



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

June 26, 2020

PR 20-52

Mr. Christopher Lamendola

Aubrey L. Lombardo Esquire
Legal Counsel, East Greenwich School District

Re: **Lamendola v. East Greenwich School District**

Dear Mr. Lamendola and Attorney Lombardo:

The investigation into the Access to Public Records Act (“APRA”) complaint filed by Mr. Christopher Lamendola (“Complainant”) against the East Greenwich School District (“District”) is complete. For the reasons set forth herein, we find that the District did not violate the APRA by withholding certain responsive records and direct the District to either produce or provide a supplemental submission with regard to other withheld records.

Background

The Complainant submitted an APRA request to the District for certain documents related to a District “staff investigation”:

- “1. A copy of all documents, reports, final letters and drafts, generated by Callaghan & Callaghan in regards to ‘East Greenwich School Committee Investigation’ conducted by Mr. James Callaghan Esq.
2. A copy of all communications, emails, letters, notes, phone conversations, from East Greenwich School Committee members and Callaghan & Callaghan in regards to ‘East Greenwich School Committee Investigation’ conducted by Mr. James Callaghan Esq.
3. A copy of all communications, emails, letters, notes, phone conversations between EG School Committee members in regards to ‘requested staff investigation’ and ‘East Greenwich School Committee Investigation’.
4. A copy of all communications, documents, emails, letters, notes, phone conversations, prior investigations, and attendance between East Greenwich School Committee members/and or any EGSD memebers [sic] and Callaghan & Callaghan in regards to ‘East

Greenwich School Committee Investigation' meetings of July 6, 2019 & July 13, 2019 conducted by Mr. James Callaghan Esq and his firm Callaghan & Callaghan as referred in the billing invoice date October 9, 2019.

5. A copy of 7/9/2019, 7/16/19, 7/23/19 & 8/13/19 East Greenwich School Committee executive sessions minutes, only in regards to 'requested staff investigation' and 'East Greenwich School Committee Investigation'.

6. A copy of all communications, emails, letters, notes, phone conversations, between East Greenwich School Committee and Supt. Victor Mercurio and Matthew Oliverio Esq. in regards to 'requested staff investigation' and 'East Greenwich School Committee Investigation'.

7. A copy of all communications, emails, letters, notes, phone conversations, between Callaghan & Callaghan and Supt. Victor Mercurio and Matthew Oliverio Esq. in regards to 'requested staff investigation' and 'East Greenwich School Committee Investigation'."

The District responded by identifying certain responsive documents that it had previously provided to Complainant¹ and stating that the District did not maintain any documents responsive to part (7) of the request. For all other parts of the request (besides part (7)), the District also responded by asserting that it was withholding responsive records pursuant to one or more specifically cited exemptions. Collectively, the exemptions cited by the District in its response to parts (1) through (6) included R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) (records relating to a client/attorney relationship); § 38-2-2(4)(A)(I)(b) (individually identifiable records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy); § 38-2-2(4)(J) (meeting minutes that are not required to be disclosed under applicable law); § 38-2-2(4)(K) (preliminary drafts, notes, impressions, memoranda, working papers and work products); § 38-2-2(4)(P) (all investigatory records of public bodies pertaining to possible violations of statute, rule or regulation, other than records of final actions taken); and § 38-2-2(4)(M) (correspondence of or to elected officials in their official capacities).

Dissatisfied with the District's response, the Complainant filed the Complaint with this Office.

Arguments

The Complainant alleges the District violated the APRA when it withheld documents related to the "staff investigation," an investigation which the Complainant (and others) had requested. Complainant argues that the District "waived any claim of privilege and confidentiality" when Attorney James Callaghan relayed his investigative findings to the Complainant in a letter dated August 29, 2019.² Complainant also asserts that "[t]here is no reason the public doesn't have a right to see public documents taxpayers pay for."

¹ The Complainant does not take issue with the District's response directing him to documents he had previously been provided.

² The District explained that the East Greenwich School Committee ("School Committee") "formally retained Attorney James Callaghan, to investigate the allegations [against certain individuals associated with the District] made in the letter [submitted to the School Committee by

Ms. Aubrey L. Lombardo, Esquire provided a substantive response on behalf of the District, which included an affidavit from herself and East Greenwich School Committee Chairwoman Carolyn Mark, as well as over 150 pages of withheld documents for this Office's *in camera* review.

The District's *in camera* submission did not identify the request(s) to which each document was responsive or what exemptions had been asserted with regard to each document. This Office requested supplemental information to assist this Office's review in connection with the pending Complaint. In response, the District provided Complainant and this Office with an Exemption Log listing the withheld documents, identifying the request or requests to which each document was responsive, and listing the exemptions asserted as to each document. The Exemption Log listing the ninety-four (94) withheld documents is attached hereto as Exhibit A.³

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 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 exceptions. *See* R.I. Gen. Laws § 38-2-2(4)(A)-(AA).

The District withheld ninety-four (94) documents responsive to the Complainant's request. Of those ninety-four, eighty (80) were withheld as "relating to a client/attorney relationship[.]" R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). At the very least, this exemption encompasses any documents that would be subject to the attorney-client privilege. *See Providence Journal v. Executive Office of Health and Human Services*, PR 20-01. It is well settled that "[t]he attorney-client privilege protects from disclosure only the confidential communications between a client and his or her attorney." *State v. von Bulow*, 475 A.2d 995, 1004 (R.I. 1984). The general rule is that communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure. *Id.* In *Callahan v. Nystedt*, 641 A.2d 58, 61 (R.I. 1994), the Rhode Island Supreme Court laid out the elements that must be satisfied in order for the attorney-client privilege to apply:

the Complainant and others] and to provide legal advice regarding the same." The record indicates that the request for an investigation stemmed from some citizens' contention that their property had been damaged by the construction of a school.

³ We note that a number of the withheld documents consist of email threads and sometimes the same email appears multiple times on the Exemption Log.

“(1) the asserted holder of the privilege is or sought to become a client; (2) the person to who the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relate to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.”

Here, although the *in camera* nature of our review makes detailed discussion inappropriate, all four of the elements are satisfied in the instant matter for each of the eighty (80) documents withheld based on the client/attorney relationship exemption (subject to the caveat discussed below regarding certain less substantive emails). The asserted holder of the privilege, the District through its School Committee, was a client of Attorney Callaghan in connection with the “staff investigation” and is also a client of Attorney Matthew Oliverio, legal counsel for the District. The requested documents evince communications by and between the District’s attorney(s) and School Committee members outside the presence of third-parties, in connection with the attorneys providing legal services to the District.⁴ We have been presented with no evidence that any of these eighty (80) withheld documents have been disclosed outside the attorney-client relationship.

To the extent some of the emails contain brief non-substantive pleasantries that are not responsive to the substance of the APRA request, i.e., “Thanks, James” or “[i]t was nice to see you last night,” on this record, we do not find that these portions constituted responsive reasonably segregable information such that the District would have been required to produce the documents in redacted form. *See* R.I. Gen. Laws § 38-2-3(b) (requiring disclosure of any reasonably segregable portion of a public record).

Some of the withheld communications relate to matters such as transmitting a legal services engagement proposal,⁵ scheduling meetings, and issues related to initiating the attorney-client relationship. We have questions regarding whether these emails, which do not seem to reflect substantive legal content or protected information about the attorney-client relationship, come within the ambit of the client/attorney relationship exemption. However, the District also asserted Exemption (M) as to these emails. Exemption (M) exempts from disclosure “[c]orrespondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.” Each of these emails for which we question whether it falls within the client/attorney exemption include School Committee Chairwoman Mark and/or Committeeperson Matthew Plain. There is no dispute those individuals are elected officials. As

⁴ Some of the emails contain attachments that are drafts of the August 29, 2019 letter that was eventually sent to Complainant. These would also be exempt under Exemption (K) as “[p]reliminary drafts, notes, impression, memoranda, working papers and work products.” R.I. Gen. Laws § 38-2-2(4)(K).

⁵ The District’s APRA response indicated that Complainant had already been provided the firm’s engagement letter and first invoice, which the Complainant did not dispute.

such, even if the client/attorney relationship exemption did not apply to these documents (and any attachments to them), Exemption (M) applies.⁶

Complainant argues that the client/attorney privilege was “waived” because “Attorney Callaghan disclosed his legal opinions on actions that should be taken and his legal interpretation of events” when Attorney Callaghan sent the August 29, 2019 letter to the Complainant summarizing the findings of the staff investigation. We have not been presented with any evidence that the withheld documents were disclosed outside the attorney-client relationship or placed in the public domain. There is also no indication that the School District selectively disclosed specific information or analysis contained in the legal opinion in an attempt to gain some benefit. *See von Bulow*, 475 A.2d at 1007 (discussing impermissible selective use of privileged information). Rather, the evidence indicates that, at most, Attorney Callaghan’s letter generally informed Complainant that the District had retained the firm of Callaghan & Callaghan to investigate the allegations made by the Complainant and others related to certain District staff and that Attorney Callaghan had determined that “the [School Committee] should not take any of the requested actions in [Complainant’s] letter.” We do not find sufficient evidence to conclude that the School District waived assertion of the attorney/client privilege as contained at R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). Therefore, we find that the District did not violate the APRA when it withheld these eighty (80) documents. Because we have concluded that the client/attorney exemption and/or Exemption (M) applies to each of these documents, we need not consider the applicability of the other asserted exemptions for these eighty (80) documents.⁷

Next, we examine the approximately twelve (12) email communications involving Chairwoman Mark and Committeeperson Plain that were withheld pursuant to R.I. Gen. Laws §§ 38-2-2(4)(A)(I)(b) (“personnel and other individually-identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”); 38-2-2(4)(K) (“[p]reliminary drafts, notes,

⁶ Similarly, Document 72 is an email between Chairwoman Mark and Committeeperson Plain that forwards and discusses an email from legal counsel. Even if the email between councilmembers does not fall within the client/attorney relationship exemption, it is exempt under Exemption (M).

⁷ The Complainant generally argues that the public interest in disclosure of all the withheld documents outweighs any privacy interests because “[t]here is no reason the public doesn’t have a right to see public documents taxpayers pay for.” However, the privacy balancing test is only implicated when documents are withheld pursuant to 38-2-2(4)(A)(I)(b), and here we have determined that these documents were permissibly withheld pursuant to a different exemption. Also, the Rhode Island Supreme Court has made clear “[t]here is no public interest to be weighed in disclosure of nonpublic records. * * * Any balancing of interests arises only after a record has first been determined to be a public record.” *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d 218, 225 (R.I. 1998). Because we have determined that these documents are exempt from public disclosure, no balancing of interest analysis is conducted.

impressions, memoranda, working papers, and work products”); and 38-2-2(4)(P) (“all investigatory records of public bodies...pertaining to possible violations of statute, rule or regulation”). Based on our review of these twelve (12) documents, we question whether these emails fit within these exemptions.⁸

Document 41 is a July 11, 2019 email exchange between Chairwoman Mark and Committeeperson Plain with the subject line “Meeting Postings.” The email thread generally references posting notice for a meeting related to the investigation but contains little substantive content. Document 64 is an email from Chairwoman Mark to Committeeperson Plain dated August 14, 2019 with the subject line “Fwd: Draft” that also contains little substantive content but generally relates to the topic of the staff investigation. Documents 66 and 67 respectively comprise a July 15, 2019 and July 12, 2019 email exchange between Chairwoman Mark and Committeeperson Plain related to a meeting and hiring independent legal counsel. Documents 69 and 77 are both duplicative of Document 67. Similarly, Documents 75 and 76 are duplicative of Document 66. Document 71 is an email thread from May 20, 2019 between Chairwoman Mark and Committeeperson Plain regarding addressing the request for an investigation.

The District did not explain how these nine (9) documents contain any individually identifiable information that would implicate privacy interests within the ambit of Exemption (A)(I)(b), nor is any such information apparent to us. Additionally, these documents appear to be final emails that were actually sent rather than preliminary drafts. It is also not apparent that these documents fall within any of the other categories in Exemption (K), nor did the District present any argument in that regard. Furthermore, these documents do not contain any substantive discussions regarding the substance of the staff investigation, and it does not appear that they constitute “investigatory records.” We question whether the District violated the APRA when it withheld these documents.

Documents 73 and 74 comprise an email thread that includes a June 3, 2019 email from Committeeperson Plain to Chairwoman Mark and a May 31, 2019 email from Chairwoman Mark to Committeeperson Plain, both regarding addressing the request for a staff investigation. Our above analysis applies to these emails. We note that this thread also includes communications with an attorney, but the District did not cite an exemption related to the attorney-client relationship as a basis to withhold this document.

Document 79 is an email from Committeeperson Plain to Chairwoman Mark dated July 10, 2019. Part of the email includes proposed draft language for an agenda item, which is permissibly exempted under (K) as a draft. However, we question whether the remainder of the email fits within any of the cited exemptions for the same reasons noted in our above analysis. *See* R.I. Gen. Laws § 38-2-3(b) (requiring production of any reasonably segregable portions of public records).

⁸ We make no determination whether the District could have withheld these documents under any of the APRA’s other exemptions, as the only exemptions invoked by the District as a basis for withholding these documents were Exemptions (A)(I)(b), (K) and (P). *See* R.I. Gen. Laws § 38-2-7 (“except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body”).

Accordingly, the District is directed within twenty (20) business days to produce Documents 41, 64, 66, 67, 69, 71, 73, 74, 75, 76, 77, and 79 (Document 79, in part, as indicated above) to Complainant or, if the District believes that these documents are exempt from disclosure under the APRA, to present argument regarding why these specific documents are exempt and, if applicable, why the exemption should not be considered waived. This Office should be copied on any correspondence to the Complainant.

The final two (2) withheld documents are executive session minutes of the School Committee's July 16 and August 13, 2019 meetings withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(J), which exempts "[a]ny minutes of a meeting of a public body which are not required to be disclosed pursuant to chapter 46 of title 42." This Office has previously held that "only sealed executive session minutes *** are exempt from public disclosure." *Costantino v. Smithfield School Committee*, PR 13-24; *see also Costantino v. Smithfield School Committee*, PR 13-22 ("clearly, under the APRA, properly sealed executive session minutes are not public"). The affidavit provided by the District indicates that the meeting minutes were sealed "immediately after the executive session . . . closed." However, based on our review of the executive session minutes as well as the open session minutes for July 16 and August 13, we find no evidence that the School Committee voted to seal these executive session minutes. *See* R.I. Gen. Laws §§ 42-46-7(a) (requiring meeting minutes to record votes taken); 42-46-7(c) (permitting minutes of a closed session to be sealed by a vote of the majority of members). Therefore, within twenty (20) business days, the District is instructed to either disclose the July 16 and August 13 executive session minutes to the extent they are responsive to the APRA request, provide evidence that said executive session minutes were properly sealed by a majority vote of the members, or provide a supplemental submission to this Office addressing whether these minutes are otherwise exempt from disclosure under the APRA and, if applicable, why the exemption should not be considered waived. *See* R.I. Gen. Laws § 38-2-7.

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 question whether the District violated the APRA by withholding certain documents identified above. As of this time, we have not been presented with evidence that any violation was willful and knowing, or reckless. To the contrary, the evidence indicates that the District responded to each part of the request by asserting exemptions in good faith. There are also no recent similar violations against the District.

Although injunctive relief may be appropriate, we will first allow the District an opportunity to comply with this finding. Thus, within twenty (20) business days, the District must produce documents and/or provide a supplemental submission consistent with this finding. Any

supplemental submission, or portions thereof, may be provided *in camera* to the extent deemed necessary by the District. Within ten (10) business days after the District makes its production and/or submission, the Complainant may submit a response and should indicate whether Complainant has any objections to the District's supplemental submission/production.

Although this Office will not file suit in this matter at this time, 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). Please be advised that this file will remain open pending the supplemental submissions.

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