certainly acknowledge and have encouraged “public bodies to review and unseal executive session minutes, or portions thereof, when the need for executive session is no longer applicable,” we have likewise noted that “nothing in either the APRA or the OMA compels them to do so.” *See Thompson v. Town of North Kingstown*, PR 20-15. Here, the administrative review period had not expired and there is no evidence that the Town had reviewed any of the more than 10 years’ worth of executive session minutes to make the determination that they should be unsealed, in whole or in part. Accordingly, the Town did not violate the APRA by denying the request pursuant to Exemption (J).⁴

Conclusion

Although this Office has found no violations, 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/ Adam D. Roach
Adam D. Roach
Special Assistant Attorney General

⁴ Given our finding that the records were not unsealed at the time when the request was submitted and denied, there is no need to determine whether the Policy was properly rescinded. *See Newport Daily News v. Department of Public Safety*, PR 12-25 (citing *Bonner v. United States Department of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (“court review properly focuses on the time the determination to withhold is made *** [t]o require an agency to adjust or modify its FOIA responses based on post response occurrences could create an endless cycle of judicially mandated reprocessing”)).