



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 21, 2018
PR 18-37

Ms. Sarah Markey

RE: Markey v. South Kingstown School Department

Dear Ms. Markey:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the South Kingstown School Department (“SKSD”) is complete.

You filed an APRA request to the School Department on March 18, 2018, requesting the following:

- “1) A Copy of any email sent by any member of the School Committee pertaining to the Legacy planning since September 1, 2017[;]
- 2) A copy of any emails sent by the School Committee Chair pertaining to the Legacy planning since September 1, 2017[;]
- 3) A copy of all emails received by each School Committee member from the public about the Legacy project since January 1, 2018[;]
- 4) A copy of all communications, including email, between the Superintendent and the representatives of Education Legacy Planning since January 1, 2017[;]
- 5) A copy of all communications, including email, between the School Committee Chair and the representatives of Education Legacy Planning since January 1, 2017.”

In its response, the SKSD declined to provide documents responsive to Requests 1, 2, and 3 pursuant to R.I. Gen. Laws § 38-2-2(4)(M). However, the SKSD provided responsive documents to Requests 4 and 5, but redacted portions of those documents pursuant to R.I. Gen. Laws § 38-2-2(4)(K).

Thereafter, you filed the instant Complaint, alleging, in pertinent part:

“While the APRA exclusion does in fact cover communications by elected officials in their official capacities, the School Committee Chair is not elected. He was appointed by the Town Council in October 2017. ***

I am filing this complaint because I believe that the District did not include every email communication that falls under the request and because some information may have been unnecessarily redacted.”¹

In response to an inquiry from this Department as to what information you alleged was improperly redacted, what the basis was for that conclusion, and what information you had to support your contention that there are additional responsive email communications that were not provided, you provided the following:

“Two other emails support that there is correspondence between the School Committee Chair and the Robert Hendricks team[.] *** Scan 4 Page 73 email is entirely redacted but Roland [the School Committee Chair] is included in the cc’d addresses. ***

I believe the District’s interpretation of [R.I. Gen. Laws § 38-2-2(4)(K)] is too strict and not in accordance with the intent of the APRA exclusion in state statute. It is virtually impossible to believe that the information that was shared with me, [sic] is the full picture of discussions between the School Committee Chair, Superintendent, and/or the company hired to facilitate the legacy project. ***

Frankly, I don’t have evidence. I heard from two community members that the Superintendent in one instance and the IT Director in another instance essentially told them that this information request would yield little information and that they were planning to exclude emails. I am in no position to prove this, however, so [I] understand if the AG’s office cannot proceed to investigate this specific concern.”

In response to your Complaint, the SKSD submitted a substantive response through its counsel, Joseph M. Cooper, Esquire. In his substantive response, Attorney Cooper states, in pertinent part:

“[The Complainant] sought the emails of every member of the South Kingstown School Committee, an elected body, dating back more than one year. On their face, these requests sought records that are exempt from disclosure under § 38-2-2(4)(M).

Ms. Markey asserts that APRA’s elected official exemption/exclusion should be inapplicable with respect to two individual School Committee members – Scott Mueller and Roland Benjamin (the Committee Chair) – because they were

¹ We observe that you explicitly limited your Complaint to the SKSD’s response to Requests 1, 2, 4, and 5, noting that “I understand why request #3 was denied and that it does in fact fall under the umbrella of information excluded from APRA[.]” We also observe that you claim that the SKSD withheld information based on the deliberative process privilege. However, the SKSD’s response to your APRA request does not claim the deliberative process privilege and, accordingly, we have no occasion to address it.

appointed by the South Kingstown Town Council to fill vacancies left by Committee members who resigned prior to completing their terms.

This argument should be rejected. No prior precedent supports Ms. Markey's claims. *** Ms. Markey's assertion, if accepted by the Attorney General, would undermine the clear purpose of § 38-2-2(4)(M) – namely, to afford some level of protection to communications between constituents and the individuals who represent them in state or municipal elective office.

In addition, it would be an absurd result if individual school committee members *** serving side-by-side on the same public body were treated different under APRA, simply because a prior member of the public body resigned due to ill-health, family obligations, or some other unpredictable event. ***

Ms. Markey's generalized allegations that responsive, non-exempt documents were improperly withheld lack merit. The District engaged in an extensive, diligent, time-consuming effort to appropriately identify, retrieve, analyze, and redact thousands of pages of documents in response to Ms. Markey's expansive request."

The SKSD's substantive response included an affidavit from Dr. Kristen Stringfellow, the Superintendent of the SKSD, that corroborates the SKSD's substantive response and details the search and retrieval process. The SKSD's substantive responsive also included the produced documents in unredacted form for this Department's in camera review.

You provided a rebuttal stating, in relevant part:

“[W]hen these individuals act in a way that functions beyond the prescribed role of that office, their communications should no longer be exempt from APRA requests. For example, correspondence between school administration and the Superintendent and the Legacy planning team particularly surrounding the design, timing, decision-making, and execution of the planning effort are subject to APRA *and should be* because they are functioning in an administrative capacity. ***

The interpretation of the School Committee's attorneys identifies and circumscribes a mechanism for avoiding public accountability and discussion in a fundamental planning process by allowing the simultaneous invocation of APRA protections and circumvention of the Open Meetings Act. All communications covering these issues should be released as part of the public record.” (Emphasis in original).

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 SKSD violated the APRA. See R.I. Gen. Laws § 38-2-8.

As a preliminary matter, we note that to the extent that your rebuttal alleges additional allegations not included in your Complaint – including allegations of the Open Meetings Act – they will not

be considered. As stated in this Department's acknowledgment letter, “[y]our rebuttal ... should not raise new issues that were not presented in your complaint[.]” See Save the Bay v. Department of Environmental Management, PR 15-19.

We turn then to the SKSD’s stated reason for nondisclosure of documents responsive to Requests 1 and 2: Rhode Island General Laws § 38-2-2(4)(M), which exempts from disclosure, in relevant part:

“Correspondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.”

As formulated in your Complaint, you do not contend that the withheld documents are outside the ordinary scope of the exemption. Instead, you maintain that strict construction of the above exemption renders those *appointed* to elected office – as opposed to those *elected* to elected office – outside the exemption’s protections. In this matter, that applies to two members of the SKSD who were appointed by the Town Council when two elected SKSD members resigned.

We respectfully disagree with this argument since it would lead to the result of two classes of public officials – those who are elected to the elected position and those who are appointed to the position when an elected official leaves his or her seat prematurely. Under your formulation, the former class is afforded the APRA’s protections and the latter is not. Indeed, under your argument, if either of the officials appointed later decided to continue in their position and be elected, the same person performing the same responsibilities would be subject to different rules based upon the timeframe they served. You do not provide – and we do not find – any authority that evinces the General Assembly’s intent to create such a dichotomy. Nor do we find this interpretation on R.I. Gen. Laws § 38-2-2(4)(M) to be practical; public bodies (and the citizens they represent) require reliability and consistency in order to fulfill their duties and responsibilities and remain responsive to their constituents. The fact that a particular public official was appointed to fulfill the remainder of an elected official’s term, rather than being elected, should not thwart these significant reliance interests or the General Assembly’s intent in enacting this exemption. Indeed, the Rhode Island Supreme Court has counseled against such parsimonious statutory construction. See, e.g., Chambers v. Ormiston, 935 A.2d 956, 964 (R.I. 2007) (“[S]tatutes are not to be read in a myopic manner but rather holistically and in context.”). Moreover, a second, entirely plausible, reading of the statutory phrase “elected officials” is that it singles out positions ordinarily elected by voters from other non-elected government officials. Under that reading there is no diminished stature for those appointed to elected office. For these reasons, we decline to narrow R.I. Gen. Laws § 38-2-2(4)(M) to exclude appointed public officials in elected positions.

With respect to your rebuttal argument that the documents here should not be covered by the cited APRA exemption because they relate to the SKSD’s public officials’ *administrative* capacities, we similarly disagree. We note that the plain language of the APRA makes no such distinction between capacities of elected officials. The exemption broadly applies to “correspondence” of elected officials “in their official capacity.” R.I. Gen. Laws § 38-2-2(4)(M). You do not provide

any evidence or argument that the subject documents fall outside that category. Accordingly, the SKSD's response to Requests 1 and 2 did not violate the APRA.² We find no violation.

We move next to your second set of allegations of violation, namely that the SKSD's response to Requests 4 and 5 failed to include certain responsive documents and improperly redacted certain information. In response to an inquiry from this Department to further substantiate your allegations, you noted that "[f]rankly, I don't have evidence" that there are additional responsive documents that were not provided. You acknowledged that these allegations are based on second-hand information and conceded that "I am in no position to prove this[.]" We appreciate your candor. Respectfully, the SKSD provided information in affidavit-form from its Superintendent, Dr. Kristen Stringfellow that it had provided all responsive documents. We accordingly find no violation on this first allegation.

With respect to your claim that the SKSD improperly redacted information, you note that your allegation is based on your belief that "[i]t is virtually impossible to believe that the information that was shared with me, [sic] is the full picture of discussions between the School Committee Chair, Superintendent, and/or the company hired to facilitate the legacy project." Notwithstanding, when asked to specifically identify what information was improperly redacted, you only identified a single email. Specifically, you pointed to a December 5, 2017 email communication that copied the School Committee Chair that was "entirely redacted[.]"

At first blush, in reviewing both the redacted and unredacted versions of the produced information during our in camera review, we observe large swaths of black redaction on nearly every email. However, upon closer inspection it is apparent that the vast majority of these redactions are of email routing and encryption data – largely indecipherable strings of letters and numbers – that were redacted for security purposes. According to the affidavit of Dr. Stringfellow, this information is a byproduct of the Information Technology database searches used to retrieve the responsive documents. We take no issue with the redaction of this non-substantive information and question whether it is even responsive to your requests.

With this in mind, after reviewing the one document you identified as being improperly redacted, we find that no responsive information was improperly redacted. We note that the December 5, 2017 email communication you claim was improperly redacted is, in fact, provided in full and that only the encryption data is redacted. As such, the SKSD did not violate the APRA by redacting it.

To the extent that the SKSD withheld any information pursuant to R.I. Gen. Laws § 38-2-2(4)(K), we have no occasion to address it because you have failed to specifically allege what, precisely, was improperly redacted under this exemption. However, in any event, after reviewing the voluminous produced documents, we find that the redactions largely concern non-responsive information. There are only two instances where the SKSD redacted arguably responsive information: (1) redacted email addresses where the names of addressees are provided; and (2)

² We note that our reasoning on R.I. Gen. Laws § 38-2-2(4)(M)'s application to Requests 1 and 2 would seem to apply to Request 5 as well. However, as the SKSD did not raise R.I. Gen. Laws § 38-2-2(4)(M) in response to Request 5, we have no occasion to address it.

information unrelated to Education Legacy Planning. We are satisfied that the provided documents show the “full picture of discussions[.]” We accordingly 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). 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,

A handwritten signature in black ink, appearing to read "Sean Lyness". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sean Lyness
Special Assistant Attorney General

SL/kr

Cc: Joseph M. Cooper, Esq.