



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 17, 2017

PR 17-30

TJ

Re: TJ v. City of Providence

Dear TJ:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the City of Providence (“City”) is complete. You allege the City violated the APRA with respect to two (2) APRA requests you made on October 16, 2016. With respect to your request relating to a tobacco license, you allege, notwithstanding the City’s response that it did not maintain responsive documents, the City, by its own ordinance, should maintain this document. With respect to your request regarding Club Therapy, you allege the City extended the time to respond, but did not do so with sufficient particularity. You also submit that the City’s response was untimely.

In response to your complaint, we received a substantive response, in affidavit form, from Assistant City Solicitor, Mario M. Martone, Esquire, who also provided an affidavit from the Licensing Administrator for the City, Ms. Serena Conley. Solicitor Martone states, in pertinent part:

“On Sunday, October 16, 2016, the Law Department received two APRA requests from ‘TJ’ numbered 16-549 and 16-550. * * *

The due date for the response for both requests was October 31, 2016 as the request was received on a Sunday; Day 0 for calendaring purposes was Monday, October 17, 2016. Ten business days after that would be October 31, 2016.

On the tenth business day, October 31, 2016, a response was provided to ‘TJ’ for request number 16-549 requesting an additional twenty (20) business days (until November 29, 2016) to respond pursuant to R.I. Gen. Laws 38-2-3(e)

due to the number of requests pending and the difficulty in searching for or retrieving or copying the requested records.

* * *

The City provided two reasons for the request for extension. * * *

On November 29, 2016 the records in redacted format were provided to the requestor and no documents were withheld. * * *

On the tenth day, October 31, 2016, a response was provided to 'TJ' for request number 16-550 that there were no responsive documents for this request. The City used the standard language that 'The City does not maintain documents responsive to this request.' * * *

Subsequent to the response to request number 16-550 the requestor posed a follow up question with regard to whether the City maintained a responsive document. While under no obligation to reply the City did provide a response that explained that while the City does maintain tobacco licenses it did not maintain a license for the location requested as there was none."

Ms. Conley's affidavit supports Mr. Martone's representations.

We note you did not file a rebuttal.

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 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, unless exempt, all records maintained by any public body shall be public and every person shall have the right to inspect and/or to 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. 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, for "good cause," extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. The public body may extend the time to respond by an additional twenty (20) business days 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." See R.I. Gen. Laws § 38-2-3(e). "Any such explanation must be particularized to the specific request made." Id.

You made two (2) APRA requests on October 16, 2016. One request (the City referred to it as Request #16-549) sought:

“all information from the Board of Licenses pertaining to the transfer of 2-5am license for ‘Club Therapy’ for the transfer of its location to its current location. Also, any relevant documents for transfer of ownership for same.”

The City responded on October 31, 2016, indicating it was extending the time to respond an additional twenty (20) business days for good cause. The City stated:

“The Public Records Unit respectfully extends the time to respond by an additional twenty (20) business days, pursuant to R.I. Gen. Laws § 38-2-3(e), the number of requests for records pending, and/or the difficulty in searching for and retrieving or copying the requested records.”

Here, the City’s extension mirrored the statutory language nearly verbatim, and in doing so, failed to provide an explanation “particularized to the specific request made.” R.I. Gen. Laws § 38-2-3(e). We review our findings in CVDDI, LLC v. Town of Smithfield, PR 15-04 and Bath v. Rhode Island Office of Health and Human Services, PR 15-16 and conclude both cases are distinguishable. Specifically, in CVDDI, LLC, PR 15-04, we noted that the extension referenced the “scope and breadth of your request.” Similarly, in Bath, PR 15-16, although we noted that the extension could have been articulated “in a more ‘particularized’ manner,” we nonetheless found that the extension “did reference the subject-matter of the December 5, 2014 and December 10, 2014 APRA requests, and indicated additional time was required to allow staff to complete its search, retrieval, and production.” In contrast, the City’s extension in this case was not “particularized to the specific request made” and recited the statutory language set forth in R.I. Gen. Laws § 38-2-3(e) nearly verbatim. See Greenbaum v. City of Providence, PR 17-25. As we noted, supra, this Department’s mandate is to enforce the APRA as written and not to substitute its own independent judgment. In its response to your APRA complaint, the City provided a more detailed explanation as to the need for the extension, namely that during a one (1) month span, it received over thirty-two (32) APRA requests. Also, your APRA request sought records dating back over five (5) years and from three (3) different Departments within the City. While you take no issue with the City’s assertion of an extension or “good cause,” we conclude on this record that the manner and language used to effectuate the extension violated the APRA.

Your other APRA request submitted on October 16, 2016 (the City referred to it as Request #16-550), sought:

“Any information pertaining to any license to sell or consume on premises tobacco at 1 Franklin Square, Providence RI”

Based upon a review of the evidence, the City responded on the tenth (10th) business day indicating:¹

“The City of Providence does not maintain documents responsive to this request.”

Rhode Island General Laws § 38-2-3(h) provides:

“Nothing in this section 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.”

Here, based on our review of the evidence presented, we respectfully fail to find any evidence that would lead us to conclude that the requested document is maintained by the City, or that the City’s search was in anyway inadequate. You do not present, nor do we find, any evidence to establish that the City has a document responsive to your request that it refused to provide.

This Department has previously held that the failure of a public body to produce records that do not exist does not violate the APRA. See e.g., Harris v. City of Providence, PR 16-37; see also R.I. Gen. Laws §§ 38-2-3(a), (h). Accordingly, based upon our review of the record, we find no violation.

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).

Declaratory and injunctive relief is inappropriate and we simply find no evidence of a willful and knowing, or reckless, violation. While we noted a similar violation in Greenbaum, the City’s actions discussed herein predated Greenbaum, and accordingly, Greenbaum could not have served as notice to the City in this case. This finding does serve as notice to the City, however, that its extension language violated the APRA and this finding may serve as notice in a future similar situation of a willful and knowing, or reckless, violation.

¹ You take issue with the timelessness of both responses, but both requests were received on Sunday, June 16, 2016, and therefore were not received by the City until the next business day, Monday, June 17, 2016. When calculating the ten business day response time, the date of receipt does not count and accordingly, the City’s October 31, 2016 response was timely. See R.I. Super. Ct. Civ. Pro. R. 6(a)(computation of time).

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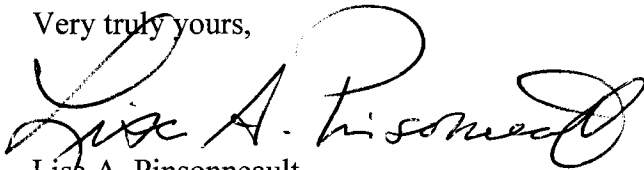
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While the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). 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 cursive script, reading "Lisa A. Pinsonneault". The signature is written in black ink and is positioned above the printed name and title.

Lisa A. Pinsonneault

Special Assistant Attorney General

LP/kr

Cc: Mario M. Martone, Esq.