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VIA EMAIL ONLY

April 14, 2021
PR 21-11

Michael Grygiel, Esquire
Legal Counsel, Providence Journal

Bruce Leach, Esquire
Legal Counsel, RI Convention Center Authority

Re: The Providence Journal v. Rhode Island Convention Center Authority

Dear Attorneys Grygiel and Leach:

The investigation into the Access to Public Records Act (“APRA”) complaint filed by Attorney Michael Grygiel on behalf of his client, The Providence Journal, (“Complainant”) against the Rhode Island Convention Center Authority (“Authority”) is complete. For the reasons set forth herein, we find that the Authority did not violate the APRA. However, we also find that, because SMG¹ performs work on behalf of or in place of the Authority, as contemplated in the APRA’s definition of “public body,” SMG is a public body under the APRA. We also note that public bodies are required to disclose payroll records they maintain in response to a public records request to the extent such records contain information set forth in the APRA as public. Accordingly, we encourage SMG to produce the requested employee records to Complainant within five (5) business days of the issuance of this finding to the extent such information is public pursuant to the APRA and the guidance provided in this finding. If SMG does not do so, Complainant may wish to make a clearly framed APRA request for such records directly to SMG. If Complainant is dissatisfied with SMG’s response, Complainant should notify this Office at which time this Office would open a complaint. We expect that such a complaint process would be greatly expedited based on the information that this Office has already reviewed in connection with the instant Complaint.

¹ Based on the record, “SMG” is a professional management company that provides staffing (such as security guards, plumbers, ticketing personnel, foodservice staff, and facility managers) for the Rhode Island Convention Center and the Dunkin’ Donuts Center pursuant to a management agreement with the Authority. The record indicates that SMG merged with “ASM Global.” For purposes of this Complaint, we will use “SMG” to collectively refer to SMG/ASM Global.

I. Background

A reporter for the Complainant, Ms. Katherine Gregg, submitted an APRA request to the Authority seeking:

“in a digital format the names, job titles, salaries, OT and/or daily/hourly rates and total calendar year 2019 earnings of Convention Center Authority employees, including those working for the RICCA under the auspices of SMG/ASM Global.”

The Authority responded to the Complainant by providing the requested information for the three employees who are directly employed by the Authority. The Authority denied the Complainant’s request for information for employees working “under the auspices of SMG/ASM Global” on the grounds that “there is no such category” of “Convention Center Authority employees” and that pursuant to the Authority’s contract with SMG, “those personnel are deemed employees of SMG and subject to its control and will not for any purposes be considered employees or agents of the Authority.” The Authority’s response also noted that a copy of the Authority’s last management contract with SMG was being sent to Complainant in response to a different request.²

The Complainant appealed the Authority’s response to Mr. Bernard Buonanno, Chairman of the Authority, arguing that the Authority interpreted the APRA’s public employee disclosure provisions too narrowly. The Complainant’s appeal described the initial APRA request as seeking: “the names, job titles/positions, salaries and 2019 earnings of the employees who staff the RI Convention Center, Dunk., [sic] Vets and associated parking garages.” The Complainant also asserted that the information requested must be disclosed pursuant to the Government Oversight and Fiscal Accountability Review Act.³

Chairman Buonanno responded to the Complainant’s administrative appeal, noting that Complainant’s characterization of the request in the appeal was different and seemingly broader

² Although the record indicates that the Complainant made multiple different requests to the Authority, the Complaint specifies that it pertains to the “Authority’s . . . partial denial of Reporter Katherine Gregg’s APRA request for access to the names, job titles, salaries, overtime and/or daily/hourly rates and total calendar year 2019 earnings of RICCA employees & contractors.” As such, any other requests and responses are not before us.

³ The Government Oversight and Fiscal Accountability Review Act (“GOFAR”) provides that in order “to ensure that citizens of this state receive high quality public services at low costs, with due regard for the taxpayers of this state, and the service recipients, the legislature finds it necessary to ensure that access to public information guaranteed by the access to public records act is not in any way hindered by the fact that public services are provided by private contractors.” R.I. Gen. Laws § 37-2.3-2. Among other provisions, GOFAR requires that “[e]ach private contractor shall file a copy of each executed subcontract or amendment to the subcontract with the agency, which shall maintain the subcontract or amendment as a public record.” R.I. Gen. Laws § 37-2.3-4.

than the initial request. Nonetheless, Chairman Buonanno upheld the denial related to employees of SMG, stating that “[a]s the Authority does not maintain the information you requested in the format in which you requested it, the Authority need not create such format. As no such document exists, there is nothing to provide.” Additionally, the Authority stated that “since the requested employee data is data of a third party the Authority must request it from SMG and PFM”⁴ and noted that its contract with SMG requires the Authority “to keep all payroll information it obtains from SMG confidential,” and thus “without their approval [the Authority] may not furnish it to you.”

The Authority’s appeal response also stated that SMG and PFM have asserted that the requested records are exempt from disclosure pursuant to R.I. Gen. Laws §§ 38-2-2(4)(A)(I)(b) (personal individually identifiable records where disclosure “would constitute a clearly unwarranted invasion of personal privacy”) and 38-2-2(4)(B) (“trade secrets and commercial or financial information obtained from a person, firm or corporation that is of a privileged or confidential nature.”).

The Authority additionally responded that “[i]f SMG and PFM are a ‘public agency’ as they act on behalf of the Authority, any inquiries for information as to payroll data as to their employees who perform services for the Authority should be directed to them. It is our understanding that SMG will be replying to your request.”

Finally, the Authority responded that GOFAR only applies to the executive branch of government, not the Authority.

Dissatisfied with the Authority’s response, the Complainant submitted this Complaint.

II. Arguments

A. Initial Submissions

The Complainant alleges the Authority violated the APRA when it denied its request for certain payroll-related information regarding employees who perform work for the Authority “under the auspices of SMG/ASM Global.” The Complainant argues that the Authority “cannot avoid APRA’s mandatory disclosure obligations merely because certain of its services are provided by private contractors.” The Complainant also maintains that the invocation of Exemptions (A)(I)(b) and (B) was improper. Additionally, the Complainant asserts that “[w]hile it is true that private entities are not generally subject to APRA’s disclosure obligations, [GOFAR] provides that ‘access to public information guaranteed by the access to public records act [may not] in any way [be] hindered by the fact that public services are provided by private contractors.’”

⁴ “PFM, LLC,” was not specifically named in the initial APRA request but is a different management company that manages The Veterans Memorial Auditorium for the Authority pursuant to a different management contract.

Attorney Bruce D. Leach provided a substantive response on behalf of the Authority, which included an affidavit from Mr. James P. McCarvill, who was the Executive Director of the Authority at that time. The Authority maintains that “the Authority has no employees working for the Authority under the auspices of SMG/ASM Global” because “SMG’s employees are SMG’s employees and subject to their control, and not for any purposes to be considered employees or agents of the Authority.” Mr. McCarvill attested that “SMG’s employees who work at the Convention Center or Dunk are members of various trade unions and SMG, not the Authority, is the signatory to each union contract.” Likewise, “under its management Contract with PFM the personnel working at The Vets are employees of PFM and are controlled by PFM and not the Authority.”

The Authority additionally states that the “personnel data is not in the possession of the Authority” but the Authority inquired with SMG and PFM “as to providing the Authority the requested payroll information as to their employees” in order for it to be provided in response to the Complainant’s request. According to the Authority, “both objected on the fact that the requested information was subject to exceptions from disclosure under the APRA” as disclosure would constitute a clearly unwarranted invasion of personal privacy and affect the company’s competitive posture.

Additionally, the Authority contends that SMG “is acting on behalf of the Authority” and “[i]f it therefore qualifies as an agency [under the APRA] directly, then the Journal’s request for information as to its employees should have been made directly to SMG.” The Authority attests that legal counsel for SMG directly responded to the Complainant on March 6, 2020 stating its objections to providing the requested information.⁵

Finally, the Authority maintains that “GOFAR is not applicable to the Authority” because the authority is not “a board or commission of the *executive* branch” of state government. (Emphasis in original).

We acknowledge Complainant’s rebuttal.

B. Supplemental Submissions

This Office sought supplemental submissions from the parties, as well as from SMG and PFM, addressing several issues.

⁵ The record indicates that the Complainant also directly sent SMG the February 10, 2020 APRA request that it had sent to the Authority, as well as other requests, and that SMG directly responded by providing certain responsive documents and explaining why it believed other documents were exempt from disclosure. SMG maintained that although it did not consider itself in receipt of a proper APRA request seeking records related to its employees, it was responding at the urging of the Authority. As noted above, the only request that was the subject of this Complaint and that is before us now is Complainant’s February 10, 2020 request to the Authority and the Authority’s response.

SMG's submission noted that Complainant's initial request for records, which was sent to both the Authority and SMG, was worded differently and more narrowly than the administrative appeal to the Authority. SMG notes that Complainant never directly presented it with the version of the APRA request that was presented in the administrative appeal to the Authority and argues that Complainant's original request, as worded, did not seek records related to SMG employees, but rather to employees of the Authority.

SMG explains that pursuant to its contract with the Authority, "SMG manages, operates and maintains the Rhode Island Convention Center, the Dunkin' Donuts Center ('DDC'), and the RICCA's parking garages (collectively the 'Convention Center')." The nature of the work performed by SMG employees ranges widely and includes functions such as management and budgeting, as well as working concessions, providing security, and maintaining booking records and schedules.

This Office asked SMG to address whether it was a public body under the APRA. In response SMG affirmatively acknowledged that it is a public body under the APRA:

"In regard to the 'public body' question, SMG does not dispute that it manages and operates the Convention Center 'on behalf of and/or in place of' the RICCA. APRA defines a 'public body' to include any 'public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.' G.L. 1956, § 38-2-2(1). The RICCA itself is subject to APRA by virtue of G.L. 1956, § 42-99-17. Therefore, SMG is within the APRA definition of a 'public body.'"

PFM provided a submission asserting that it is "not an agency of the State of Rhode Island nor of any local government." PFM explains that it employs six executive level employees who work at the Vets, as well as part-time event staff, who work for and are paid by PFM. PFM states that the Authority has never been provided with its employee payroll records.

The Authority and the Complainant also provided supplemental submissions. The Authority took the position that SMG and PFM are both public bodies under the APRA. The Authority stated that SMG and PFM employees are employees of those respective entities and the Authority has no control over those employees or their hiring or firing, with the limited exception of having some input regarding the highest level executive employees who interface with the Authority. Unlike with the SMG contract, which gives the Authority some ability to access SMG payroll records subject to confidentiality, the Authority's contract with PFM does not give the Authority any access to PFM's payroll records.

III. 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.

A. The Authority

The APRA applies to entities that are an “agency” or “public body.” Importantly, the APRA defines those terms to include: “any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of and/or in place of any public agency.*” R.I. Gen. Laws § 38-2-2(1) (emphasis added).

The APRA provides that, unless exempt, “all records *maintained or kept on file* by any public body . . . shall be public records[.]” R.I. Gen. Laws § 38-2-3(a) (emphasis added). The APRA further provides that:

“Nothing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made except to the extent that such records are in an electronic format and the public body would not be unduly burdened in providing such data.”

R.I. Gen. Laws § 38-2-3(h) (emphasis added); *see also* R.I. Gen. Laws § 38-2-7(c).

It is undisputed that the Authority provided the Complainant with the requested payroll information that it maintained for the three individuals directly employed by the Authority. In response to this Complaint, Mr. McCarvill attested that personnel data requested by Complainant (to wit, “the names, job titles/positions, salaries and 2019 earnings of the employees who staff the RI Convention Center, Dunk,. [sic] Vets and associated parking garages”) “is not in the possession of the Authority” outside of the three employees the Authority directly employs. The Complainant has not presented any evidence to dispute the Authority’s contention that it does not maintain the requested information as to the workers who are employed through SMG and/or PFM. Upon reviewing the evidence presented, we fail to find any evidence that would lead us to conclude that the Authority is in possession of the records requested, except as to the three Authority employees for whom the records were provided.

Consistent with the text of the APRA and this Office’s prior findings, the Authority did not violate the APRA by not producing records it does not maintain. *See Lopez v. City of Providence*, PR 20-03 (“Because the APRA does not require a public body to disclose records that do not exist or that are not within its custody or control, we find no violation[.]”); *see also* R.I. Gen. Laws §§ 38-2-3(h), 38-2-7(c). The relevant portion of the request in this case did not seek contracts or other documents pertaining to the relationship between the Authority and SMG, but rather sought records related to employees hired and managed by SMG, not the Authority.⁶ The record indicates

⁶ The Complainant asks this Office to direct that the Authority release the requested records, and if that fails, presumably the Complainant would expect that this Office seek injunctive relief against the Authority to obtain the requested records. *See* R.I. Gen. Laws § 38-2-8. But the Authority has already requested the subject records from SMG and PFM, and it is SMG and PFM that have declined to provide them. A finding by this Office against the Authority – or even a judicial order against the Authority – would leave this case in no different posture than when the

the Authority did provide Complainant with the amounts paid by the Authority to SMG and PFM for their services.

While we do not find a violation against the Authority, we do note that in situations where a public body delegates its functions to a private entity such that the private entity is itself a public body, it would behoove the public body to clearly communicate with that entity regarding that entity's legal obligations and responsibilities as a public body. It would also be beneficial for the public body to clearly delineate in its APRA procedures how requests for certain types of records it does not maintain should be directed to the other public body doing work on its behalf.

B. SMG

This, however, does not mean that the Complainant does not have an ability to seek the requested records under the APRA. SMG has openly acknowledged that it performs work “on behalf of and/or in place of” the Authority and is itself a public body subject to the APRA. *See* R.I. Gen. Laws § 38-2-2(1). We agree, and on these facts, we would have concluded as such. The record in this case, including SMG's submission, evinces that SMG “manages, operates and maintains” the Convention Center and other facilities on behalf of the Authority, which itself only employs three people. The Authority's enabling legislation provides that the Authority is “a public instrumentality exercising public and essential governmental functions,” and was “created, established, and incorporated . . . to construct, manage, and operate a convention center[.]” R.I. Gen. Laws § 42-99-4(a), (b). The evidence before us demonstrates that the Authority delegated SMG to carry out the Authority's statutory governmental functions on its behalf. Because SMG is “acting on behalf of and/or in place of [a] public agency,” it is itself a public body for purposes of the APRA. *See* R.I. Gen. Laws § 38-2-2(1).

The APRA provides that “[p]ersonnel and other personal individually identifiable records” are not public records if disclosure “would constitute a clearly unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(a)(I)(b). This provision contemplates a balancing test whereby the public interest and privacy interests in the records are balanced to determine whether the records are public. However, in relevant part, this exemption expressly provides that certain information pertaining to public employees *shall* be public:

“with respect to employees, and employees of contractors and subcontractors working on public works projects that are required to be listed as certified payrolls, the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and any other remuneration in addition to salary, job title, job description, dates of employment and positions held with the state, municipality, or public works contractor or subcontractor on public works projects, employment contract, work location, and/or project, business telephone number, the city or town of residence, and date of termination shall be public.”

Authority originally requested the records from SMG and PFM. At bottom, the Authority cannot be made to produce records that it does not maintain or have an absolute legal right to demand.

R.I. Gen. Laws § 38-2-2(4)(a)(I)(b). We have repeatedly held that the information delineated in this provision is public as to all employees of public bodies. *See Farinelli v. Pawtucket*, PR 20-10; *Graziano v. Department of Administration*, 00-01 (“Based upon the foregoing statutory language, we believe that the above-mentioned categories represent the records relating to employees that the Legislature has deemed to be public.”); *In Re: Department of Business Regulation*, ADV 03-05 (“The General Assembly has made an express determination, for public employees, that city or town of residence is public.”).⁷

Here, because no complaint has been filed against SMG, SMG is not formally before us as a party and we cannot, therefore, order them to produce the records at this juncture. Nonetheless, given the express statutory language, we encourage SMG to produce the requested employee records to Complainant within five (5) business days of the issuance of this finding to the extent such information is public pursuant to the APRA and the guidance provided in this finding. If SMG does not do so, Complainant may wish to make a clearly framed APRA request for such records directly to SMG. If Complainant is dissatisfied with SMG’s response, Complainant should notify this Office at which time this Office would open a complaint. Given that this Office has already reviewed substantial information in connection with the instant Complaint, we expect that such a complaint process would be greatly expedited.

C. PFM

We next turn to PFM. Unlike SMG, PFM disputes that it is a public body. Also, unlike SMG, there is no evidence that PFM directly received a request from the Complainant. Indeed, Complainant’s original request did not seem to pertain to PFM at all and it is not entirely clear whether Complainant intended to seek records related to PFM employees. It was only once Complainant mentioned the “Vets” in the administrative appeal that the Authority first mentioned PFM. Additionally, the Complaint filed in this matter did not name PFM as a party. Given these circumstances, we do not believe that PFM is properly a party to this matter and we do not think it is appropriate to issue findings related to PFM. If Complainant contends that PFM is a public body and wishes to seek records maintained by PFM, Complainant is free to make an APRA request to PFM. If PFM denies the request, Complainant is free to bring a Complaint against PFM to this Office.

D. Application of GOFAR

We next address the Complainant’s invocation of GOFAR. To be sure, the general statement of legislative intent contained within GOFAR expresses the desire “to ensure that access to public information guaranteed by the access to public records act is not in any way hindered by the fact that public services are provided by private contractors.” R.I. Gen. Laws § 37-2.3-2. However, neither this general language of intent nor the specific requirements imposed by GOFAR related

⁷ Some precedent cited by SMG pertains to a prior version of the APRA that exempted information identifiable to a particular employee and did not reflect the current wording of R.I. Gen. Laws § 38-2-2(4)(a)(I)(b).

to fiscal monitoring of privatization contracts, *see* R.I. Gen. Laws § 37-2.3-4, purport to alter the requirements of the APRA. Regardless of whether or not the Authority is subject to GOFAR — an issue that the parties dispute and the resolution of which is outside the scope of this Office’s authority in resolving this APRA Complaint — GOFAR does not alter the substantive provisions of the APRA, including the provision that the APRA applies to records that are actually “maintained or kept on file by any public body.” R.I. Gen. Laws § 38-2-3(a). In cases where a public body delegates functions to a contractor such that the contractor becomes a public body under the APRA, as is the case with SMG here, the public may access the contractors’ public records by making an APRA request directly to the contractor.

Conclusion

Although the Attorney General has found no violation and will not file suit in this matter, nothing within the APRA prohibits an individual or entity 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
Kayla E. O’Rourke
Special Assistant Attorney General

cc:

J. Richard Ratcliffe, Esq., Counsel for SMG

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