



STATE OF RHODE ISLAND  
OFFICE OF THE ATTORNEY GENERAL

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*Peter F. Neronha*  
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**VIA EMAIL ONLY**

August 21, 2020  
PR 20-59

Mr. John D. Armstrong

William J. Conley, Jr., Esquire  
Town Solicitor, Town of Westerly

Re: **Armstrong v. Town of Westerly**

Dear Mr. Armstrong and Attorney Conley:

The investigation into the Access to Public Records Act (“APRA”) complaint filed by Mr. John D. Armstrong (“Complainant”) against the Town of Westerly (“Town”) is complete. For the reasons set forth herein, we find that the Town violated the APRA.

**Background**

The Complainant submitted an APRA request to the Town on May 1, 2019 seeking certain documents related to operation of the Town Planning Department:

- “1. Comprehensive Plan and its preparation for the time period of May 1, 2018 through present
2. Bradford Dying for the time period of January 1, 2019 through Present
3. South Drive Condominiums Comprehensive Permit, 19 South Drive for the time period of 1/1/2018 through present.
4. Any communications between the Director of Development Services and Nancy LeTendre specific to her continued employment as Assistant Solicitor for Planning and Zoning.

Response to this request shall include all documents sent to or from:

The Director of Development Services and the Assistant Town Solicitor for Planning and Zoning assisting the Director of Development Services, the Town Manager, and any participating developers and their representatives.

1. Copies of all emails sent or received from any Town email address regarding the above captioned matter;
2. Copies of all emails sent or received from any email address regarding the above captioned matters (this is intended to include private email servers or addresses used by a public official during the time frame referenced and regarding the above cited matters that were before the Town Council as official business during the same time periods);
3. **Copies of all texts sent or receive [sic] from cell phone or other electronic device capable of communicating messages regarding the above captioned matters (this is intended to include private email servers or addresses used by a public official during the time frame referenced and regarding the above cited matters that were before the Town Council as official business during the same time periods);**
4. **Copies of all documents as defined by R.I.G.L. rules of discovery, including memos, agendas, electronic calendars detailing communication or scheduling regarding the above cited time frames.**” (Emphasis added for clarity as discussed below).

The Town extended the time to respond to the Complainant’s request an additional twenty (20) business days on May 13, 2019. *See* R.I. Gen. Laws § 38-2-3(e). On June 10, 2019, the Town provided a flash drive of responsive documents to the Complainant in person and “no written letter accompanied the same.” On June 11, 2019, the Complainant emailed the Town stating that the flash drive was “missing information” related to Requests #3 and #4 above (in bold). On June 13, 2019, the Town Clerk spoke with the Complainant and advised that the response was complete and that “he had the right to appeal to the Town Manager.” Later that day, the Town Clerk contacted Complainant advising him that she had learned from the Director of the Department of Developmental Services (“DDS”), Ms. Lisa Pellegrini, that DDS and the Information Technology Department (“IT”) “miscommunicated concerning the contents of the June 10, 2019 flash drive, and inadvertently documents in response to Request #3 and #4” were not included and the Town was “working on retrieving the additional information requested in Requests #3 and #4.”

On June 17, 2019, the Town provided a second flash drive to the Complainant, which Complainant retrieved in person. On that date, the Town Clerk verbally “advised Mr. Armstrong that one-hundred ninety-one (191) electronic mail communications were not provided on the flash drive because they were between Town staff and legal counsel for the Town, and thus protected by the attorney-client privilege.” The Complainant requested that the Town provide the reasons for exempting the 191 emails in writing, which the Town did on June 20, 2019, citing R.I. Gen. Laws § 38-2-2(4)(A)(I)(a), which exempts records relating to the client/attorney relationship.

Dissatisfied with the Town’s response, the Complainant filed the Complaint with this Office.

Arguments

The Complainant alleges the Town violated the APRA by: (1) failing to timely respond to the request; (2) failing to respond to the request for text messages; and (3) withholding responsive documents pursuant to the attorney-client relationship exemption. The Complainant argues that the Town's "delinquency prohibits them from withholding information" and that Complainant is "questioning their invocation of Attorney/Client privilege for 191 emails since the topics of my investigation fall within the public domain."

Attorney William J. Conley, Jr., provided a substantive response on behalf of the Town, which included affidavits from the Town Clerk, Donna L. Giordano, Deputy Town Clerk, Mary L. LeBlanc, DDS Director Pellegrini, and IT Director Marc Tate, as well as 194 withheld emails for this Office's *in camera* review.<sup>1</sup> Ms. LeBlanc's affidavit sets forth the timeline of events as outlined above and states that "[t]he Town Clerk's office worked to comply in good faith with Mr. Armstrong's APRA request, and attempted to immediately correct the error that the June 10, 2019 flash drive did not contain all of the information requested in the May 1, 2019 APRA request." This is echoed in Ms. Giordano's affidavit. Ms. Pellegrini attests that she worked with Mr. Tate of the "IT department to compile documents in response to Mr. Armstrong's APRA request." "On June 13, 2019, [Ms. Pellegrini] was advised by the Town Clerk, Donna Giordano, that she received a telephone call from Mr. Armstrong, who advised her that the flash drive provided to him on June 10, 2019 did not contain responsive documents to Requests #3 and #4 of his APRA request." Ms. Pellegrini "inquired with Marc Tate, who then confirmed that he had not provided documents in response to Requests #3 and #4 of the APRA request." Ms. Pellegrini outlines the efforts undertaken to compile records responsive to Requests #3 and #4 and states that "DDS worked to comply in good faith with Mr. Armstrong's APRA request." Ms. Pellegrini also states that "as Director of DDS, I do have a town issued cell phone; however, it is used for emergencies and I did not make any text messages concerning the matters requested in Mr. Armstrong's APRA request." Mr. Tate's affidavit describes the efforts undertaken by the IT Department to compile documents responsive to the Complainant's request. Mr. Tate attests that he "spent approximately thirty (30) hours reviewing the data and creating the final file with all of the e-mails that were relevant and responsive, and removed any e-mails that were considered privileged communications between legal counsel and Town personnel."

This Office requested supplemental information about the withheld documents to assist this Office's review. In response, the Town provided this Office with a Log of the withheld emails identifying the subject matter, sender, recipients, and reason(s) for withholding ("Exemption Log"). The Town also provided a supplemental affidavit from Mr. Tate detailing the process he undertook to compile the Exemption Log. Mr. Tate states, "I believe that I held some records which I classified as attorney client privileged that may have not met that exemption due to the fact that legal counsel was not included thereon, privilege had been broken, or should have been exempt under a different section of the APRA statute." Mr. Tate also states that "some of the 191

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<sup>1</sup> Although the Town's June 20, 2019 response to the Complainant's request and its response to the Complaint indicated that it was withholding 191 emails, this Office received a total of 194 emails identified as "privileged" for *in camera* review.

electronic records withheld and provided for an *in camera* review to the Office of Attorney General do not actually relate to the four (4) subject matters requested in Mr. Armstrong's APRA request." The Exemption Log includes yellow and red highlighting to respectively identify documents that Mr. Tate now indicates are not exempt or not responsive. The Town provided both the Exemption Log and supplemental affidavit *in camera* to this Office.

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.

Each of the Complainant's allegations will be discussed in turn.

(1) The Town's alleged failure to timely respond to the request.

Pursuant to the APRA, 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 reason(s), or extending the period necessary to comply. *See* R.I. Gen. Laws §§ 38-2-3(e), 38-2-7. A public body may extend the time period to respond an additional twenty (20) business days "if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary[.]" *Id.*

Here, it is undisputed that the Complainant submitted the request to the Town on May 1, 2019. The Town timely invoked the twenty (20) business day extension permitted under the APRA on May 13, 2019, which established a deadline of June 13, 2019 for the Town's response. The Town provided the first flash drive to the Complainant on June 10, 2019. On June 11, 2019, the Complainant advised the Town, and the Town confirmed, that the first set of documents provided to the Complainant was incomplete. The Town did not provide the second flash drive of responsive documents until June 17, 2019 – more than thirty (30) business days after the Complainant submitted the request. There is no indication that the Town sought or was awaiting prepayment. Importantly, the Town does not dispute that it failed to timely respond to the Complainant's request. As such, we find the Town violated the APRA when it failed to completely respond to the Complainant's request within the time period set by the APRA. *See* R.I. Gen. Laws § 38-2-3(e).

(2) The Town's alleged failure to respond to Complainant's request for text messages.

The Complainant contends that the Town failed to provide documents or otherwise respond to Request #3, which sought copies of certain text messages.

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). "Failure to comply with a request to inspect or copy the public

record within the ten (10) business day period [subject to the extension in § 38-2-8(e)] shall be deemed to be a denial.” R.I. Gen. Laws § 38-2-7(b). Additionally, “[a] public body that receives a request to inspect or copy records that do not exist or are not within its custody or control shall, in responding to the request in accordance with this chapter, state that it does not have or maintain the requested records.” R.I. Gen. Laws § 38-2-7(c).

It is undisputed that the Town did not respond to the request for text messages either by providing responsive records or indicating that no responsive records exist. In fact, there is apparently no mention of text messages in any of the Town’s communications with the Complainant until the affidavit of Ms. Pellegrini submitted to this Office in response to the Complaint wherein she states that although she has a “Town issued cell phone” she “did not make any text messages concerning the matters requested in Mr. Armstrong’s APRA request.” Although Ms. Pellegrini indicates that her Town-issued cell phone does not contain responsive text messages, the Town has still not affirmatively stated that neither the Town nor its employees maintain any responsive text messages.

We find that the Town violated the APRA either by failing to timely produce responsive records or by failing to affirmatively state that it did not maintain the requested text messages. *See* R.I. Gen. Laws §§ 38-2-7(b), (c); *Sherman v. Joint Committee on Legislative Services*, PR 20-38. Within ten (10) business days, the Town is directed to either produce any responsive text messages or to provide a sworn statement confirming that the Town, through its employees, does not maintain any responsive text messages. The Town should also provide a sworn statement detailing the search it conducted to determine whether it maintained any responsive text messages, including who was consulted, the dates or approximate dates when the search was conducted, the means used to search, and why the Town believes the search was reasonable. For purposes of this search, personal devices and personal accounts would come within the ambit of the APRA to the extent that they include communications relating to “public business.” R.I. Gen. Laws § 38-2-2(3). The Town’s submission should be sent to both this Office and Complainant.

(3) The Town’s withholding of documents pursuant to the attorney/client relationship exemption.

The Complainant argues that the Town improperly exempted emails pursuant to the attorney/client privilege because “the topics of my investigation fall within the public domain.” Additionally, Complainant argues that the Town waived the right to exempt these documents by not timely asserting an exemption.

As previously stated, under the APRA 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 APRA exempts “[a]ll records 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. 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.*; *see also Callahan v. Nystedt*, 641 A.2d 58, 61 (R.I. 1994).

Additionally, the APRA provides that “[a]ny denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made to the person or entity requesting the right in *writing* giving the specific reasons for the denial within ten (10) business days of the request and indicating the procedures for appealing the denial. Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” R.I. Gen. Laws § 38-2-7(a) (emphasis added).

Here, the Town withheld 194 documents as “relating to a client/attorney relationship[.]” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). The Town did not provide a written response asserting this exemption until June 20, 2019, after the Town’s deadline to respond to the request had already passed. As such, absent “good cause shown,” the exemption has been waived. R.I. Gen. Laws § 38-2-7(a). In its response to this Complaint, the Town did not specifically identify any “good cause” why the exemption should not be deemed waived. Indeed, the Town’s supplemental submission to this Office indicated that it subsequently came to believe that certain withheld records are actually not subject to the cited exemption. The Town did not indicate whether it has now provided Complainant with those records that the Town no longer considers exempt.

Importantly, “the burden shall be on the public body to demonstrate that the record in dispute can be properly withheld from public inspection under the terms of this chapter.” R.I. Gen. Laws § 38-2-10. The Town has now indicated that a number of the documents were improperly withheld. Based on our review, we also question whether some of the records that the Town still maintains are exempt fall within the cited exemption. For instance, it appears that a number of the withheld emails, or certain emails within withheld email threads, do not include legal counsel. However, our review is inhibited by the fact that the Town did not clearly identify which withheld documents correspond with which entries on its Exemption Log. Additionally, it is not apparent to us that there is “good cause” for not deeming the exemption waived. Although we recognize that the Town expended substantial time responding to this request and did not assess costs for doing so, the Town has not identified any good cause for not timely asserting the exemption in writing, as required by the plain text of the APRA.

We find that the Town violated the APRA by improperly withholding the responsive emails that it now indicates are not exempt and by withholding emails without timely asserting an exemption in writing in accordance with the APRA. *See* R.I. Gen. Laws §§ 38-2-7(a), (b).

Within ten (10) business days, the Town is required to provide Complainant with the emails it withheld, subject to the following caveat. If after conducting a careful review, the Town maintains that certain particular emails are exempt pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) and believes it can establish good cause for the exemption not being waived, then the Town should provide only those emails to this Office for *in camera* review and produce the remaining emails to Complainant. Any documents the Town does not provide to Complainant should be provided to this Office, with each document separately labeled with a number that corresponds to a modified

Exemption Log that lists only those records that the Town is continuing to withhold.<sup>2</sup> For each document the Town is continuing to withhold, the Town should clearly identify why it contends the client/attorney relationship exemption applies to that document (and if the document contains a thread of emails, why the privilege applies to each email). The Town should also state, as required by the APRA, that no reasonably segregable portion of that document is non-exempt. *See* R.I. Gen. Laws § 38-2-3(b) (requiring public body to provide any reasonably segregable portion of document or affirmatively state that no such reasonably segregable portion is available). If any reasonably segregable portion of the document is non-exempt, that portion should be provided to Complainant. The Town should also explain why it contends there is good cause for not considering the exemption waived. Given our findings outlined above and the Town's admission that it withheld non-exempt documents, we expect the Town to promptly turn over as many of the withheld documents as possible to Complainant and to be judicious in determining whether it wishes to press its assertion that certain documents are exempt and articulating the good cause for the exemption not being waived.<sup>3</sup>

### 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).

Although injunctive relief may be appropriate, for the reasons discussed, we believe it appropriate to first allow the Town an opportunity to comply with this finding. Thus, within ten (10) business days, the Town must provide a supplemental submission consistent with the guidance provided above. Additionally, the Town should address whether the violations found herein were knowing and willful, or reckless. Within ten (10) business days of receiving the Town's supplemental submissions, the Complainant may also submit a supplemental submission if he wishes, limited to addressing the issues presented in the Town's supplemental submission.

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<sup>2</sup> The Exemption Log should be provided to Complainant except to the extent the Town contends that doing so will compromise the exemption.

<sup>3</sup> As noted above, the Town now contends that some of the withheld documents are non-responsive to the request. Given that the Town initially withheld those documents in response to the request, we encourage the Town to provide those documents to the Complainant. If the Town wishes to press its contention that those documents are non-responsive and/or exempt, then the Town should include those documents as part of its supplemental *in-camera* submission to this Office, and provide a particular explanation for each document expressing why the Town contends that document is non-responsive to the request. The Town should provide Complainant with a copy of this explanation regarding why it contends the document is non-responsive and also provide the Complainant with a description of each document so that Complainant can assess whether he takes issue with the Town's contention that the document is non-responsive.

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