



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

April 17, 2017

PR 17-15

Ms. Karen Oliver

**RE: Oliver v. Rhode Island Commission on the Deaf and Hard of Hearing**

Dear Ms. Oliver:

The investigation into your Access to Public Records Act ("APRA") complaint against the Rhode Island Commission on the Deaf and Hard of Hearing ("RICDHH") is complete.

You filed a complaint alleging the following, in pertinent part:

"On July 18, 2016, I attended a public meeting of the [RICDHH]. At that meeting, the Chair of the Commission presented a slide deck, created by the Commission Chair Timothy Riker, for this meeting. It had many footnote references, but when asked, Chairman Riker said he did not have the references available. The Executive Director of the Commission said that he would make both the slide deck and the reference list available on the Commission's website within 30 days[.] \*\*\*

On August 23, 2016, I sent an email request to Steven Florio, Executive Director of the RICDHH, and to Pamela Zellner, the Administrative Assistant for RICDHH, requesting both a copy of the presentation, as well as the references. I received a response from Ms. Zellner stating that Mr. Florio was out of the office that day, but would attend to my request upon his return.

To date, I have received no response back from Mr. Florio or any other members of RICDHH addressing my request."

You attached your August 23, 2016 email to RICDHH Executive Director Steven Florio to your complaint. This email is labelled with the subject heading "Follow Up" and states, in relevant part:

"Thank you for the opportunity to engage in the meeting last night. I found it quite useful and informative.

I notice that our RI AGB Event is still not listed in your RICDHH Events Calendar. Can you please make sure it gets posted today?"

Also, I forgot to ask last night, but in the July 18 Special Meeting, you had stated that the PowerPoint presentation and the citations referenced would be available to us after 30 days. Seeing as 30 days has passed, would you or Chairman Riker please send that information to me?"

In response to your Complaint, this Department received a substantive response from the RICDHH which states, in pertinent part:

"RICDHH justifiably misinterpreted Ms. Oliver's request as one to compile information as opposed to a formal APRA request for records. Accordingly, no APRA violations should be found.

APRA does not require agencies of public bodies to create or compile information upon request. \*\*\* In this case, Mr. Florio, Executive Director for RICDHH, did not have possession of the requested records at the time of request and, therefore, any formal APRA response at that time would have been no responsive records exist. However, Mr. Florio interpreted Ms. Oliver's request as one to compile information as opposed to a formal APRA request for records. Accordingly, he intended to respond to Ms. Oliver's request when he was able to gather and collect the information. []

While no APRA violation should be found, RICDHH appreciates the concerns of Ms. Oliver. In response to her complaint, RICDHH has taken immediate action to strengthen its commitment towards ensuring compliance with APRA. [] This includes the adoption of a formal APRA policy which is now posted on the RICDHH website. []

Finally, RICDHH has gathered the information which Ms. Oliver requested and a copy of the pertinent records are attached."

The RICDHH's substantive response also included an affidavit of Mr. Steven Florio, which states, in pertinent part:

"4. I did not gain possession of the list of references and power point slides until October 19, 2016. While preparing to send the records to Ms. Oliver, I was notified of the above-referenced complaint by legal counsel and was advised to send the records with this Affidavit and RICDHH's response to the complaint.

5. The RICDHH has only 3 FTEs to carry out the legislative mandates on a daily basis in responding to a vulnerable community in RI. We do not have a legal counsel on staff to advise us of any legal concerns or measurements and only recently gained access to legal counsel from the Department of Administration Legal Services. I was not aware that all agencies and departments are required to have a policy on APRA effective in the fall of 2012 and to have a certified APRA officer. Therefore, we never had a policy to follow the procedures to handle APRA requests appropriately and accordingly.

6. I took the complaint seriously and implemented appropriate policy immediately which was adopted by the Board of Commissioners on November 16, 2016. I also

wanted to ensure that the training is available for everyone who is involved with the [RICDHH] so they become aware of all APRA requirements.”

The RICDHH’s substantive response also included a list of “Actions Taken by the [RICDHH]” to further compliance with the APRA, a copy of the RICDHH’s APRA policy and procedures, and copies of documents responsive to your request along with a signed certification that these documents were also sent to you.

We acknowledge your rebuttal.<sup>1</sup>

At the outset, we observe that in examining whether an APRA violation has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether a violation 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 RICDHH 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 to copy such records. See R.I. Gen. Laws § 38-2-7. 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).

Here, although we note that your request was arguably not a cognizable request for documents pursuant to the APRA – although not dispositive your request in no way suggested it was made under the APRA – it is undisputed that at the time of the request the RICDHH did not have an APRA policy. Accordingly, your request was not prohibited and we therefore treat your email as an APRA request. See Fitzmorris v. Portsmouth Town Council, PR 11-20 (“Since there were no established procedures in this case pursuant to R.I. Gen. Laws § 38-2-3(c), your oral request was not prohibited[.]”). Because the RICDHH did not respond to your APRA request in some capacity within ten (10) business days we find that the RICDHH violated the APRA. See R.I. Gen. Laws §§ 38-2-7, 38-2-3(e).

Upon a finding that a complaint brought pursuant to the APRA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 38-2-9(d). There are two remedies available in suits filed under the APRA: (1) the court may issue injunctive relief and declaratory

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<sup>1</sup> To the extent that your rebuttal alleges any additional violations of the APRA not already raised in your initial complaint, such new allegations will not be addressed. As stated in this Department’s acknowledgment letter to you, “Your rebuttal . . . should not raise new issues that were not presented in your complaint[.]” See also Save the Bay v. Department of Environmental Management, PR 15-19.

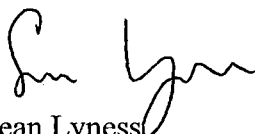
relief and/or (2) the court may impose a civil fine of up to two thousand dollars (\$2,000) against a public body or any of its members found to have committed a willful and knowing violation of the APRA, or a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated the APRA. R.I. Gen. Laws §§ 38-2-8(b), 38-2-9(d).

In this case, we find that neither remedy is appropriate. Injunctive relief is inappropriate where, as here, the requested documents have already been provided. Additionally, you do not present – and we do not find – any evidence that this violation of the APRA was willful and knowing, or reckless. Such a determination is consistent with our finding Fitzmorris, PR 11-20. Nonetheless, this finding serves as notice to the RICDHH that its omission violated the APRA and may serve as notice of a willful and knowing, or reckless, violation for any future similar cases.

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). Please be advised that we are closing this 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,



Sean Lyness  
Special Assistant Attorney General

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Cc: Andrew S. Marcaccio, Esq.