



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

PR 16-32

Mr. Justin Katz

Re: **Katz v. Employees Retirement System**

Dear Mr. Katz:

The investigation into your Access to Public Records (“APRA”) complaint filed against the Employees Retirement System of Rhode Island (“ERSRI”) is complete. By email correspondence dated January 13, 2016, you allege that the ERSRI violated the APRA when it denied your December 21, 2015 APRA request on the grounds that the records requested were not maintained by the ERSRI.

On December 21, 2015, you made an APRA request to the ERSRI seeking:

the actuarial FUTURE value of future benefits for all active and retired state employees and teachers as of the end of the fiscal year 2015. This should be the total, undiscounted values that produce the ‘total actuarial present value of future benefits’ numbers shown on pages 14 and 15 of the latest valuation report by Gabriel Roeder Smith. Please provide the numbers separately for state employees and for teachers.

The ERSRI responded to your APRA request on December 31, 2015, relating that it “does not maintain the information you seek,” and accordingly, “cannot be expected to compile data or create new documents it does not maintain in the ordinary course of business in response to a public records request.” R.I. Gen. Laws § 38-2-3(h). By email dated January 13, 2016, you filed the instant complaint alleging that the ERSRI violated the APRA by failing to provide you the

requested information and you indicate that after communicating with the actuary, “[i]t is clear that the actuary has the information I seek but will release it only at the instruction of [the ERSRI].” Your complaint continues that “[t]he fact that [the actuary] has not had cause to share a particular number with any state officials is not a shield to the public’s right to know that number, particularly when the firm acknowledges that the state officials, themselves, would have access to it upon demand.”

In response to your complaint, this Department received a substantive response from ERSRI Deputy General Counsel, Amy Crane, Esquire, which states in relevant part that:

it was explained that the information sought by Complainant does not exist and further, that the information sought is information that the ERSRI would never calculate in its ordinary course of business as it is not within the scope of the ERSRI’s duties pursuant to Rhode Island General Laws § 36-8-1 et. seq. Additionally, the ERSRI would be unduly burdened in providing this information as it is not a calculation that the ERSRI has performed or maintains electronically. Rather, this calculation would have to be calculated and compiled by the ERSRI’s outside vendor at a cost to the ERSRI.

ERSRI’s response added that “[t]o require the ERSRI to authorize and pay one of its vendors to perform calculations based upon an APRA request would be unduly burdensome and costly.” An affidavit submitted by Gayle Mambro-Martin, Esquire, further supports ERSRI’s position.

You did not provide a rebuttal.

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 ERSRI violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

Unless exempt, the APRA provides “[a]ll records maintained or kept on file by any public body, whether or not those records are required by any law or by any rule or regulation, shall be public records and every person or entity shall have the right to inspect and/or copy those records at such reasonable time as may be determined by the custodian thereof.” R.I. Gen. Laws § 38-2-3(a)(emphasis added). The APRA also provides that nothing within the APRA “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).

As we understand your APRA request, you do not seek the raw data that ERSRI maintains and uses to perform its calculation, but rather you seek “the actuarial FUTURE value of future benefits of all active and retired state employees and teachers as of the end of fiscal year 2015.” Your APRA request continues and makes clear that this calculation should be the “total, undiscounted values that produce the ‘total actuarial present value of future benefits’ numbers shown” in the actuary’s latest report. In other words, you seek to have ERSRI, through its actuary, perform a calculation that neither ERSRI nor its actuary has yet to calculate, and which neither ERSRI nor its actuary maintains in its possession. See R.I. Gen. Laws § 38-2-3(a).<sup>1</sup> To be clear, while ERSRI and/or its actuary may very well maintain the raw data that would enable the actuary to perform the calculation you seek – and thus provide you the documents you seek – there is no evidence that either ERSRI or the actuary has performed the calculation you seek or otherwise maintains documents responsive to your APRA request. On this point, as previously observed, the evidence is directly the opposite.

We are unaware of any legal authority that would require a public body to perform a calculation in the circumstances presented in this case – and thus produce documents – and R.I. Gen. Laws § 38-2-3(h) supports our conclusion. This provision provides that nothing within the APRA “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). Even assuming that the raw data is in electronic format, this is not a case where a public body need only “reorganize, consolidate, or compile data,” but rather, this is a case where a public body would have to perform a never-before executed calculation to create a non-existent document in order to satisfy your APRA request. In fact, even the precise data you seek – the undiscounted future value – is data that does not presently exist. See id. Again, while you submit that the actuary could perform this calculation, the fact that this calculation has not been performed and could only be performed at a cost to Rhode Island taxpayers supports our conclusion. As such, we find nothing with the APRA that requires such an action, and respectfully, you have provided no legal authority to support this conclusion. We find no violation.

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<sup>1</sup> For purposes of this finding we consider, *arguendo*, that ERSRI and the actuary are the same legal entity subject to the APRA.

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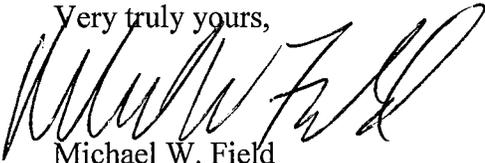
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While the Attorney General has found no violation, nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court, See R.I. Gen Laws § 38-2-8(b). Please be advised that we are closing your file as of the date of this letter.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael W. Field", written in a cursive style.

Michael W. Field  
Assistant Attorney General  
Extension 2380

MWF/kr

Cc: Ms. Gayle C. Mambro-Martin, Esq.