State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 22, 2016
PR 16-53

Mr. Ethan Shorey

Re: Shorey v. City of Pawtucket

Dear Mr. Shorey:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the City of Pawtucket ("City") is complete.

On September 25, 2015, you made an APRA request to the City seeking "the vacant housing list[,]" which refers to a list maintained by the City Zoning Division of houses located in the City that are vacant and/or abandoned.

The City responded to your APRA request on October 13, 2015, stating, in pertinent part:

> "This office is in receipt of your [APRA] request received by the City on September 25, 2015 requesting a copy of the 'vacant housing list[.]' Please be advised that the Zoning Division views this internal document as a tool in assisting the City in Code Enforcement and also views it as a 'working paper' and/or 'work product[.]' Therefore, the City believes that the list is exempt from public disclosure (See R.I. Gen. Laws § 38-2-2(4)(K), which exempts '[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public'). In furtherance of this position, the City refrains from placing this list on the City Council docket or from submitting it at any public meetings of the City Council or its various Committees. As a result of the foregoing, the City respectfully denies your request for the list."

You filed the instant APRA Complaint on October 22, 2015, alleging, in relevant part:

> "I didn't hear back until Oct. 13, well after the 10-day timeframe required under the APRA, when City Solicitor Frank Milos responded with a denial.

> City Council President David Moran asked for the vacant and abandoned housing list at the council's Sept. 9 meeting. ***
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> President Moran indicated during that meeting that the council previously received the reports as items for public discussion. The reports have been discussed publicly on numerous occasions in the past. ***
>
> To call the vacant housing list any kind of 'preliminary' list is wrong. The report as presented to the council has to be a final work and not a draft based on what President Moran requested and the final reports that have been provided to the council in the past.
>
> I'm asking that you determine that this is a violation of the APRA and order [City] officials to provide me with the document."

In response to your complaint, this Department received a substantive response from City Solicitor Frank Milos. In his response, Attorney Milos states, in pertinent part:

> "1. On Friday, September 25, 2015 at 7:43 p.m., Mr. Shorey emailed an APRA request to the City, which requested a copy of the City's 'vacant housing list' []. Since the APRA request was sent after normal City Hall business hours (i.e., 8:30 a.m. to 4:30 p.m.), the City deemed Monday, September 28, 2015 to be the date of receipt of the request.
> ***
> 3. Upon receipt of Mr. Shorey's APRA request, the City opened a file and calculated ten (10) business days from the date of receipt. Due to the fact that October 12, 2015 was a City holiday (i.e., Columbus Day) and not a business day, the City contends that the due date for the response to Mr. Shorey's APRA request was October 13, 2015.
> ***
> 5. The City's 'vacant housing list' is a list of houses that are located in the City of Pawtucket that are vacant and/or abandoned. The content of the list fluctuates. If a house becomes occupied, it is taken off the list. If a house becomes vacant and/or abandoned, then it is added to the list.
> 6. In March of 2013, a discussion was held at a Director's meeting at Pawtucket City Hall regarding a request that had been made by the City Council for a copy of the vacant housing list.
> 7. At the meeting, then Zoning Director, Shaun Logue, expressed concern that public disclosure of the list could undermine continuing code enforcement efforts regarding those properties. In addition, both Police Chief, Paul King, and Fire Chief, William Sisson, expressed concern that public disclosure of the list of these vacant properties at an open meeting could potentially be an invitation for vagrancy, theft, graffiti, arson, etc. of those properties.
> 8. Contrary to Mr. Shorey's assertion, the City did not deny his APRA request because it considers the vacant housing list to be a 'preliminary list' (even though

the content of the list is always in flux and is never really a 'final list'). Rather, the City denied Mr. Shorey a copy of the list because the Zoning Division views the list as an internal document which is regularly used by it as a tool to assist in day-to-day code enforcement and as a focal point in deciding which houses it should target in its continuing 'war against blight' in the City. Based on the foregoing, the City views the list as a 'working paper' and/or 'work product' and, therefore, deems the list to be exempt under R.I. Gen. Laws § 38-2-2(4)(K).

9. However, even if the list is not deemed by the Department to be a 'working paper' and/or 'work product[,]' the City contends that upon balance, it is still appropriate for the City to deny public access to the list. The City contends that the public interest in disclosure of the vacant housing list is negligible and that disclosure of the list to the public, even in redacted form, would not serve to shed light on the official acts and workings of government, nor would it shed light on how the Division of Zoning and Code Enforcement operates.

10. In addition, Chief King has stated that from a law enforcement perspective he cannot think of any positive reason to publish a list of vacant houses. Chief King states that in 2013 the City had a total of 624 incidents of breaking and entering into buildings, and that 67 of these break-ins concerned vacant property. Chief King states that in 2014, the City had a total of 571 incidents of breaking and entering into buildings, and that 24 of these break-ins concerned vacant property. Chief King believes that the number of break-ins at vacant and/or abandoned properties would increase if the City's vacant housing list were published.

11. It is also the opinion of Chief King that publishing a list of the City's vacant properties would be irresponsible on the part of the City. Chief King believes that disclosure of the list to the public would serve to only increase the likelihood of these properties becoming targets for criminal acts committed by those looking at a low risk-high reward option. Based on his experience dealing with these matters, Chief King also states that disclosure of the location of these properties could increase the chance that they attract homeless persons who may start fires inside the buildings in an attempt to keep warm in the winter months.

12. In addition, it is the opinion of Fire Chief Sisson that disclosure of the City's list of abandoned properties and disclosing the locations of these properties would jeopardize the safety of the public and of Pawtucket Firefighters. Chief Sisson further states that public disclosure of the list would bring unwanted attention to these properties and could possibly increase the crime rate and the commission of arson at these locations. Based on his experience dealing with these matters, Chief Sisson also states that criminals often enter these buildings to steal copper and other metals and use torches to cut the pipes which often leads to fires. A fire in an abandoned building continues to grow unchecked until it breaks through windows or roofs.

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15. According to both the City Clerk, Richard J. Goldstein, and the Planning Director/Acting Zoning Director, Barney Heath, since March of 2013, if the City Council requests a copy of the City's vacant housing list, the list is not placed on

> the City Council's docket, and it is not submitted to the City Council at an open meeting [.] ***
> 16. *** The City contends that if the City Council asks questions about a list that is not submitted to them at a public meeting, the list does not then automatically become a public record. However, the City Clerk cannot recall a time when any individual member of the City Council, including the Council President has asked any questions about any properties located on the 'vacant housing list[.]'"

The City's substantive response was signed by the City Planning Director, City Clerk, City Police Chief, and City Fire Chief. The City's response also included, for our in camera review, a copy of the City's most recent vacant housing list.

You filed a rebuttal on September 16, 2016. In your rebuttal you state, in pertinent part:

> "To begin with, all of this effort on the [C]ity's part was a big silly since I said from the beginning that I wasn't planning to publish the list. But even if I was planning to publish a list, [C]ity officials and others contradict this 'concern' at every turn. The [C]ity regularly promotes vacant properties for sale on various online sites, and many vacant bank-owned properties are posted all over the internet. A simple Google search will turn up hundreds of them.
>
> The [C]ity regularly broadcasts that properties are vacant by boarding up windows and allowing grass to become overgrown. This is more of an advertisement to the common passing criminal than any innocuous list of addresses somewhere.
>
> Allowing the [C]ity to keep this list secret would open the door to keeping so many other things hidden. ***
>
> Very slippery slope and a bad precedent."

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

First, as a preliminary matter, we consider your assertion that you do not plan to publish the requested records. Respectfully, this contention is at odds with the APRA. If this Department determines that a particular document is a public record, then any person may access or inspect that record regardless of whether or not that person is an interested party. See R.I. Gen. Laws § 38-2-3(a). Once a record is made public to one person under the APRA, that record is public to all without any restrictions. We note that in Bernard v. Vose, 730 A.2d 30 (R.I. 1999), the Rhode Island Supreme Court held that the petitioner did not have a right, under the APRA, to review his own board files, which contained personal and sensitive information about him, because once the

files were made public to him under the APRA, the files were then available for inspection by the general public. For this reason, the fact that you do not intend to publish the requested records is of no consequence to our analysis. See Niquette v. Woonsocket Police Department, PR 16-19; see also D'Amario v. Rhode Island Probation Office, PR 08-22; R.I. Gen. Laws § 38-2-3(j).

Next, we consider your allegation that the City violated the APRA by failing to timely respond to your APRA request. 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 to copy such records. See R.I. Gen. Laws § 38-2-3. To effectuate this mandate, the APRA provides procedural requirements governing the time and means by which a request for records is to be processed. Upon receipt of a records request, a public body is obligated to respond in some capacity within ten (10) business days, either by producing responsive documents, denying the request with a reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws §§ 38-2-7, 38-2-3(e). The ten (10) business days does not include legal holidays. See Go Local Providence v. City of Providence, PR 13-18; see also Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13.

Here, the undisputed evidence reveals that you made your APRA request at 7:43 P.M. on Friday, September 25, 2015. Because this request was made outside of the City's normal business hours, the City correctly identified Monday, September 28, 2015, to be the date of receipt of the request. Counting ten (10) business days from that date, excluding the Columbus Day holiday of October 12, 2015, the City correctly identified the statutory response date deadline to be October 13, 2015. See Go Local Providence v. City of Providence, PR 13-18. Because the City responded to your APRA request on October 13, 2015, we find no violation.

We next turn to your allegation that the City violated the APRA by failing to disclose the requested document. In its initial response the City cited R.I. Gen. Laws § 38-2-2(4)(K), which exempts from disclosure "[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public." In particular, the City asserted that the requested document was a "'working paper' and/or 'work product.'"

The term "working paper" is undefined by the APRA, but in general the term refers to pre-publication drafts of written work intended to be finalized in the future.[1] Importantly, the term implies that the document will, at some point, be completed. The requested document here is a continuously updated list of the vacant and/or abandoned homes in the City. We find no indication that the requested document is pre-publication in the way contemplated by the common usage of the term "working paper." Indeed, the document is sufficiently final that it is (or at least was) periodically submitted to City Council members for review. Moreover, under the City's apparent definition, a continuously updated document would never be considered sufficiently final to be exempted from the "working paper" definition. The City cites no authority for this position. See Sheehan v. Economic Development Corporation, PR 01-03 ("when a document such as the instant

[1]See generally "What Are Working Papers?" http://www.princeton.edu/~pswpc/about/about.html.

'white paper,' is sufficiently complete so that it can be shared with outside agencies * * * we believe that the document is far less likely to be fairly considered a preliminary draft or work product").

The term "work product" is also undefined by the APRA, but it is defined by Black's Law Dictionary as material "prepared by or for a lawyer or prepared for litigation, either planned or in progress." Black's Law Dictionary (10th ed. 2014). We find no evidence, and none has been presented, that the requested document was produced in anticipation of litigation or that it was produced by or for lawyers. As such, the requested document does not easily fall within the ambit of either "working paper" or "work product." Cf. Save the Bay v. Rhode Island Department of Environmental Management, PR 16-47 (finding list of compliance cases pending court action was exempt under R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) as a document "relating to a client/attorney relationship" because list was compiled with the input of agency attorneys).

We are unaware of any authority that exempts disclosure of a document simply because it is continuously updated. Indeed, our previous findings contain no indication that a continuously updated document is per se exempt from production under R.I. Gen. Laws § 38-2-2(4)(K). See, e.g., The Narragansett Bay Commission v. Public Utilities Commission, PR 06-20. Furthermore, in Long v. Immigration and Customs Enforcement, 149 F. Supp. 3d 39, 56–57 (D.D.C. 2015), a federal district court found that a snapshot of a "continuously updated" database was subject to the federal Freedom of Information Act ("FOIA") and was only exempt from disclosure because it was unduly burdensome to produce and difficult to redact.[2] In contrast, the requested document here was easily produced to this Department for in camera review and is susceptible to redaction.

Based on our in camera review and the totality of the circumstances, we find that the requested document here does not fit within the categories of R.I. Gen. Laws § 38-2-2(4)(K) relied on by the City.[3] Accordingly, we need not consider whether the document was submitted at a public meeting.

We turn next to the City's second argument against production of the document, advanced in its substantive response but not in its initial October 13, 2015 response to your APRA request, that the public interest in disclosure is negligible and not outweighed by the privacy interest. The APRA's stated purpose is both "to facilitate public access to public records" and "to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-1. Similarly, the United States Supreme Court has made clear that the federal Freedom of Information Act ("FOIA"), and by extension the APRA:

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[2] Although this case involved the federal Freedom of Information Act, we make reference to FOIA cases because the Rhode Island Supreme Court has made clear that "[b]ecause APRA generally mirrors the Freedom of Information Act * * * we find federal case law helpful in interpreting our open record law." Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

[3] We do not decide, however, if another subsection of R.I. Gen. Laws § 38-2-2(4) would apply since the City raised no other subsection.

> "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct." U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773, 109 S. Ct. 1468, 1481–82 (1989).

The Court further explained that:

> "the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." Id. at 774–75, 109 S. Ct. at 1482.

As recognized by the Rhode Island Supreme Court, the APRA contemplates a "balancing test" whereby the "public interest" in disclosure is weighed against any "privacy interest." See Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998). Consequently, we must consider the "public interest" versus the "privacy interest."

Here, based on our in camera review of the requested document, we find that only limited privacy interests are implicated. To be sure, the requested document contains a column that includes the name(s) of the "Property Owner[,]" which implicates the privacy interests of third parties. See Coleman v. Federal Bureau of Investigation, et al., 13 F. Supp. 2d 75, 80 (D.D.C. 1988) (finding that "[u]pon inspection of the submitted documents, it is evident that release of any portion would reveal the identities of innocent third parties."). However, these privacy interests can be adequately protected through redaction, as the "Property Owner" column is readily segregable. See Direct Action for Rights and Equality v. Gannon, 713 A.2d. 218 (R.I. 1998) (finding that providing requested documents in redacted form would satisfy the APRA); see also R.I. Gen. Laws § 38-2-3(b) ("Any reasonably segregable portion of a public record . . . shall be public records[.]").

We also find that there is at least some public interest in disclosure of the requested document. Based on our in camera review, we find the requested document distinguishable from other lists where we previously found disclosure would not further any significant public interest. See, e.g., Harris v. City of Providence, PR 16-37 (finding no public interest in the disclosure of a basketball program signup sheet). A list of vacant and/or abandoned properties sheds at least some light on the operations and performance of the City in addressing blight. See Reporters Committee, 489 U.S. at 773. Indeed, the columns labelled "Municipal Court Status[,]" "Date Added to List[,]" and "Comments" provide some indication of what the City has done to address abandoned and/or vacant homes. Production of this document would open the City's activities to "the sharp eye of public scrutiny[,]" furthering a central goal of the APRA. Reporters Committee, 489 U.S. at 774–75.

We additionally note that the concerns voiced by the City's Police and Fire Chiefs, as well as the City Zoning Director, that publication of this list will spotlight abandoned properties throughout the City and make easy targets for vandalism, theft, or vagrancy, can be adequately addressed through appropriate redaction. The disclosure of the numerical address of a particular vacant and/or abandoned home does little to further the public interest discussed supra, and therefore we view redacting the numerical addresses as a reasonable accommodation to assuage some of the publicity concerns. Moreover, we are advised that websites and other means of publicity are regularly used to offer abandoned or vacant properties for sale. As such, we concluded that this approach satisfies the competing privacy and public concerns in a manner consistent with the APRA.

While a close question, based on the specific facts before us, we conclude that the limited privacy interests are outweighed by the public interest in disclosure and can be addressed through redaction. Accordingly, we find that disclosing the requested document in a redacted manner is appropriate as discussed herein. We therefore conclude that the City's failure to release the requested document, in a redacted manner, violated the APRA.

Upon a finding of an APRA violation, the Attorney General 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). A court "shall impose a civil fine not exceeding two thousand dollars ($2,000) against a public body . . . found to have committed a knowing and 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).

Based upon the specific facts of this case, we find no evidence of a willful and knowing, or reckless, violation. Indeed, in certain respects, we agree with the City that portions of the requested document is exempt from public disclosure and, as discussed, the City's legitimate concerns regarding theft, vandalism, and vagrancy cannot be dismissed. Although injunctive relief may be appropriate in this case, we will allow the City ten (10) business days within receipt of this letter to respond to you with the requested document in a redacted manner consistent with the APRA and our findings, supra. We do not eliminate the possibility that the document provided could contain additional limited redactions consistent with our analysis and finding. If you do not receive a response within this time frame, you should contact this Department so that we may further review the City's response.

Although the Attorney General will not file suit in this matter at this time, 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). The City is advised that its actions violated the APRA and may be used as evidence of a willful and knowing, or reckless, violation in a similar future situation. Please be advised that we are closing this file as of the date of this letter, although we reserve the right to reopen this matter should the circumstances warrant.

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

Very truly yours,

Sean Lyness
Special Assistant Attorney General

SL/kr

Cc: Frank J. Milos, Jr., Esquire