



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

September 23, 2016

PR 16-40

Mr. Phillip Koutsogiane

**Re: Koutsogiane v. Cumberland Fire District**

Dear Mr. Koutsogiane:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Cumberland Fire District ("Fire District") is complete. By email correspondence dated August 26, 2015, you relate that on August 7, 2015, you filed an APRA complaint that related as of the date of your complaint (August 26, 2015), you "have not received any of the requested materials." Your APRA request sought:

1. Copies of all bills/statements for legal services for all the four (4) Cumberland Fire Districts and the newly formed merger, the Cumberland Fire District, from November 4, 2014 to date and continuing to date of response. \* \* \*
2. Copies of all documents indicating the gross salary of each and every firefighter for the year 2014, indicating the amount received by each firefighter for overtime.
3. Copies of all documents indicating the gross salary of each and every firefighter for the period 1/1/2015 to 7/30/2015, indicating the amount received by each firefighter for overtime.

In response to your complaint, we received a substantive response from the Fire District's legal counsel, Kelley Nickson Morris, Esquire. Attorney Nickson Morris states, in pertinent part:

"We do not dispute that Mr. Koutsogiane requested legal invoices. \* \* \* I suggested [to Mr. Koutsogiane] that he could not take copies of invoices, because of privileged information contained therein, but by way of cooperation, I would provide complete bills for his review at the office. I

spoke with Barbara Margolis, Assist. Disciplinary Counsel, and she agreed that I should not provide privileged information to Mr. Koutsogiane without a full vote of the Board, which I relayed to him. He insisted on receiving complete bills with descriptions of work. On July 23, 2015, Mr. Koutsogiane presented to the Cumberland Fire District office and reviewed all legal bills. \* \* \* He had access to all of the information contained in each invoice, including dates of services, descriptions of services, amount of time expended, total amounts billed and payment information. He was not allowed to copy the bills for the protection of privileged information. At that time, I assumed he was satisfied. In fact, neither I nor the office staff heard anything more about legal invoices until his letter dated August 7, 2015.

On August 4, 2015, Mr. Koutsogiane emailed the Finance Subcommittee Chairman, [Mr.] Ron Champagne, the Finance Director, [Mr.] Thomas Bruce, and the Business Manager, [Ms.] Diane Karolshyn, and requested certain payroll information. \* \* \* [T]he Cumberland Fire District is a newly merged district (financial merger occurred on July 1, 2015). Besides normal day-to-day tasks, at the time of the request, staff was handling the following additional time-consuming tasks:

- Financial information from four districts had to be merged with technology updates
- Tax collections were at a high as bills had just been mailed out in mid-June
- Substantial call volume regarding some increased tax bills
- Preparation for state-mandated audit of the former four separate districts

In addition, the information requested was located in several different databases.

\* \* \*

On August 7, 2015, Mr. Koutsogiane sent a formal letter \* \* \* requesting payroll records and adding a request for legal bills. On August 11, 2015, I respond[ed] relaying again my concern about the privileged information contained in the legal bills and that the response would be made within 30 days for the reasons stated. A local reporter [was then] included in our communications and she provided me with a citation included in the 6<sup>th</sup> Edition of the Attorney General's Guide to Open Government in Rhode Island, that indicates I may provide redacted legal bills.

We did not take the full 30 days to comply. On August 27, upon receipt from staff, I provided the payroll information requested. On Monday, August 31, after receipt of invoices including the stamp for payment, I redacted the descriptions of work and forwarded the bills to Mr. Koutsogiane.”<sup>1</sup>

We acknowledge your rebuttals dated November 5, 2015, November 20, 2015 and March 23, 2016.

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 determine whether this Department believes that 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 Fire District 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, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or copy such records. See R.I. Gen. Laws § 38-2-3(a). To effectuate this mandate, the APRA provides procedural requirements governing the time and means by which a request for records is to be processed. A public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. If the inspection or copying is not permitted within ten (10) business days, the public body shall explain in writing the need for additional time to comply with the request. R.I. Gen. Laws § 38-2-3(e). “Any such explanation must be particularized to the specific request made,” and in such cases, “the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body.” Id.

Here, we begin by highlighting what is – and what is not – at issue. According to your August 26, 2015 complaint, you contend that you made an APRA request on August 7, 2015, and that as of the date of your complaint, you “have not received any of the requested materials.” By letter dated September 30, 2015, we confirmed your allegation and advised you that “[i]f you have any additional information that you wish this Department to consider, or if this acknowledgment letter does not accurately reflect your complaint, please contact me in writing within five (5) business days.” You provided no response until after the Fire District’s response. Accordingly, the only

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<sup>1</sup> Attached to legal counsel’s response was a copy of correspondence from the Fire District’s Business Manager, Ms. Diane Karolshyn, addressed to the Fire District’s Chairman, Mr. Bruce Lemois, dated October 28, 2015. In her correspondence she indicated, inter alia, that your various pre-August 7, 2015 requests came “at the height of the tax season and \* \* \* during [the Fire District’s] busiest time,” and that she was “working 40-50 hours per week to process payments, coming in on the weekends, answering numerous calls from taxpayers, and giving fire tax information to attorneys for closings, along with \* \* \* doing payroll, and \* \* \* fulfilling various other tasks necessary for the smooth operation of the new district.”

issue properly before this Department is that as of the date of your complaint, you had not received the documents you requested.

With respect to your August 7, 2015 APRA request, it appears, based upon the evidence presented, that you received an acknowledgment of your APRA request on August 10, 2015 from Chief Finlay who indicated that you would be provided with “the information in as timely a fashion as possible[, but that the Fire District was] in [a] tax collection period, preparing for the s[t]ate mandated audit, and [would] have to contact the three previous payroll companies for the 2015 records.” The following day, August 11, 2015, Ms. Nickson Morris sent you a letter advising, inter alia:

because of tax collection traffic and an abundance of telephone calls related to the same, as well as the location of the information in several separate databases, staff may not be able to complete your request within 10 days. Therefore, your request will be completed no later than 30 days from the date of your request.

Your August 26, 2015 complaint to this Department makes absolutely no mention that the Fire District extended the time to respond to your APRA request by letter dated August 11, 2015, and your August 26, 2015 complaint raises no issue with the Fire District’s exercising an extension to respond to your APRA request. Rather, as previously noted, your complaint simply contends that as of the date of your complaint, you had “not received any of the requested materials.” The reason you had “not received any of the requested materials,” is of course, because the Fire District timely extended the time to respond to your APRA request. On this basis, we find no violation.

While your original complaint does not take issue with the Fire District’s extension – even though it had occurred two weeks before your complaint – your later correspondences do contend that the Fire District’s assertion of an extension was improper and unwarranted. As our acknowledgement letter and our precedent make clear, new issues may not be raised in your rebuttal because the public body has not had the opportunity to address these issues and this is particularly the case when the Fire District notified you of the extension by letter dated August 11, 2015, and you filed the instant complaint on August 26, 2015. See Mudge v. North Kingstown School Committee, OM 12-35 (declining to address issues raised in reply for first time); Costantino v. Smithfield School Committee, PR 13-22.

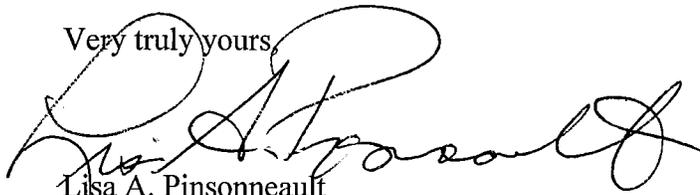
It is not lost upon this Department that despite the Fire District’s extension for an additional twenty (20) business days, the Fire District provided you some responsive records on August 27, 2015 and other responsive records on August 31, 2015, three and five business days, respectively, into the twenty (20) business day extension. Considering the nature of your APRA request and the totality of the circumstances and evidence presented, it appears this “additional time [was] necessary to avoid imposing an undue burden on the public body.” R.I. Gen. Laws § 38-2-3(e); Plain v. Office of the Governor, PR 16-21. To be sure, you raise issues and facts contesting this extension, as well as the Fire District’s responsiveness to your APRA request, but for the reasons

already discussed, these issues are not properly before this Department, the Fire District has not had the opportunity to address these issues, and we need not resolve them.<sup>2</sup>

Although the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual or entity 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). We are closing this 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,



Lisa A. Pinsonneault  
Special Assistant Attorney General

LP/kr

Cc: Kelley Morris, Esquire

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<sup>2</sup> Among the issues that you do raise in your complaint is that you had been asking the Fire District for records for several weeks preceding your August 7, 2015 APRA request, so as of the date of your complaint, “[i]n a real sense, the District has had over seven (7) weeks to comply.” While there is evidence that you had been seeking documents from the Fire District prior to your August 7, 2015 APRA request, the evidence before this Department is that the only APRA request you made and complain about was on August 7, 2015. As this Department has previously noted, in order to invoke this Department’s APRA jurisdiction, a citizen must have made an APRA request and been denied access to records. See Access/Rhode Island v. West Warwick School Department, PR 15-24. Since no evidence has been submitted that these prior requests were made under the APRA – and indeed the evidence is that you are a commissioner of the Fire District – these prior requests do invoke this Department’s jurisdiction.