



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

June 9, 2020
PR 20-50

Matthew Jerzyk, Esquire
Legal Counsel, Mr. Michael Moretti

Mark Davis, Esquire
Town Solicitor, Narragansett

RE: Moretti v. Town of Narragansett

Dear Attorneys Jerzyk and Davis:

The investigation into the Access to Public Records Act (“APRA”) Complaint filed by Attorney Matthew Jerzyk on behalf of his client, Michael Moretti (“Complainant”) against the Town of Narragansett (“Town”) is complete. For the reasons set forth herein, we find that the Town violated the APRA with respect to one of Complainant’s allegations.

Background

We begin by outlining the protracted history of this Complaint. The undisputed facts are as follows:

On January 22, 2019, Complainant made an APRA request to the Town seeking, “all electronic (emails/TXT messages) of all Council members from 2016 to present as it relates to the Belmont Building and Library – also Finance Director, Town Manager and Town Solicitor.” (“First Request”).

On February 4, 2019, the Town Clerk, Ms. Theresa Donovan, advised Complainant that “[t]he search of electronic messages within the parameters you provided has resulted in a voluminous number of records,” thus the Town would require “ten (10) additional business days to fulfill the request.” The Town Clerk also provided a “target date of Monday, February 18” for anticipated completion and indicated an estimate for prepayment of costs would be forthcoming. Complainant responded to the Town Clerk acknowledging that he “[u]nderstood” and “would need the estimate before proceeding.”

On February 8, 2019, the Town Clerk sent an estimate to Complainant outlining the “[a]ctual costs to date” of \$291.00 and an “[a]nticipated additional cost” of \$150.00 for a total payment estimate of \$441.00. The Town also advised Complainant that “[t]he Town of Narragansett does not maintain or have access to text messages.” After setting forth the cost estimate, the Town informed Complainant that the estimate was pursuant to “RIGL 38-2-4” and asked Complainant to “[k]indly advise.” Complainant responded in the evening on February 13, 2019 by asking how to pay the requested amount.

On February 14, 2019, the Town Manager, after a verbal conversation with Complainant, instructed the Town Clerk to “proceed with Mr. Moretti’s First Request.”

The Complainant emailed the Town Clerk on February 18, 2019 asking for the status of his First Request. The Town Clerk responded on February 19, 2019 stating, “Solicitor Mark Davis estimates it will take an additional couple of weeks to review and redact.”

On March 5, 2019, the Acting Town Manager emailed Complainant that “[d]ue to the voluminous nature of the request and the difficulty in processing it the Town staff will require additional time,” invoking an extension for the remaining ten (10) business days allotted under R.I. Gen. Laws § 38-2-3(e). The Acting Town Manager also offered to provide a partial response for “partial payment,” to which Complainant responded, “I’m fine – when it’s complete is when it’s complete.”

On March 11, 2019, the Town Clerk advised Complainant that the Town had completed its response to the First Request, and it was available for retrieval pending payment. Complainant’s associate, Laurie Kelly (“Ms. Kelly”), “picked up the documents on his behalf, and paid the open invoice” on March 13, 2019. The final invoice totaled \$471.00.

On March 14, 2019, Complainant emailed the Town Clerk “asking whether the provided response included all emails related to the library issue.” The Town Clerk responded on March 15, 2019 that the Town recently “became aware that there may be other responsive documents [and] would immediately start working on supplementing the response.”

On March 20, 2019, Complainant submitted a Second Request to the Town [reproduced below, formatting slightly altered] seeking:

“From January 1, 2016 to the present: All emails and/or text messages and/or public records that were sent to OR from the following individuals, individually OR collectively – each member of the town council (from 1/1/16 to the present), or the town manager (from 1/1/16 to the present), or the town solicitor (from 1/1/16 to the present), or the town manager (from 1/1/16 to the present) [sic], or the fire chief (from 1/1/16 to the present), or the building inspector (from 1/1/16 to the present), or the finance director (from 1/1/16 to the present), or the town engineer (from 1/1/16 to the present), or the town planner (from 1/1/16 to the present) or the town’s bond counsel (from 1/1/16 to the present) or the police chief (from 1/1/16 to the present) – that contain one or more of the following terms:

Library or
Belmont or
IGA or
Gilbane or
Laurie or
Trustees or
Bond or
Referendum

Please note that this request includes all purported deleted emails and/or text messages and/or public records which are still in the possession of the town (i.e. on a computer or server and still recoverable).”

The Complainant indicated that this Second Request was intended to seek the documents he thought were missing from the Town’s response to his First Request.

On March 22, 2019, the Town Clerk informed Complainant that supplemental documents responsive to his First Request were ready for retrieval pending payment of a second invoice. The Town Clerk’s correspondence also informed Complainant that “[w]e will continue to work on the balance of your request and advise as soon as it is ready.” On March 25, 2019, Ms. Kelly retrieved the second batch of documents responsive to the First Request “but did not pay the associated invoice” of \$328.50.

On April 2, 2019, Complainant informed the Town that Attorney Jerzyk would be representing him in connection with his Requests going forward. On that same date, the Town Clerk emailed Complainant and Attorney Jerzyk “that his Second Request should have been made on the Town’s APRA request form, rather than the email request he made.” Attorney Jerzyk responded to this message on April 7, 2019 by stating that the APRA “does not require that APRA requests be submitted on a Town form.” That same day, Attorney Jerzyk filed the instant Complaint with this Office. The specific allegations raised in the Complaint will be discussed further below.

On April 8, the Town Clerk denied the Second Request, stating “the information requested on March 20 is duplicative in nature” to the First Request and “searches for over three years’ worth of the electronic communications of at least 18 individuals for terms such as ‘Laurie’ or ‘Bond’ are overly broad and unduly burdensome.”

On April 8, 2019, the Town Clerk also emailed Attorney Jerzyk regarding the First Request, stating that “there was another batch of responsive documents ready to be provided once Mr. Moretti paid[.]” The Town Clerk asked Attorney Jerzyk to advise her if Complainant wished to proceed with his First Request. The Town Clerk also noted that “[t]he Town Manager and Town Clerk were in contact with Mr. Moretti throughout the process, seeking clarification on the parameters of the request and providing estimated response dates.”

Having received no response to her April 8 email, the Town Clerk again emailed Attorney Jerzyk on April 18, 2019 inquiring as to whether Complainant “wanted the Town to proceed with the completion of his First Request.” Having received a response in the affirmative, the Town Clerk emailed Attorney Jerzyk on May 1, 2019 that the third batch of documents “was ready for pickup upon payment of the fees that were due.” “This batch of documents was picked up by a representative of Mr. Moretti that same day and the fees were paid.” We understand this to mean that on May 1, the fees for both the second and third batches were paid.

On May 17, 2019, the Town Clerk emailed Complainant and Attorney Jerzyk that “the fourth, and final supplemental response was available and attached an invoice.” “The documents were picked up several days later.” The record does not indicate whether the additional fees for the fourth batch were paid at that time.

Arguments

Complainant alleges the Town violated the APRA when: (1) the Town did not respond to his January 22, 2019 APRA Request until February 8, 2019 and requested payment to proceed with his request; (2) after providing prepayment, the Town did not provide the records until March 11, 2019, thirty-four (34) business days after the initial request; (3) the Town’s March 11 response was missing responsive records and did not claim any statutory exemptions nor contain a log of the records withheld; and (4) the Town did not respond to the Second Request within ten (10) business days and required the Complainant to submit his March 20, 2019 APRA Request on a specific form. Complainant filed his Complaint with this Office on April 7, 2019, which is the time period when he was still communicating with the Town regarding both Requests and receiving additional installments of documents responsive to the First Request.

The Town provided a substantive response through its Assistant Solicitor, Andrew Berg, Esquire, which included affidavits from Town Solicitor, Mark Davis, and the Town Clerk, and provided eighteen (18) supporting exhibits consisting of correspondences reflecting the extensive history of these APRA requests as outlined above. The Town maintains it responded timely and completely to the Complainant’s First Request and “all documents responsive to Mr. Moretti’s Request have been provided.”

Attorney Jerzyk did not submit a rebuttal on behalf of his client. However, Mr. Moretti sent a letter to this Office on September 24, 2019, roughly three months after the Town submitted its response. This Office sought but did not receive clarification from Attorney Jerzyk regarding whether this Office should consider that letter as Complainant’s rebuttal. In any event, the September 24, 2019 submission primarily raises new allegations regarding the substance of the documents provided by the Town in the four installments; these allegations were not raised in the initial Complaint. As we explained in our acknowledgment letters, any rebuttal should not raise new issues that were not presented in the complaint since the public body has no opportunity to respond to the new allegations and this Office cannot fully investigate them. *See Mudge v. North Kingstown School Committee*, OM 12-35. Consistent with this Office’s precedent and acknowledgement letters to the parties, this Office declines to review issues raised for the first time in a rebuttal. The Complainant is free to file a new complaint regarding those issues.

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 has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with specific reason(s), or providing an explanation as to why an extension of the period to comply is necessary. *See* R.I. Gen. Laws § 38-2-3(e). A public body may extend its time to respond to a request up to an additional twenty (20) business days if it can demonstrate that additional time is necessary. *Id.* Additionally, “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.” R.I. Gen. Laws § 38-2-7(b).

Before addressing the issues raised in the Complaint, we note that our review is complicated by the fact that the factual circumstances continued to evolve after the Complaint was filed, but only the issues presented in the Complaint are properly before us since those were the allegations to which the Town had the opportunity to respond. The events that developed after the Complaint was filed addressed certain issues raised in the Complaint, but also created new issues. Although we encourage parties to work with each other to resolve matters, filing a complaint when those efforts are still ongoing complicates the record and can lead to a piecemeal review of the issues. Additionally, since events continued to evolve after the Complaint was filed, we are left to wonder as to the current state of affairs.

- Complainant alleges the Town did not respond to the First Request until February 8, 2019 and that the Town requested prepayment.

It is undisputed that the Complainant submitted his First Request to the Town on January 22, 2019 and the Town invoked a ten (10) business day extension pursuant to R.I. Gen. Laws § 38-2-3(e) on February 4, 2019, which was the ninth business day after the request was submitted. Thus, the record demonstrates that the Town timely sought an extension within ten (10) business days of receiving the request and the record does not support Complainant’s allegation that the Town did not respond to the First Request until February 8, 2019. *See* R.I. Gen. Laws § 38-2-3(e).

Complainant also seems to take issue with the fact that the Town requested payment on February 8, 2019. The APRA provides that “[a] reasonable charge may be made for the search and retrieval of documents. Hourly costs for a search and retrieval shall not exceed fifteen dollars (\$15.00) per hour and no costs shall be charged for the first hour of a search or retrieval.” R.I. Gen. Laws § 38-2-4(b); *see also DARE v. Gannon*, 819 A.2d 651, 661 (R.I. 2003) (“costs of redaction should be borne by the requesting party because it is part of the process for retrieving and producing the requested documents”); *Marcello v. Town of Scituate*, PR 20-09.

It seems Complainant's chief contention is that the Town's payment estimate was provided more than ten (10) business days after the initial request. As noted above, on February 4, 2019 (which was the ninth business day), the Town extended the time to respond by an additional ten (10) business days. As such, the February 8, 2019 payment request was timely provided within that extended timeframe. The Complainant does not present any reasons why he contends the February 8, 2019 payment request was substantively improper. Indeed, Complainant does not dispute the Town's contention that "[t]he search of electronic messages within the parameters [Complainant] provided has resulted in a voluminous number of records. These records must now be individually reviewed to determine their relevance to your request." The record indicates that the Complainant provided payment without objection. Based on the totality of the evidence before us, we do not find that the Town violated the APRA when it requested payment on February 8.

- Complainant alleges the Town did not provide records to the First Request until March 11, 2019, thirty-four (34) business days after the initial request.

It is undisputed that the Town provided a cost estimate for completing the request on February 8, 2019 and asked Complainant to "[k]indly advise," but did not receive payment until March 13, 2019, at which time Complainant retrieved the records. The record reveals that the Complainant inquired in the evening on February 13, 2019 regarding how to submit prepayment, and that the Town Manager had a telephone conversation with Complainant the following day. Subsequently, the Town Manager instructed the Town Clerk to proceed with processing the request, notwithstanding that prepayment had not been submitted. The record does not indicate the nature or content of the parties' verbal discussions regarding the issue of prepayment and therefore, these discussions cannot factor into our finding. Nonetheless, the record establishes that the Town requested prepayment (on February 8, 2019) and that payment was not provided until the request was completed (on March 13, 2019). The Complainant did not argue that he attempted to provide prepayment sooner or that the Town had waived the requirement for prepayment. The Complainant similarly did not provide any evidence or argument regarding why the Town's request for payment (on February 8, 2019) did not toll the Town's timeframe to respond in accordance with the APRA. *See* R.I. Gen. Laws § 38-2-7(b) ("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").

The record also indicates that the Town was in communication with Complainant regarding the status of his request between February 8 and March 11 and that Complainant declined an offer to receive a portion of the requested documents sooner in exchange for partial payment. Indeed, on March 5, 2019, Complainant responded to such an inquiry, indicating "I'm fine – when it's complete is when it's complete." A couple of times during this timeframe, Complainant also asked for updates regarding the progress being made on his request, and the Town responded by providing an update. At no point did Complainant object or contend that that Town's timeline was violating the APRA. Based on the totality of the record before us, and in particular R.I. Gen. Laws § 38-2-7(b), we do not find that the Town's March 11, 2019 production of documents was untimely.

- Complainant alleges the Town’s March 11, 2019 response to his First Request was missing responsive records and the Town did not claim any statutory exemptions nor provide a log of withheld records.

Here, the April 7, 2019 Complaint alleges that the Town violated the APRA when it did not provide all responsive records on March 11, 2019. We need not resolve this issue, however, because, as noted above, after the Complaint was filed, the Town continued to provide responsive documents. The Town now maintains that “all documents responsive to [Complainant’s] Request have been provided.”¹

In the typical case, when this Office finds an APRA violation, the APRA provides for only two types of remedies, namely injunctive relief and civil fines for a willful and knowing, or reckless, violation. *See* R.I. Gen. Laws § 38-2-9(d). For the reasons explained below, neither remedy would be appropriate in these circumstances, and accordingly, we decline to opine on whether a violation occurred. *See Lamendola v. East Greenwich School Committee*, PR 20-10 (declining to determine whether violation occurred when there was no basis for a remedy).

Although it is apparent that the Town did not provide all responsive documents on March 11, 2019, we were not presented with evidence that the Town’s action or omission was willful and knowing, or reckless. In this regard, we note the voluminous nature of the request and the Town’s uncontested March 14, 2019 assertion that the Town had just recently become aware of other potentially responsive documents.

Additionally, as we note above, it is undisputed that the Town subsequently provided Complainant with additional documents after March 11, 2019. Based on this record, injunctive relief is inappropriate at this juncture because the Town already took action to respond to the Complainant’s allegation that additional documents needed to be provided beyond the documents provided on March 11, 2019. For this same reason, the Complainant’s allegation that the Town failed to provide a privilege log concerning documents not provided on March 11, 2019 is moot. To be sure, there appears to be some remaining dispute regarding the sufficiency of the Town’s subsequent productions. Whereas the Town asserts that all responsive records have now been provided, the Complainant’s September 24, 2019 letter appears to assert that the Town’s subsequent productions was insufficient and responsive records remain outstanding. That issue — the sufficiency of the four installments of documents provided by the Town — was not raised in the Complaint, nor could it have been since the Town’s production of documents was still ongoing at the time when the Complaint was filed.² To the extent Complainant’s September 24, 2019 submission suggests that he is dissatisfied with the documents provided in subsequent installments

¹ The Town denied Complainant’s request for text messages, asserting that the Town did not have “access and control” of text messages, and also indicated that certain limited redactions had been made to some of the produced documents. The Complaint did not take issue with those aspects of the Town’s response.

² The Complaint, which was submitted before the final two installments of documents were provided, only alleged that documents were missing from the Town’s March 11 response.

after the Complaint was filed, that issue is outside the allegations raised in the parties' initial submissions and investigated by this Office. *See Mudge v. North Kingstown School Committee*, OM 12-35. Complainant is encouraged to work with the Town to resolve any outstanding issues and is free to file a new Complaint regarding that issue if necessary.

- Complainant alleges the Town did not respond to the Second Request within ten (10) business days and required him to submit his Second Request on a specific form.

It is undisputed that Complainant submitted his Second Request via email on March 20, 2019. On April 2, 2019, the Town Clerk emailed Complainant and Attorney Jerzyk stating that Complainant's Second Request needed to be submitted on the "official form." The APRA specifically states "[e]ach public body shall establish written procedures regarding access to public records" but "[a] written request for public records need *not* be made on a form established by a public body if the request is otherwise readily identifiable as a request for public records." R.I. Gen. Laws § 38-2-3(d) (emphasis added). Based on the evidence presented, Complainant's Second Request was clearly identifiable as an APRA request. Accordingly, we find the Town violated the APRA when it required the Complainant to submit his Second Request on a specific form and when it did not substantively respond to, i.e., deny, the Second Request until April 8, 2019, which was more than ten (10) business days after the March 20, 2019 request was submitted. *See* R.I. Gen. Laws § 38-2-3(e).

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).

This Office has concluded that the Town violated the APRA with regard to Complainant's Second Request by asserting that Complainant had to submit his request on a specific form and not substantively responding within ten (10) business days. The record indicates that the Town provided a substantive denial of the request on April 8, 2019. Given the nature of the violation found herein and the undisputed fact that the Town subsequently provided a substantive response to the Second Request (i.e., denying it), there is no need for injunctive relief. In arriving at this conclusion, we note that the substance or basis of the Town's April 8, 2019 denial is not properly before this Office because the Town's April 8, 2019 denial was provided *after* this Complaint was submitted. To state the obvious, the Complaint did not allege (nor could it have since it was submitted before April 8) that it was improper for the Town to deny the Second Request for the reasons set forth in the Town's April 8 denial. As such, we do not make any determinations regarding the substance of the Town's April 8 denial. Nor do we find sufficient evidence that the violation was willful and knowing, or reckless. The basis for this conclusion includes, based upon the evidence presented, the Town's belief that this Second APRA request was duplicative of Complainant's First APRA request, which remained pending (and which the Town was in the

midst of responding to) at the time of the Second APRA request. This belief is not without support since the Complainant indicated that the Second Request (made on March 20, 2019) was intended to seek the documents he thought were missing from the Town's response to his First Request. As noted herein, the Town subsequently provided three additional installments of documents after March 20, 2019. Additionally, we are not aware of any similar recent violations by the Town. Nonetheless, this finding serves as notice to the Town 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).

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla O'Rourke
Kayla O'Rourke
Special Assistant Attorney General