



STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

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Peter F. Neronha
Attorney General

VIA EMAIL ONLY

October 2, 2020
PR 20-59B

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:

We have completed our supplemental investigation into the Access to Public Records Act (“APRA”) Complaint filed by Mr. John D. Armstrong (“Complainant”) against the Town of Westerly (“Town”). In *Armstrong v. Town of Westerly*, PR 20-59, we found that the Town violated the APRA when it failed to timely produce or exempt all documents responsive to the Complainant’s request.

Armstrong v. Town of Westerly, PR 20-59

As discussed in our finding, PR 20-59, this Complaint stems from the Town’s response to Complainant’s APRA request seeking certain documents related to the operation of the Town Planning Department. The Town withheld 194 documents as “relating to a client/attorney relationship[.]” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). However, this Office found that the Town did not timely assert the exemption and did not explicitly identify any “good cause” that would warrant not finding the exemption to have been waived. R.I. Gen. Laws § 38-2-7(a). Moreover, in responding to the Complaint, the Town indicated that a number of the documents it initially withheld are not actually exempt. Additionally, this Office found that the Town failed to timely produce records responsive to Complainant’s request for certain text messages, or to affirmatively state that it did not maintain the requested text messages.

This Office directed the Town to provide Complainant with the responsive records it withheld, subject to the caveat that if after conducting a careful review, the Town still maintained that certain particular records are exempt pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) and believed it could

establish good cause for the exemption not being waived, then the Town could identify and provide those records to this Office for *in camera* review, and produce the remaining records to Complainant. We also directed the Town 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 was also required to 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. Finally, we asked that the Town address whether the violations committed by the Town were knowing and willful, or reckless.

Supplemental Submission

The Town provided a supplemental submission wherein it acknowledges that its response to Complainant's APRA request was not timely but asserts that the Town "worked in good faith" to provide a complete response after initially inadvertently failing to respond to certain parts of Complainant's APRA request. The Town maintains that its violation should not be considered knowing and willful, or reckless, including because of the significant time spent on completing the request and the fact that "the Town provided Mr. Armstrong with more than one-thousand (1,000) pages of responsive documents" in response to the APRA request prior to this Complaint being filed, at no charge to the Complainant. The Town notes that when originally responding to Complainant's request, it had to review over 7,000 documents and provided Complainant with two flash drives of responsive documents, all without assessing any cost for the flash drives or the time spent on search and retrieval. The evidence provided by the Town indicates that one employee spent about thirty (30) hours working on Complainant's request prior to this Complaint being filed, and that between the Town's original response to the Complainant and the work that had to be performed to provide Complainant with additional, previously-withheld records in response to this Office's finding in PR 20-59, the Town has collectively spent about sixty-six (66) hours responding to Complaint's request at no charge.

The Town asserts it "cautiously reviewed" the 194 documents initially withheld from disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) and has now provided Complainant with unredacted versions of 171 of those previously withheld documents. Additionally, the Town provided Complainant with ten (10) additional previously withheld communications and attachments (some of which consisted of legal invoices), with limited redactions to legal services narratives that it maintains are consistent with this Office's previous findings. *See Chiaradio v. Town of Westerly*, PR 16-17 (concluding that the total hours billed and the total amount of legal bills paid were public records, but the narrative information regarding the nature of the legal services provided was exempt from public disclosure as related to the client-attorney relationship, R.I. Gen. Laws § 38-2-2(4)(A)(I)(a)). The Town also maintains that "Mr. Armstrong's APRA request did not include requests for legal invoices . . . , but rather these documents were retrieved by the IT Department in its search for electronic communications and withheld due to the communications being between the attorney and client." As such, the Town indicates that these redacted records are not responsive to the request. As previously noted in PR 20-59, when responding to the Complaint, the Town contended that it had realized that "some of the . . .

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 Town submitted the final thirteen (13) withheld records, which consist of email communications and their attachments, to this Office for *in camera* review. The Town contends that eleven (11) of these documents "relate to on-going proceedings involving the Town, Rawson Materials, Amaresco Solar Energy System and National Grid concerning the Town's negotiations with said parties relative to the acquisition of land and the purchasing of energy." The Town asserts that these "communications include advice from legal counsel and attorney work product and draft documents relative to said potential purchases" and that no reasonably segregable portion of these emails is non-exempt pursuant to R.I. Gen. Laws § 38-2-3(b). Additionally, "the Town states that it has 'good cause' for withholding said documents because none of these emails relate to the subject matters requested in Mr. Armstrong's APRA request. This matter was inadvertently included in the withheld emails when the IT Director searched for legal counsel in order to protect the Town from the disclosure of attorney client communications."

The Town produced the twelfth email and its attachments to the Complainant, with limited redactions to the portions that "related to the aforementioned matter concerning the potential purchase of land/energy." Although the Town maintains that the portions related to the acquisition of land and energy are exempt and outside the scope of the Complainant's APRA request, the Town provided other portions of the record to the Complainant in accordance with R.I. Gen. Laws § 38-2-3(b) ("Any reasonably segregable portion of a public record *** shall be available for public inspection after the deletion of the information which is the basis of the exclusion.").

The final document presented for *in camera* review is an email with one attachment that "relates to a personnel matter concerning the former Town Planner, Rui Almeida" and "[t]he Town states that it has 'good cause' for withholding said documents because these relate to a personnel matter and are personal individually identifiable documents[.]" The Town also states that "Mr. Armstrong's APRA request did not request such records relating to Mr. Almeida and his personnel matters."

Finally, the Town provided an affidavit from Office of the Town Manager Executive Assistant, John Moretta, addressing the Town's response to the Complainant's request for certain text messages. Mr. Moretta states that he is "responsible for management of all cellular phones issued to employees for the Town of Westerly" and that the carrier for the Town is Verizon Wireless Communications ("Verizon"). Mr. Moretta attests that "[t]he Town of Westerly does not maintain and is not in possession of copies of text messages sent or received from cellular phones or other devices capable of communicating messages for employees of the Town of Westerly, as requested in the APRA Request submitted by Mr. Armstrong to the Town of Westerly on May 1, 2019." Mr. Moretta attests that he communicated with Town employees to ensure that personal devices and personal accounts were not used for communicating on matters of "public business," and he was informed that no such communications were exchanged regarding the subject matters requested in Mr. Armstrong's APRA request. Mr. Moretta maintains that he also "personally communicated with Verizon concerning the retrieval of text messages sent or received from cellular phones *** for employees of the Town of Westerly" and that he "was told by Verizon that it maintains such

text messages for a period of seven (7) days” and that Verizon requires a “subpoena or court order issued to the Subpoena Compliance Unit of the Verizon Law Enforcement Division” to retrieve such messages. Mr. Moretta states that his communications with Verizon through the Town’s Verizon representatives occurred on or about June 8, 2020.

The Complainant was provided an opportunity but did not provide a supplemental submission and did not contest any of the assertions in the Town’s supplemental submission.

Analysis

The Town copied this Office on its communication providing Complainant with a link to 171 of the records that the Town initially withheld. The Complainant does not contest the Town’s assertion that he has now received these documents in their entirety. For each of the other twenty-three (23) documents that were initially withheld and that the Town continues to maintain are exempt in part (i.e., redacted) or in full, the Town asserts that the record, or portion of the record being withheld, is not actually responsive to the Complainant’s request. The Complainant does not take issue with the Town’s contention in this regard. Additionally, based on our review of those records that the Town continues to withhold in part or in full, the Town’s contention that these withheld materials do not pertain to the subject matter of Complainant’s request seems reasonable based on the record before us.¹ As such, the record indicates that Complainant has now been provided with all the withheld records to the extent those records were responsive to the APRA request. We additionally note that the Town has provided evidence that it searched for and did not retrieve any responsive text messages. The Complainant did not dispute the Town’s representation that it is not in possession of any responsive text messages or offer any evidence to the contrary.

Based on the record before us, we do not find injunctive relief appropriate. As discussed above, in response to this Office’s finding in PR 20-59, the Town has now provided Complainant with all the records it had withheld, with the exception of the records (or portions thereof) discussed in this finding that the Town, without any dispute from Complainant, asserts are not responsive to the request. *See Harris v. City of Providence*, PR 17-28 (“the failure of a public body to produce records that do not exist or that are not responsive to an APRA request does not violate the APRA.”); *see also Amaral v. City of Providence*, PR 20-43 (finding that the City did not violate the APRA by withholding those portions of the emails that were not responsive to the request).

Additionally, based on the totality of the evidence presented and the Town’s disclosure of the previously withheld records in response to our finding, we do not find the Town committed a knowing and willful, or reckless violation. *See* R.I. Gen. Laws § 38-2-9(d). Even though the Town failed to provide a complete, timely written response to Complainant’s APRA request, the Town was in communication with Complainant regarding the APRA request and discussed it with him in person. The Town indicates that its failure to initially provide a complete response to the APRA request was inadvertent and that it took measures to complete its response once it became aware

¹ Complainant’s APRA request was lengthy, but the content of the request is set forth in PR 20-59.

of the issue. Further, although the Town improperly withheld certain records, we acknowledge the evidence in the record and the Town's representation that it expended substantial time and effort responding to Complainant's request, both before and after the Complaint was filed, without assessing any fees. *See* R.I. Gen. Laws § 38-2-4(b). We also note that the Town does not have a record of any recent similar violations.

Nonetheless, we caution the Town that the APRA requires a public body to conduct a thorough review of each potentially responsive document to determine that document's responsiveness and whether any of the APRA's twenty-seven (27) exemptions may apply. We cannot help but think that most of the issues involved in this Complaint could have been resolved, or at least narrowed, had the Town conducted a more thoughtful review of the potentially responsive documents prior to responding to the request. Conducting a reasonable review (and leaving adequate time to do so) is paramount to promoting the APRA's purpose of facilitating public access to public records. *See* R.I. Gen. Laws § 38-2-1. We encourage the Town to view the APRA portion of this Office's recorded 2020 Open Government Summit on our website (<http://www.riag.ri.gov/CivilDivision/OpenGovernmentUnit.php>) or to otherwise contact this Office to schedule a training on the APRA.

Conclusion

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 E. O'Rourke
Kayla E. O'Rourke
Special Assistant Attorney General