



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

July 28, 2016

PR16-31

Michael D. Pushee, Esquire

Re: **Tavares v. Newport Housing Development**

Dear Attorney Pushee:

The investigation into the Access to Public Records Act (“APRA”) complaint filed against the Newport Housing Development Corporation (“the Housing Development” or “Housing Authority”), on behalf of your client, is complete. By email correspondence dated March 17, 2016, you filed the instant APRA complaint against the Housing Development and alleged that it violated the APRA when it:

1. failed to respond to your APRA requests, sent on your client’s behalf, dated October 26, 2015, November 20, 2015, and the administrative appeal dated December 16, 2015, and
2. failed to identify a specific reason for the denial of the records, including any exemptions and failed to indicate any appeal rights.

On April 6, 2016, Joseph J. Nicholson Jr., Esquire, who represents the Housing Development, submitted a substantive response, which included three affidavits. According to Mr. Nicholson:

[t]he Housing Authority of the City of Newport has reviewed its email archives as well as any paper files it has to determine receipt of the October 26, 2015 correspondence addressed to Housing Authority of Newport at 120B Hillside Avenue, Newport, RI 02840, as well as the November 20, 2015 correspondence, as well as the December 16, 2015 correspondence. The Housing Authority of the City of Newport has no record of ever having received these three (3) letters, nor does any staff recall receiving any of the letters.

I will also tell you that the process that has been in place for years with the Housing Authority is that when correspondence of this type is received by the Housing Authority, whether by email or through regular mail, it is immediately forwarded to my office to address the matter or provide advice. I have searched my records at my private office as well and I have no record of having received any of these correspondences.

As noted above, Mr. Nicholson also provided affidavits supporting the Housing Authority's response from three (3) sources – the Executive Director of the Housing Authority of the City of Newport, Ms. Rhonda Mitchell; her Executive Assistant, Ms. Donna Bonnenfant; and Mr. Peter Ruggeri, the Housing Authority's Director of Facilities.

Mr. Ruggeri provided in his affidavit:

[t]hat I am the Director of Facilities for the Housing Authority of the City of Newport.

That I have no files, electronically or otherwise that reflect correspondence from Formisano and Company, Attorneys at Law dated October 26, 2015, November 20, 2015 and December 16, 2015.

Ms. Rhonda Mitchell similarly provides in her affidavit, in pertinent part:

I have reviewed my files to determine whether the Housing Authority received or whether I received correspondence from Formisano and Company, Attorneys at Law dated October 26, 2015, November 20, 2015 and December 16, 2015.

That I have no files, electronically or otherwise, which reflect receipt of these correspondences.

Finally, Ms. Donna Bonnenfant stated in her affidavit, in pertinent part:

one of my responsibilities is to receive and review all mail addressed to 120B Hillside Avenue, Newport, Rhode Island.

That I do this on a regular, routine basis and time-stamp the incoming mail.

That when correspondence comes in, I review it with the Executive Director and the Executive Director generally indicates how the correspondence is to be handled or what action the Housing Authority needs to take.

That on a routine basis I forward correspondence of the type being discussed here to our attorney, Joseph J, Nicholson, Jr., for advice and action.

That I have reviewed the Housing Authority's paper files as well as my electronic mail and I have no record of ever having received the October 26, 2015, November

20, 2015 and December 16, 2015 correspondence from Formisano and Company, Attorneys at Law.

You did not provide a rebuttal.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Housing Authority violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA provides in relevant part that “[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request.” See R.I. Gen Laws § 38-2-3(e)(emphases added). Accordingly, in the context of this case, the central question is whether and/or when the Housing Authority received your correspondences.

On this point, we observe a factual discrepancy. For your part, you provide at least some evidence that the two APRA requests and the one APRA appeal was sent to the Housing Authority and no evidence has been submitted that these correspondences were misaddressed. On the other hand, the Housing Authority submits three affidavits evidencing that your correspondences were never received by the Housing Authority, although the reason for this non-delivery is unexplained.

In the typical APRA complaint, a person files a complaint with this Department seeking access to a particular document that is being withheld. If this Department determines that a particular complaint is meritorious and that a document has been improperly withheld, among the available remedies is that this Department 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).

In this case, we need not resolve this factual discrepancy or examine whether the Housing Authority violated the APRA by failing to respond to your APRA requests or appeal – and thus seek “injunctive or declaratory relief” requiring the disclosure of the requested documents – because the evidence provided to this Department makes clear that you have since been provided with the responsive records. As such, since you have a copy of the records you requested, injunctive or declaratory relief would be inappropriate (or moot) and this Department need not address whether the Housing Authority violated the APRA by failing to respond to your request. See e.g., Tanner v. Town Council of East Greenwich, 880 A.2d 784, 794 (R.I. 2005); Farinelli v. City of Pawtucket, PR 16-27.

While our finding that injunctive relief is not appropriate – and thus we need not determine whether the Housing Authority's actions violated the APRA – the fact that you are now in possession of

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the requested documents does not entirely end our inquiry. The reasons for this conclusion is because a court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing a 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). In the appropriate case, we could envision a lawsuit against a public body seeking monetary fines for the willful and knowing, or reckless, denial of a public record, even though the complainant was in possession of the previously withheld document at the time of our finding. Based on the evidence present in this case, however, we conclude that this is not one of those cases. See Farinelli, PR 16-27. Notably, as explained above, no evidence has been obtained that demonstrates that the Housing Authority received your APRA requests or APRA appeal.

Although the Attorney General will not file suit in this matter, nothing in the APRA prohibits an individual from obtaining legal counsel for the purposes of instituting injunctive or declaratory relief within the Superior Court. Please be advised that we are closing your file as of the date of this correspondence.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Michael W. Field  
Assistant Attorney General

MWF/kr

Cc: Joseph J. Nicholson, Jr., Esquire