



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 14, 2017

PR 17-56

Mr. Roland J. Lavallee

Re: Lavallee v. Rhode Island Commerce Corporation

Dear Mr. Lavallee:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Commerce Corporation (“Corporation”) is complete. By email correspondence dated September 21, 2017, you allege the Corporation violated the APRA when its pre-payment estimate was unreasonable.

In response to your complaint, we received a substantive response from the Corporation’s legal counsel, Christopher J. Fragomeni, Esquire,¹ who also provided an affidavit from the Corporation’s Deputy Director of Communications, Mr. Brian Hodge. In response to your APRA request – the categories of documents sought are outlined infra – the Corporation responded by indicating, in pertinent part:

“Based on the quantity of documents that would need to be retrieved and redacted, we estimate that the total length of time that will be required to comply with your request is 20 hours, of which approximately 16 hours will be devoted to document retrieval and approximately 4 hours will be committed to reviewing documents for redaction purposes. As the Act provides that the first hour is free, the estimated cost for search, retrieval, and review would be \$285.00. In addition, the actual cost to the Corporation for providing electronic copies of the requested documents will total approximately \$9.00.”

Mr. Hodge states, in pertinent part:

¹ The content of Attorney Fragomeni’s response is substantially similar to the averments set forth in Mr. Hodge’s affidavit. As such, we do not duplicate the information contained in Attorney Fragomeni’s response.

“On or about August 8, 2017, Mr. Lavallee made a request for records pursuant to APRA via email (‘APRA request’), specifically requesting the following:

‘Pertaining to Business RFP + Contract beginning 3/1/17

- a) the top four submitted proposals for the Business RFP.
- b) required monthly media pre-submissions from HVACCS to RICC for following month publication
- c) monetary balance sheet from start of current contract 3/1/17
- d) committee members and contact info that either approve and/or monitor media submissions from HAVAS to RICC
- e) communications between RICC and the Governor’s office regarding Business media publications

Pertaining to Tourism RFP + Contract beginning 3/1/17

- a) the top four submitted proposals for the Tourism RFP
- b) RFP for Tourism contract
- c) contract for Tourism RFP
- d) monetary balance sheet from start of current contract 3/1/17
- e) required monthly media pre-submissions, if applicable in current contract, from NJF/NAIL for following month publication
- f) committee members/contact info that approve/monitor media submissions from NJF/NAIL to RICC if applicable
- g) communications between RICC and the Governor’s office regarding Tourism media publications’

On or about August 23, 2017, the Corporation responded to the APRA Request by notifying Mr. Lavallee that it extended its time to respond by twenty business days ‘for good cause’ due to the voluminous nature of the APRA Request. * * *

On or about September 12, 2017, the Corporation responded to the APRA Request by sending Mr. Lavallee a letter via email requesting that he pay for the cost of retrieval of the requested documents in the APRA Request. * * *

The Cost Letter estimated that the time for retrieval of the records requested in the APRA Request would be approximately sixteen hours, which is broken down by specific request as follows:

- a. Search and retrieval of ‘the top four submitted proposals for the Business RFP’ was estimated to take myself or other staff members approximately one-half hour.

- b. Search and retrieval of the 'required monthly media pre-submissions from HAVAS to RICC for following month publication' was estimated to take myself or other staff members approximately one-half hour.
- c. Search and retrieval of the 'monetary balance sheet from start of current contract 3/1/17' was estimated to take myself or other staff members approximately one-half hour.
- d. Search and retrieval of the 'committee members and contact info that either approve and/or monitor media submissions from HAVAS to RICC' was estimated to take myself or other staff members approximately one quarter hour.
- e. Search and retrieval of the 'communications between RICC and the Governor's office regarding Business media publications' was estimated to take six staff members approximately one hour each, for a total of six hours.
- f. Search and retrieval of 'the top four submitted proposals for the Tourism RFP' was estimated to take myself or other staff members approximately one-half hour.
- g. Search and retrieval of the 'RFP for Tourism contract' was estimated to take myself or other staff members approximately one-half hour.
- h. Search and retrieval of the 'contract for Tourism RFP' was estimated to take myself or other staff members approximately one quarter hour.
- i. Search and retrieval of the 'monetary balance sheet from start of current contract 3/1/17' was estimated to take myself or other staff members approximately one quarter hour.
- j. Search and retrieval of the 'required monthly media pre-submissions, if applicable in current contract, from NJF/NAIL to RICC if applicable' was estimated to take myself or other staff members approximately one-half hour.
- k. Search and retrieval of 'committee members/contact info that approve/monitor media submissions from NJF/NAIL to RICC if applicable' was estimated to take myself or other staff members approximately one quarter hour.

1. Search and retrieval of ‘communications between RICC and the Governor’s office regarding Tourism media publications’ was estimated to take six staff members approximately one hour each, for a total of six hours.

I estimated that the time required to review and redact the above-requested records would be approximately four hours, based upon the quantity of documents requested, which I estimate to be a minimum of about 500 pages.”

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

The record contains no indication that you asked the Corporation to clarify its estimate or response, but rather you filed the instant Complaint alleging, in pertinent part:

“I do not feel that there should be a \$\$ attached * * * as the materials I’ve requested are simple and should be on electronic file and could be placed on a CD.”

Rhode Island General Laws Section 38-2-4(b) provides:

“A reasonable charge may be made for the search or retrieval of documents. Hourly costs for a search and retrieval shall not exceed fifteen dollars (\$15.00) per hour and no costs shall be charged for the first hour of a search or retrieval.”

Ever since the 2012 APRA amendment, the APRA expressly allows an entity, such as the Corporation, to require prepayment for “costs properly charged” and provides that in such a case “the production of records shall not be deemed untimely if the public body is awaiting receipt of payment.” R.I. Gen. Laws § 38-2-7(b); see also Conservation Law Foundation v. Office of the Governor, PR 16-08. The Rhode Island Supreme Court has explained that other costs not expressly mentioned within the APRA may be assessed, specifically, the “costs of redaction should be borne by the requesting party because it is part of the process of retrieving and producing the requested documents.” See DARE v. Gannon, 819 A.2d 651, 661 (R.I. 2003); see also Pitochelli v. Town of Johnston, PR 14-20.

Here, we find no violation. The Corporation’s response to your APRA request, as well as the affidavit submitted by the Corporation, conclusively establish that the pre-payment fee charged by the Corporation complied with R.I. Gen. Laws § 38-2-4(b). As confirmed by the affidavit of

Mr. Hodge, the twenty-hour estimate was an estimate of the search, retrieval and potential redaction of documents responsive to your request. The Corporation's response conveyed that it would take an estimated sixteen (16) hours to search and retrieve all responsive documents and an estimated four (4) hours to review and redact responsive documents. The APRA expressly permits the Corporation to charge for pre-payment for time spent searching, retrieving and redacting responsive documents. See R.I. Gen. Laws § 38-2-4(b). See APRA Watch v. City of Providence, PR 17-46; Nye v. City of Warwick, PR 17-48.

Respectfully, you have presented no evidence that would support your allegation that the requested estimate is unreasonable. Given the scope of your request and the nature of the documents requested, namely twelve categories of documents, including such broad categories as "communications between the Corporation and the Governor's office regarding tourism media publications," we cannot conclude such an estimate was unreasonable. It should also be noted that although it appears through your complaint that the Corporation has waived search and retrieval fees in the past, nothing within the APRA required the Corporation to do so in this instance. We find no violation.

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,

A handwritten signature in black ink, appearing to read "Lisa A. Pinsonneault", written over a printed name.

Lisa A. Pinsonneault
Special Assistant Attorney General

LP/kr

Cc: Thomas E. Carlotto Esq.