



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

July 2, 2020
PR 20-49B

Mr. Charles Payne
Ms. Emily Calandrelli

Peter F. Skwirz, Esquire
Assistant Town Solicitor, Town of Barrington

RE: Payne, et al. v. Town of Barrington

Dear Mr. Payne, Ms. Calandrelli and Attorney Skwirz:

We have reviewed the June 11, 2020 submission from Mr. Payne and Ms. Calandrelli (“Complainants”) requesting this Office reconsider its finding in *Payne, et al. v. Town of Barrington*, PR 20-49, which was issued on May 29, 2020. For the reasons discussed below, we decline to reconsider our finding and consider this matter closed.

In *Payne, et al. v. Town of Barrington*, PR 20-49, the Complainants alleged the Town of Barrington (“Town”) violated the APRA based on the Town’s prepayment estimate for search, retrieval, and review of certain potentially responsive documents; the Town withholding certain records pursuant to the client/attorney relationship exemption; and the Town claiming that it did not maintain responsive records related to certain parts of the Complainants’ request. Based on the evidence presented, including the breadth of Complainants’ request, we concluded that the Town’s prepayment estimate did not violate the APRA. Based on our *in camera* review of the withheld documents, we found that the Town permissibly withheld documents pursuant to the client/attorney relationship exemption, except we directed the Town to either produce or provide a supplemental submission regarding one particular email that was part of an email thread that was withheld. It is undisputed that the Town provided Complainants with the relevant email on or about June 1, 2020 in accordance with our finding. Finally, we did not find that the Town violated the APRA by asserting that it did not maintain responsive records as to certain parts of the request. Ultimately, we found no violations. In reaching this determination, this Office relied on the evidence presented by both parties in support of their respective positions.

After the issuance of this Office’s finding and after the Town produced the email in accordance with the finding, the Complainants submitted a twenty-three page request for reconsideration raising various arguments and “circumstantial evidence” and contending that the Town acted knowingly and willfully, or recklessly. Complaints assert that reconsideration is appropriate, including because their prior submissions “failed to organize [the facts] in a way that was clear and understandable and failed to analyze them under the applicable law.”¹

We first consider Complainants’ assertions with regard to the single email the Town produced in response to our finding. The Town had exempted an email thread on the basis of the attorney/client exemption, R.I. Gen. Laws § 38-2-2(4)(A)(I), but this Office questioned whether one email in the chain, which did not appear to involve legal counsel, fell within the ambit of that exemption. As noted above, the Town responded by producing the email to Complainants in accordance with this Office’s finding. Although the Complainants do not dispute that they have now received the email per our finding, they contend that “the Town acted *knowingly and willfully* when it withheld the tax assessor’s email because the evidence in the record indicates that the tax assessor, the Town Manager and the Town Solicitor knew or showed reckless disregard as to whether this email was a public record.” (Emphasis in original).

We have not been provided with sufficient evidence that the Town’s initial withholding of this single email between the Tax Assessor and Town Manager, assuming such withholding violated the APRA,² was willful and knowing, or reckless. *See DiPrete v. Morsilli*, 635 A.2d 1155, 1163-64 (R.I. 1994) (“The Rhode Island Supreme Court has held that the knowing and willful standard is satisfied when “the official either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute.”). We note that the email we directed the Town to disclose (or provide a supplemental submission regarding) was part of an email chain forwarded to the Town Solicitor and seeking legal advice. The Town withheld the email thread, including the email between the Tax Assessor and Town Manager, pursuant to the attorney/client relationship exemption. *See* R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). As noted in our finding, the forwarding of this email to legal counsel comes within the ambit of the attorney-client relationship exemption, but this single email was also independently responsive to the APRA request, before it was forwarded to legal counsel. As such, the exemption cited by the Town did apply to the email when it was part of the chain, but it appears the Town did not separately analyze the applicability of any exemptions to this particular email by itself, independent of the chain. Although we acknowledge Complainants’ arguments, we do not find sufficient evidence to find that initially withholding this single email within a chain of other properly exempted emails constituted a willful and knowing, or alternatively reckless, violation of the APRA in these circumstances.

¹ This Office did not request a supplemental submission from the Town addressing the allegations in the Complainants’ request for reconsideration because we did not think it was necessary based on the record before us.

² As noted in our original finding, this Office has previously determined it unnecessary for us to consider whether a public body violated the APRA where a complainant receives the subject documents after filing an APRA complaint and where there is no evidence of a willful and knowing or reckless violation. *See Lamendola v. East Greenwich School Committee*, PR 20-10.

In addition to arguing that the Town committed a knowing and willful, or reckless, violation by withholding this single email, Complainants ask this Office to reconsider our prior finding and argue that the Town's conduct related to their APRA request was knowing and willful, or alternatively reckless. As discussed in our original finding in this matter, Complainants identified certain documents now in their possession that they contended the Town should have provided in response to their initial APRA request. The Town maintained the documents were not responsive. We declined to determine whether the Town violated the APRA by not initially producing these documents since the Complainants undisputedly now possess the documents and, in accordance with our precedent, we did not find sufficient evidence to indicate a knowing and willful, or reckless, violation that would warrant pursuing civil fines. *See* R.I. Gen. Laws § 38-2-9(d) (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***").

In their request for reconsideration, Complaints do not dispute that they now possess the relevant documents. Additionally, Complainants "agree that the AG need not determine whether the Town's 'procedures document' or some other record would have been responsive to our APRA request and all of its subsequent clarifications." Nonetheless, Complainants urge this Office to find that the Town acted knowingly and willfully, or recklessly, and pursue civil fines.

For instance, the Complainants take issue with the timing of the Town's disclosure of a certain Procedures Document, which the Town maintained was nonresponsive but nonetheless provided Complainants as a precaution when responding to this Complaint. Complainants argue that "the Town had a strong motive to delay access to its valuation plan until after deadlines passed for our appeal and for seeking a judicial remedy." This argument is a nonstarter because Complainants concede that they knew about the existence and location of this document — which was posted on the Town's website — when they were communicating with the Town to clarify their request, and even directed the Town to the Procedures Document as "an example of what [they] had requested."³

Additionally, Complainants also maintain that "[t]he burden on the Town was to provide access to the record or records most closely responsive to our request." Complainants state that the Town "could have avoided APRA liability by responding, for example, that 'reasonable parties may disagree' on whether this is what you requested, the Town does have a document that may or may not satisfy your request." However, caselaw and our past findings make clear that the onus is on the requester to indicate what documents are being sought under the APRA. *See Assassination Archives and Research v. Central Intelligence Agency*, 720 F. Supp. 217, 219 (D.D.C. 1989) ("[I]t is the requester's responsibility to frame requests with sufficient particularity to *** enable the

³ To the extent Complainants' request for reconsideration raises additional allegations pertaining to the Town's real estate valuation methods and appeals process, these allegations are outside the scope of the APRA and will not be investigated. *See* R.I. Gen. Laws § 38-2-8. The Complainants may wish to obtain private counsel to represent their interests.

searching agency to determine precisely what records are being requested.”) (citations omitted); *Albanese v. North Kingstown Harbor Management Commission*, PR 20-19; *Lopez v. City of Providence*, PR 20-03; *Farinelli v. City of Pawtucket*, PR 19-25. We decline to find a knowing and willful, or reckless, violation simply because the Town did not identify every document that “may or may not satisfy [the] request.”

Our initial acknowledgement letter opening the investigation into the Complaint in this matter notified the Complainants that they should provide all relevant information and evidence to support their allegations. The Complainants submitted a rebuttal and we also accepted a supplemental submission and supplemental rebuttal from Complainants several months after filing their initial Complaint, affording them an opportunity to present additional evidence. We decline to reconsider our finding based on new, or “clarified,” evidence or arguments submitted after a finding has been issued without a showing of extraordinary circumstances. The Complainants did not identify any circumstances that would warrant re-opening our investigation or that leads us to question the conclusions we have reached. Additionally, it does not appear that the content of the request for reconsideration is materially different than the Complainants’ prior submissions or would have any impact on our finding. Indeed, many of the arguments Complainants raise in their request for reconsideration were already addressed in our finding. As such, we decline to reconsider our previously issued finding.

As we noted in our initial finding, 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). We are now closing the file in this matter.

We thank you for your interest in keeping government open and accountable to the public.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

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