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VIA EMAIL ONLY

July 15, 2020
PR 20-53

Mr. Rahim Caldwell

Etie-Lee Schaub, Esquire
Associate City Solicitor, City of Providence

RE: Caldwell v. City of Providence

Dear Mr. Caldwell and Attorney Schaub:

The investigation into the Access to Public Records Act (“APRA”) Complaint filed by Mr. Rahim Caldwell (“Complainant”) against the City of Providence (“City”) is complete. For the reasons set forth herein, we find that the City did not violate the APRA.

Background and Arguments

The Complainant submitted an APRA request to the City on May 16, 2018 seeking: “Dispatch Records, audio or otherwise from April 30, 2018 at Rhode Island College 600 Mount Pleasant Ave Providence Rhode Island.”

The City responded on May 31, 2018 by indicating that it was withholding responsive records pursuant to R.I. Gen. Laws §§ 38-2-2(4)(D), “to prevent the disclosure of information which (a) could reasonably be expected to interfere with investigations of criminal activity or with enforcement proceedings and (b) would deprive a person of a right to a fair trial or an impartial adjudication.”

The Complainant appealed the City’s May 31, 2018 response to City Commissioner of Public Safety Steven M. Paré on April 16, 2020, arguing that “[t]he city argument is moot. there [sic] is no investigation of criminal activity or with enforcement proceedings and *** There is no trial or

adjudication pending.”¹ Commissioner Paré responded to the Complainant on April 27, 2020 stating that “[t]he APRA does not impose on any public body an ongoing obligation to release records if circumstances change after an individual receives a response to a request. Instead, you should submit a new request.” There is no evidence that the Complainant submitted a new request to the City following the response to his appeal.

The Complainant subsequently filed the instant Complaint alleging that the City violated the APRA when it did not disclose the requested records, arguing that “the public has a right to know about the activity of government,” and “Providence police department has previously released dispatch recordings[.]” Based on the apparent email thread included in the Complaint, this Office also construed the Complaint as asserting that the City had failed to timely respond to Complainant’s administrative appeal.

The City provided a substantive response through its Assistant City Solicitor, Ms. Etie-Lee Schaub, Esquire, which included copies of the Complainant’s May 2018 request, the City’s initial response, and the City’s response to the Complainant’s appeal. The City also provided the relevant audio recordings for our *in camera* review and affidavits from Commissioner Paré and Assistant City Solicitor Monsurato Ottun, Esquire. The City avers that the responsive records “were properly withheld at the time they were requested” because “the recordings pertain to an incident which was still under investigation at the time the Complainant received his response.”² The City also provided evidence that Commissioner Paré responded to the Complainant’s April 16, 2020 administrative appeal.

The Complainant did not submit a 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.

¹ The Complaint also included what appears to be an email thread that includes an email from Complainant dated June 24, 2019 to an email address that seems to belong to Commissioner Paré appealing the City’s response to the request. It appears this email was forwarded by Complainant on April 16, 2020 to a non-party third person entity (whose identity is unclear), along with a message expressing that Commissioner Paré had been unresponsive.

² In addition, the City maintains that even if it was no longer investigating the matter, withholding the records would have been proper pursuant to R.I. Gen. Laws § 38-2-2(4)(D)(c), which exempts law enforcement records, the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” However, because the City did not invoke that exemption in its May 2018 response and did not identify any good cause why that exemption should not be considered waived, we do not consider whether it may have been permissible to withhold the records on that basis. *See* R.I. Gen. Laws § 38-2-7(a) (“Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.”).

The APRA states, 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). The APRA exempts from public disclosure “[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime,” where disclosure, among other reasons, “could reasonably be expected to interfere with investigations of criminal activity or with enforcement proceedings” or “[w]ould deprive a person of a right to a fair trial or an impartial adjudication.” R.I. Gen. Laws §§ 38-2-2(4)(D)(a), (b).

As an initial matter, our review must consider the circumstances surrounding the City’s reasoning for denying access to the responsive records at the time the denial was made. *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”)).³ Accordingly, we need not make a determination as to whether the records Complainant seeks are *now* public as that is not before us. The relevant question is whether it was permissible for the City to withhold the requested records on May 31, 2018.

In this case — according to the undisputed affidavit of Attorney Ottun — the Complainant sought dispatch records related to an incident when Providence Police were contacted “in order to respond to an incident at Rhode Island College.” The records included “general dispatch conversations between officers as well as phone calls from a member of the public.” The City asserts that at the time the Complainant submitted his APRA request, the responsive records were part of an ongoing investigation and that a “preemptive public release of records relating to an investigation could possibly taint a jury pool or impact a trial.”

The Complainant does not dispute the City’s argument that the requested records pertained to an incident which was still under investigation when he submitted his APRA request, nor does he proffer any specific arguments contending that the City’s initial denial of the records was improper. Instead, Complainant maintains in his administrative appeal that “the city argument is now moot.” As discussed *supra*, we review the City’s denial as of the date of denial, not as of the date a complaint is submitted. Based on our *in camera* review, the audio records contain dispatch accounts and information about an April 30, 2018 incident at Rhode Island College, which generally speaking involved a disturbance and potential security threat. We find the City’s determination that disclosing those records while the investigation was still ongoing could impact a jury or interfere with an ongoing investigation was reasonable and did not violate the APRA. *See Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (request for investigation

³ We reference FOIA caselaw because the Rhode Island Supreme Court has made clear that “[b]ecause APRA generally mirrors the Freedom of Information Act *** we find federal case law helpful in interpreting our open record law.” *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556 n.3 (R.I. 1989).

documents during the pendency of a Department of Justice investigation properly denied as “[p]ublic disclosure of information could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government’s investigation”). Therefore, based on the undisputed evidence, we find no violation in connection with the City’s May 31, 2018 denial. The Complainant is free to submit a new APRA request to the City if he believes the records he seeks should now be public under the APRA.

We next consider the allegation that the City failed to timely respond to Complainant’s administrative appeal. The APRA provides that “[a]ny person or entity denied the right to inspect a record of a public body may petition the chief administrative officer to that public body for a review of the determinations made by his or her subordinate. The chief administrative officer shall make a final determination whether or not to allow public inspection within ten (10) business days after the submission of the review petition.” R.I. Gen. Laws § 38-2-8(a).

The City avers that it received the Complainant’s administrative appeal on April 16, 2020 and responded to it on April 27, 2020. Although the Complaint included an email thread which seemed to suggest that Complainant sent an earlier administrative appeal on June 24, 2019, the Complainant did not provide any further information or allegations regarding that purported email. As the City noted when responding to the Complaint, Complainant’s “points of contention are not made clear[.]” The Complainant also did not submit a rebuttal contesting the City’s assertion that it received the appeal on April 16, 2020 and responded on April 27, 2020, which was within ten (10) business days. By simply including a copy of what appears to be a June 24, 2019 email to Commissioner Paré, without specifically raising allegations to this Office about the email or representing when or if the email was actually sent, Complainant has not sufficiently pressed any claim regarding any purported earlier appeal. Because the evidence indicates that the City received the administrative appeal on April 16, 2020 and responded to the appeal within the ten (10) business day time period allotted under the APRA, we find no violation. *See* R.I. Gen. Laws § 38-2-8(a).

Conclusion

Although the Attorney General has found no violations and will not file suit in this matter, 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/ Kayla E. O’Rourke

Caldwell v. City of Providence

PR 20-53

Page 5

Kayla E. O'Rourke

Special Assistant Attorney General