



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 16-33

Ms. Johanna Harris

Re: **Harris v. City of Providence**

Dear Ms. Harris:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the City of Providence (“City”) is complete. By email correspondence dated October 24, 2015, you allege the City violated the APRA when it withheld, based upon the attorney-client relationship, three (3) documents responsive to your September 6, 2015 APRA request.

In response to your complaint, we received a response from the City’s Assistant Solicitor, Kathryn M. Sabatini, Esquire, who also provided an affidavit from another Assistant Solicitor, Christy M. Diorio, Esquire. Assistant Solicitor Diorio states, in pertinent part:

“On August 10, 2015, I received a request for records from the Complainant via email. * * *

In her request, Ms. Harris sought the following: (1) All documents, dated from January 1, 2010 to the present, referring to contracts between the City of Providence and the law firm of Oliverio and Marcaccio LLP, or between the City of Providence and any of the following attorneys: Matthew T. Oliverio, Raymond A. Marcaccio, or Samuel D. Zurier; and (2) All documents from January 1, 2005 to the present, covering the following three categories: (a) All documents referring to any request for or agreement to provide indemnification of legal expenses, costs or damages for any employee, official, executive, City Council member, commission, or board member of the City of Providence except for public safety employees. (b) All documents referring to any request for or agreement to provide legal representation for any employee, official, executive, City Council member, commission, or board member of the City of Providence except for public safety employees. (c) All contracts, invoices, or correspondence with outside

counsel in connection with the legal representation of any employee, official, executive, City Council member, commission, or board member of the City of Providence except for public safety employees.

I reviewed the Complainant's request, as well as documents which may be responsive to the request, and provided a lengthy response on August 25, 2015. * * * Therein, I provided responsive documents to parts (1), (2)(a) and (2)(b) of the request, as well as a \$30 estimate for searching for the so-called 'joint representation' letters that may have been responsive to (2)(a) and (2)(b), and a \$480 estimate for the search of documents potentially responsive to request (2)(c), as well as a request for whether the Complainant would like an estimate for searching for potentially responsive documents that were archived.

Ms. Harris responded to my email of August 24, 2015 the following day, submitting a revised, more tailored request for 2(c) * * * Therein, Ms. Harris narrowed her request for contracts, invoices, or correspondence with outside counsel to the legal representation of three (3) city employees: []¹. * * *

On August 27, 2015, I responded to Ms. Harris advising her that despite her revised, narrowed request for part 2(c), the estimate remained the same, namely \$480, as the search for records could not be limited in such a way that would reduce the number of hours expended in the search. Additionally, I inquired whether Ms. Harris would like an estimate for correspondence with outside counsel regarding the three (3) individuals identified by her, as a search would likely yield records that were privileged and, therefore, not public within the meaning of the APRA. * * *

On September 6, 2015, Ms. Harris responded to my August 27th correspondence by further narrowing request 2(c) * * * to 'contracts, invoices, and correspondence with Attorney Lauren Jones in connection with legal representation of [John Doe²] during June 2009 through December 2011.' * * *

On September 22, 2015, I extended Ms. Harris's September 6, 2015 request by an additional twenty (20) business days due to the number of requests for records pending. * * *

¹ We decline to identify these individuals for privacy reasons and due to the fact that their identity is not relevant to the issues decided in this finding.

² See footnote 1.

The Public Records Unit reviewed potentially responsive documents and determined that a portion of the new narrowed Request 2(c) – correspondence with Attorney Lauren Jones – did not constitute public records under the Act, R.I. Gen. Laws §§ 38-2-2(4)(A)(I)(a) and (E), because such correspondence related to a client/attorney relationship, and such records would not be available to Ms. Harris by law or rule of court to an opposing party in litigation.

On October 21, 2015, the Public Records Unit provided ‘invoices . . . with Lauren Jones . . .’ * * * and denied, in writing, part of Request 2(c) which sought correspondence with Attorney Jones, as said communications were deemed privileged. * * *

The * * * City remains of the view that withholding these specific documents (provided to the Attorney General’s office for an *in camera* review) is permissible under the Access to Public Records Act and appropriate under applicable case law.”³

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

The APRA states that all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). The APRA, however, does exempt some documents from public disclosure and among the exemptions set forth in the APRA is “[a]ll records relating to a client/attorney relationship.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). Our past cases have noted that this provision exempts documents related to the attorney/client relationship, and that this exemption is broader than documents relating to the attorney/client privilege. See Graziano v. Rhode Island Auditor General, PR 98-01.

“The general rule is that communications made by a client to his attorney for the purposes of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure.” State v. Von Bulow, 475 A.2d 995, 1004 (R.I. 1984). See also Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)(“In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free

³ In its response, the City included a copy of the documents provided to you in response to your APRA request. The City also attached a copy of three (3) emails for this Department’s in camera review.

from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”).

Here, you contend that an attorney-client type relationship did not exist with the City. As related through your complaint, you assert that:

“Mr. Jones was the attorney for [John Doe] in connection with ‘Rhode Island Ethics Complaints.’ The City of Providence was not [John Doe’s] attorney. To the contrary, the City had contracted with Mr. Jones to serve as [John Doe’s] attorney. * * * This adversarial relationship further severs any conceivable attorney-client relationship between the City and [John Doe].”

Respectfully, we disagree with your characterization of this relationship.

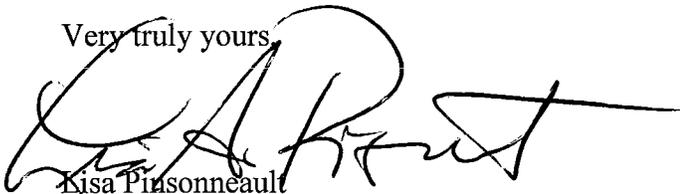
There is no dispute that during the relevant time period John Doe was a City employee and that a complaint was filed with the Ethics Commission relating to John Doe and his position with the City. As acknowledged through your complaint, “the City had contracted with Mr. Jones to serve as [John Doe’s] attorney.” Your assertion that the City “contracted” with Mr. Jones to serve as John Doe’s attorney contradicts your conclusion that an “adversarial relationship” exists among Mr. Jones, the City’s attorney (Ms. Southgate), and John Doe. Indeed, while not dispositive, Mr. Jones invoices are directed to both John Doe and Ms. Southgate and the City’s invoices approving payment to Mr. Jones describes the expense as “[f]or Legal Services rendered to the City of Providence for [a specific time period] regarding Rhode Island Ethics Commission Complaints.”

Rather than characterizing this relationship as “adversarial,” we conclude that the interested parties are more accurately described as having a “common interest.” As noted above, your complaint acknowledges that the City contracted with Mr. Jones to provide legal services to John Doe and this contractual attorney-client relationship between Mr. Jones and John Doe, arranged and paid through the City, supports our conclusion of a “common interest.” In similar circumstances, the “common interest” doctrine has been recognized to “‘protect[] the transmission of data to which the attorney-client privilege or work product protection has attached’ when it is shared between parties with a common interest in a legal matter.” See Tobaccoville USA, Inc. v. McMaster, 692 S.E.2d 526, 531 (S.C. 2010). See id. (“the inquiry is more properly whether or not the matters discussed in the allegedly privileged documents are matters of common interest”). See also Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association, 532 U.S. 1, 10 (2001)(“courts taking the latter view have held that the exemption extends to communications between Government agencies and outside consultants hired by them”)(extending Freedom of Information Act intra-agency exemption to communications outside an agency). Moreover, in a different context, Rhode Island has recognized the “common interest” doctrine. See Mills v. C.H.I.L.D., Inc., 837 A.2d 714, 720 (R.I. 2003)(“A qualified privilege also may exist when the parties communicating share a common interest.”)(defamation).

In this case, we have been provided with a copy of the three (3) emails consisting of two (2) pages. Based upon the above exemption, as well as the case law discussed above, we conclude that the documents you have requested are exempt from public disclosure. See R.I. Gen. Laws § 38-2-2(4)(A)(I)(exempting “all records relating to a client/attorney relationship”). See also Graziano, PR 98-01. Although our in camera review prevents our full discussion of the documents in issue, it suffices that these three (3) emails consisting of two (2) pages were prepared in the scope of legal representation and communicated between Ms. Southgate and Mr. Jones consistent with the “common interest” doctrine. Accordingly, for the reasons discussed, we conclude the requested documents are exempt from disclosure by the attorney/client relationship.⁴ See also Henderson v. Newport County Regional Young Men’s Christian Association, 966 A.2d 1242, 1246 (R.I. 2009)(work product).

Nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in the Superior Court. We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Lisa Pinsonneault
Special Assistant Attorney General

LP/kr

Cc: Kathryn Sabatini, Esq.

⁴ The fact that this Department has determined the document is protected by the client/attorney privilege, there is no need to determine whether any portion of this document is segregable. See R.I. Gen. Laws § 38-2-3(b).