



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

November 12, 2014  
OM 14-35  
PR 14-28

Mark McBurney, Esquire

**Re: Clark v. West Glocester Fire District**  
(November 13, 2013 complaint)

Dear Attorney McBurney:

The investigation into your Open Meetings Act (“OMA”) and Access to Public Records Act (“APRA”) complaint filed on behalf of your client, Mr. Trevor Clark, against the West Glocester Fire District (“Fire District”) is complete. By correspondence dated November 13, 2013, you allege the Fire District violated the OMA and APRA on several occasions. We address these allegations below.

At the outset, we note that in examining whether a violation of the APRA or the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred or to examine the wisdom of a given statute, but instead, to interpret and enforce the APRA and the OMA as the General Assembly has written these laws and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire District violated the APRA or the OMA. See R.I. Gen. Laws §§ 38-2-8 and 42-46-8. In other words, we do not write on a blank slate.

First, you allege that the Fire District violated R.I. Gen. Laws § 28-6.4-1 when it denied Mr. Clark access to his personnel file. With respect to this allegation, in relevant part, you contend that:

“Trevor Clark submitted a written request to the [Fire District] for his personnel file on 11/1/13, after learning the [Fire District] had suspended him. As his legal representative, I sent a second written request for that same personnel file on

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11/2/13 to [the Fire District's Chief]. The [Fire District] did not provide Mr[.] Clark's personnel file to him within seven days, or ever. The [Fire District] did not provide Mr[.] Clark's personnel file to me within seven days, or ever. The enclosed 11/7/13 reply evinces the extent of the [Fire District's] willful misconduct, in requiring us to make a third request for Mr[.] Clark's personnel file, but only after an unspecified officer returns from vacation, further requiring us to divine on what date that might be. RIGL 28-6.4-1 makes no provision for an employee to ask three times, or to wait for the return of an officer from vacation, or to intuit the date that officer might return, before an employee may receive his personnel file."<sup>1</sup>

As suggested in footnote one, this Department simply has no jurisdiction to investigate your allegation that the Fire District violated R.I. Gen. Laws § 28-6.4-1. In relevant part, R.I. Gen. Laws § 28-6.4-1(a)(1) provides:

“[e]very employer shall, upon not less than seven (7) days advance notice, holidays, Saturdays, and Sundays excluded, and at any reasonable time other than the employee's work hours and upon the written request of an employee, permit an employee to inspect personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, termination, or disciplinary action.”<sup>2</sup>

Rhode Island General Laws § 28-6.4-2 provides that “[a]ny employer or any agent of an employer who violates the provisions of this chapter without just cause shall be fined not more than one hundred dollars (\$100).”

Here, your complaint does not allege a violation of the APRA, but instead, alleges a violation of R.I. Gen. Laws § 28-6.4-1. Respectfully, you have presented no evidence or argument that such an allegation falls within the jurisdiction of this Department, and equally important, such an allegation does not implicate the APRA or this Department's statutory obligation to enforce the APRA. See R.I. Gen. Laws § 38-2-8. Although you responded to an inquiry from this Department (as part of a related, but separate complaint) and provided reasons why Mr. Clark's

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<sup>1</sup> Your complaint contains a footnote and relates, in relevant part:

“The RI Department of Labor and Training informs me that denial of personnel files is handled by the AG's office, and not the DLT. If you have a different view, I would appreciate knowing that so I can monitor and progress this issue on my client's behalf.”

By letter dated November 25, 2013, this Department advised you that this Department had no jurisdiction to investigate alleged violations of R.I. Gen. Laws § 28-6.4-1.

<sup>2</sup> We have not been provided a copy of Mr. Clark's November 1, 2013 written request.

personnel file should be considered a “public record” pursuant to the APRA, our consideration of your February 11, 2014 e-mail finds these arguments unavailing. Indeed, in a May 29, 2014 correspondence (as part of a related, but separate complaint) you acknowledged that “the APRA seemingly applies no heightened duty to provide timely defense documents requested by a governmental employee facing a termination hearing[.]” Since this allegation does not implicate the APRA, we must necessarily find no APRA violation.

Next you claim that the Fire District violated the OMA when it “failed to provide written notice (to the Secretary of State) of their regularly scheduled Board meetings at the beginning of calendar years 2010, 2011, 2012, and 2013,” in violation of R.I. Gen. Laws § 42-46-6. Despite this allegation, which was contained in your November 13, 2013 complaint, in this Department’s November 25, 2013 acknowledgement letter we requested that you address whether the statute of limitations had expired for this Department’s review of your allegation. We received no response to our inquiry. Moreover, although not expressly requested by this Department, neither your complaint nor your rebuttal provides any evidence, argument, or indication concerning how Mr. Clark was allegedly aggrieved by the instant matter.

The OMA provides that only “aggrieved” citizens may file a complaint with this Department. R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Supreme Court examined the “aggrieved” provision of the OMA. In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission’s March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission’s March 25, 1996 meeting, Mr. Hawkins and his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission’s notice was deficient, the trial justice determined that the Lottery Commission violated the OMA, and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was “unnecessary” to address the merits of the OMA lawsuit because “the plaintiffs Graziano and Hawkins ha[d] no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

“has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. \* \* \* It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice. Id. at 221-22. (Emphases added).

In this case, you have not responded to our inquiry whether the statute of limitations has passed concerning your allegation of insufficient public notice dating back to 2010, nor has any evidence been produced concerning how Mr. Clark was aggrieved by this alleged violation. See id. We have been presented no evidence concerning whether Mr. Clark attended the meetings in

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question, sought to attend the meetings in question, or could not attend the meetings in question because of the allegedly deficient notice. Accordingly, in accordance with Graziano, we find insufficient evidence to determine that Mr. Clark was aggrieved and find no violation.

Your remaining allegations pertain to the APRA. In brief, by unsigned letter dated November 2, 2013, addressed to the Fire District Chief, you sought, among other things:

- 4) Any and all police records relied upon in suspending Mr. Clark,
- 5) Any and all records regarding any sexual harassment claims against Mr[.] Clark, including the claim itself, and any record of notification to, or counseling of, Mr. Clark for the alleged incident,
- 6) Any and all documents regarding Mr. Clark's alleged 'failure to follow Department procedures,'
- 7) Any and all documents regarding Mr. Clark's alleged performance of personal business on District time with District equipment,
- 8) The Department's 2012 list of deficiencies regarding Snow's Clam Box, and/or 2461 Putnam Pike,
- 9) Year 2013 'Tally Sheets' reflecting Mr. Clark's response rate to calls vis a vis other staff, and
- 10) Yearly notice of the District's meetings, as required under RIGL 42-46-6, for 2010-2013.

In the Fire District's November 7, 2013 response, the Fire District indicated, in relevant part, that:

"[i]n response to the Requests numbered 4 through 8, access to those records, if they exist, are exempted by Title 38, Chapter 2, Section 2 of the Rhode Island General Laws (referred to as 'Access To Public Records Act' or 'the Act') and are hereby denied. \* \* \*

"In response to your Requests numbered 9 and 10, please be advised that the 2013 'Tally Sheets' are not generated until the end of the year and therefore are not available. However, even if available, said records are also exempt from production under the Act. District and Board meetings and minutes are posted pursuant to Rhode Island General Laws and are available at the Secretary of State's website."

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With respect to Requests 4-8, you contend that the Fire District's response, *i.e.*, "access to those records, if they exist, are exempted," was improper. For each of these Requests, you relate that the Fire District's response was improper because: (a) upon information and belief, there is no responsive document and accordingly, the Fire District violated R.I. Gen. Laws § 38-2-7(c) by failing to so indicate, (b) if the requested records do exist, the Fire District failed to provide the specific reasons for the exemption as required by R.I. Gen. Laws § 38-2-7, and (c) if the requested records do exist, the records are publicly available, in whole or in part.

For its part, the Fire District responds, through an affidavit from its Chairman, indicating that:

“10. The District, in denying access to items no. 4 through 8 in the November 1, 2013 correspondence, specifically cited RIGL section 38-2-2.

11. The denial was based on the determination that the material requested included personnel matters which would, if disclosed, constitute a clearly unwarranted invasion of personal privacy and also involved allegations by female members of the Department against Mr. Clark;

12. The District, in denying access to the Department's 2012 list of deficiencies regarding Snow's Clam Box (item no. 8) specifically cited the fact that those records had already been released to the attorney's client;

13. The District further advised Mr. Clark's attorney that the 'tally sheets' requested for 2013 are not generated until the end of the year;

14. The 'tally sheets' for the year are divided into two periods – the first is for the period December 1, through May 30. That period had previously been disclosed to all Department personnel including Mr. Clark;

15. The second period (June 1 through November 30) was not yet compiled at the time of the November 1, 2013 request[.]”

Frankly, we begin by expressing our disappointment in that neither your complaint, nor the Fire District's response, is particularly helpful in focusing the issues for our resolution. As an example, for Request Nos. 4-8, although you complain that the Fire District failed to provide you access to these categories, you alternatively argue that “[o]n information and belief, there is no such record.” For its part, the Fire District's November 7, 2013 response indicates that for Request Nos. 4-8 “access to those records, if they exist, are exempted.” The foregoing record (and arguments) leaves this Department in the position where neither party has submitted evidence in a manner that facilitates resolution.

Despite the foregoing, the Fire District has submitted ten (10) documents that it represents were “presented to and reviewed by the District's Board held in Executive Session at its November 19, 2013 meeting.” As we understand it, the ten (10) submitted documents may or may not have

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been included in Mr. Clark's personnel file, which was made available to you on or about November 21, 2013.<sup>3</sup>

Based upon a reading of your November 13, 2013 complaint, it appears that you sought access to documents responsive to Request Nos. 4-8 in order to defend Mr. Clark at his November 19, 2013 termination hearing. While the reason you sought the instant documents is not relevant, see R.I. Gen. Laws § 38-2-3(j), we reference this reason because it describes the nature of the ten (10) documents you seek to access through the APRA. Stated differently, these documents – to a more or less extent – are responsive to one (or more) of your Request Nos. 4-7, which sought:

- 4) Any and all police records relied upon in suspending Mr. Clark,
- 5) Any and all records regarding any sexual harassment claims against Mr[.] Clark, including the claim itself, and any record of notification to, or counseling of, Mr. Clark for the alleged incident,
- 6) Any and all documents regarding Mr. Clark's alleged 'failure to follow Department procedures,' [and]
- 7) Any and all documents regarding Mr. Clark's alleged performance of personal business on District time with District equipment[.]

While you may have sought the instant records on behalf of your client and in an effort to defend his termination, there is little question that under the APRA our analysis is limited to whether the ten (10) submitted documents would be a public record to anyone, not whether the responsive documents are available to you or your client. We made a similar observation, supra, concerning Mr. Clark's personnel file. See also McBurney May 29, 2014 correspondence ("the APRA seemingly applies no heightened duty to provide timely defense documents requested by a governmental employee facing a termination hearing").

To be sure, you have presented arguments that because Mr. Clark (or you as Mr. Clark's attorney) are requesting the instant records, such a request constitutes an "implicit waiver" of the privacy concerns imbedded within the APRA and that if "a balancing test needs to be used, the balance swings clearly in favor of an individual requesting the contents of his own personnel file to defend himself at his own termination wherein he was accused of sexual harassment." See McBurney email dated February 11, 2014 (concerning personnel file). These precise arguments, however, have already been rejected by the Rhode Island Supreme Court.

In Bernard v. Vose, 730 A.2d 30 (R.I. 1999), the Court considered whether the Department of Corrections violated the APRA when it denied an inmate's APRA request for his own sex offender treatment file. The Court affirmed the APRA denial and explained that the APRA

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<sup>3</sup> Although both you and the Fire District have possession of Mr. Clark's personnel file, neither has made its contents available to this Department.

“opens public records to inspection by the general public \* \* \* regardless of ‘the purpose for which the records are sought.’” Id. at 31-32. After referencing that the APRA exempted from public disclosure records containing “personal or medical information relating to an individual in any files,” the Court elucidated that:

“[u]ndoubtedly, board records contain personal information about inmates. For example, in the instant case, petitioner requests the right to review reports about his participation in the Sex Offender Treatment Program, reports which potentially could contain intimate details about petitioner’s sex life. If board records were subject to the Access to Public Records Act, those records would be open to the scrutiny of any member of the public who wanted to review them, contravening the purpose of the act.” Id. at 32.

Here, we are faced with a similar situation. You request – under the APRA – access to records detailing police records allegedly relied upon by the Fire District in suspending Mr. Clark, records regarding any sexual harassment claims made against Mr. Clark, documents regarding Mr. Clark’s alleged failure to follow Department procedures, and records regarding alleged performance of personal business on Fire District time with Fire District equipment. We have reviewed the submitted documents and conclude, similar to Bernard, that public disclosure would implicate Mr. Clark’s privacy interests. While your complaint submits that records relating to at least one of the categories requested would be considered public records, you submit no legal authority to support your position and we are aware of legal authority to support the opposite conclusion. See e.g., Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 559 (R.I. 1989)(“Investigations into administrative and morale problems at workplaces necessarily implicate personal and intimate topics of discussion that are inherently related to personnel matters.”). In the absence of any cognizable APRA “public interest” in disclosure, and because there is at least some privacy interest in the responsive documents, we find that the ten (10) submitted documents are exempt from public disclosure.<sup>4</sup> See DARE v. Gannon, 713 A.2d 218, 222 (R.I. 1998)(balancing test).<sup>5</sup> Your December 11, 2013 correspondence supports our

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<sup>4</sup> The tenth (10<sup>th</sup>) submitted document appears to have been provided to the Fire District after your November 2, 2013 APRA request, and for this reason, would not be responsive to your request. See R.I. Gen. Laws § 38-2-3(h)(“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[.]”)(emphasis added).

<sup>5</sup> We recognize that the Fire District did not initially (and specifically) raise this exemption in its November 7, 2013 denial letter, although the Fire District did raise this issue in its response to this Department. Considering that if we concluded that the Fire District had waived its ability to assert this exemption, such a conclusion would necessarily mean that the requested records were publicly available to any person, we conclude that under the facts of this case “good cause” has been demonstrated within the meaning of R.I. Gen. Laws § 38-2-7(a). See also Scripps News v. Department of Business Regulation, PR 14-07. Such a conclusion should not be interpreted as

conclusion. See McBurney letter dated December 11, 2013 (“While sexual harassment complainants perhaps have a privacy expectation with regard to their names (and therefore redactions of their names, alone, might have been a reasonable course of action by [the Fire District], they do not have a privacy expectation with regard to their allegations, especially given that Mr[.] Clark was unable to defend himself at his termination hearing because he had no idea of the nature of the sexual harassment allegations against him.”). Of course, this argument continues to ignore the principle discussed in Bernard and that no public interest has been asserted in accordance with the APRA. Your argument also ignores that in this case redaction would have little practical effect. See Brady, 556 A.2d at 559 (“Even if all references to proper names were deleted, the principal’s identity would still be abundantly clear from the entire context of the report.”). See generally, Robinson v. Malinoff, 770 A.2d 873 (R.I. 2001).

Having reached this conclusion, we nonetheless find that the Fire District’s November 7, 2013 response was inadequate and violated the APRA. In particular, Rhode Island General Laws § 38-2-7(a) provides that “[a]ny denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made \* \* \* in writing giving the specific reasons for the denial within ten (10) business days of the request and indicating the procedures for appealing the denial.”

In its response, the Fire District indicated, in relevant part, that:

“[i]n response to the Requests numbered 4 through 8, access to those records, if they exist, are exempted by Title 38, Chapter 2, Section 2 of the Rhode Island General Laws (referred to as ‘Access To Public Records Act’ or ‘the Act’) and are hereby denied.”

While we do not fault the Fire District for failing to confirm or refute the existence of records responsive to Request Nos. 4-7 for the reasons discussed in Clark v. Department of Public Safety, PR 14-23, the Fire District’s November 7, 2013 response nonetheless failed to indicate the “specific reasons for the denial.” R.I. Gen. Laws § 38-2-7(a). Indeed, the Fire District’s response simply indicated that Request Nos. 4-8 were exempted pursuant to the APRA. See Costantino v. Smithfield School Committee, PR 13-24. Additionally, the Fire District also violated the APRA by failing to indicate “the procedures for appealing the denial.” R.I. Gen. Laws § 38-2-7(a).

Next we address your allegation that the Fire District violated the APRA by denying Request No. 8, the Fire District’s 2012 list of deficiencies regarding Snow’s Clam Box, and/or 2461 Putnam Pike. The Fire District justifies its denial on the basis that “those records had already been

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meaning that “good cause” has been demonstrated in all cases where disclosure of seemingly exempt documents would occur as there are surely cases where “good cause” would not exist. Based upon among other factors, the nature of the instant documents, the custodian of the documents, and that such a conclusion would make these documents publicly available, we simply conclude that “good cause” has been demonstrated in this case.

released to the attorney's client." In response, you relate that the Fire District presents a "novel" defense, *i.e.*, that if the Fire District "gives a public record to one person, it may deny a request for that same record from that person's attorney." On the basis of this record, we have been provided no legal authority to support the Fire District's position. Accordingly, we find it violated the APRA.

You also contend that the Fire District violated the APRA when it failed to provide you the 2013 Tally Sheets reflecting Mr. Clark's response rate as an Emergency Medical Technician and when the Fire District failed to provide you the 2010, 2011, 2012, and 2013 regular notices for the Fire District's Board meetings. With respect to both categories, the Fire District responded by letter dated November 7, 2013, relating that:

"please be advised that the 2013 'Tally Sheets' are not generated until the end of the year and therefore are not available. However, even if available, said records are also exempt from production under the Act. District and Board meetings and minutes are posted pursuant to Rhode Island General Laws and are available at the Rhode Island Secretary of State's website."

In its response, the Fire District relates by affidavit that:

14. The 'tally sheets' for the year are divided into two periods – the first is for the period December 1, through May 30. That period had previously been disclosed to all Department personnel including Mr. Clark;

15. The second period (June 1 through November 30) was not yet compiled at the time of the November 1, 2013 request[.]"

As this Department has explained on myriad occasions, after an APRA request is made, a public body – within ten (10) business days – must provide access to the requested document(s), provide a denial in accordance with the APRA, or extend the time to respond in accordance with the APRA. See *e.g.*, Campbell v. Town of Tiverton, PR 12-13. With respect to your request for the regular meeting notices, the Fire District accomplished none of these statutory requirements, but instead, simply indicated that "District and Board meeting and minutes are posted pursuant to Rhode Island General Laws and are available at the Rhode Island Secretary of State's website." Presumably, the Fire District's response was meant to direct you to the Secretary of State's website in order to obtain the requested documents, but as indicated *supra*, such a response fails to satisfy a public body's APRA obligation to either provide access, deny access, or extend the time to respond. While the Fire District may or may not maintain a copy of the requested notices for a variety of reasons, the APRA provides for this contingency by making clear that "[n]othing 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." R.I. Gen. Laws § 38-2-3(h). While the Fire District could have denied access on the basis of the foregoing

provision, it failed to do so and simply referring a requester to another source, without a response as detailed above, is not contemplated within the APRA. This violated the APRA.

For reasons similar to those previously discussed we also find the Fire District violated the APRA when it failed to provide a copy of the "Year 2013 'Tally Sheets' reflecting Mr. Clark's response rate to calls vis a vis other staff." While conflicting evidence has been submitted concerning the number and times these Tally Sheets are created, the evidence appears to be undisputed that, at a minimum (and according to the Fire District's affidavit) a Tally Sheet had been created for the period of December 2012 through May 2013 and that you had requested "Year 2013 'Tally Sheets.'" (Emphasis added). While the Fire District's affidavit indicates that this Tally Sheet had been disclosed to "all Department personnel including Mr. Clark," no evidence has been presented that a Tally Sheet was ever provided to Mr. Clark (or to you), as part of the Fire District's referenced disclosure or pursuant to the instant APRA request. Since the APRA request sought "Year 2013 'Tally Sheets' reflecting Mr. Clark's response rate to calls vis a vis other staff," since the evidence establishes that the Fire District maintains at least one responsive Tally Sheet, and since no evidence has been presented that the existing Tally Sheet was ever provided (or properly extended), we find the failure to do so or to provide a valid APRA exemption violated the APRA. In doing so it is noteworthy that no assertion has been made by the Fire District that the requested Tally Sheet was exempt from public disclosure, other than the general and unsupported assertion in its November 7, 2013 letter that the Tally Sheets "are also exempt from production under the [APRA]." The failure of the Fire District to support this assertion and/or to provide this Department a copy of the Tally Sheet for our review, requires this conclusion.

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 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, and 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).

Here, we find no evidence that the Fire District willfully and knowingly, or recklessly, violated the APRA, and accordingly a lawsuit seeking civil fines is not appropriate. We do, however, believe that injunctive relief is appropriate to remedy certain violations discussed herein, specifically: (1) the Fire District's failure to appropriately respond to your APRA request seeking 2010-2013 annual notices; (2) the Fire District's failure to provide you (or appropriately deny) access to the Clam Box 2012 List of Deficiencies; and (3) the Fire District's failure to provide you (or appropriately deny) access to the 2013 Tally Sheets, as they existed at the time of your APRA request. The Fire District shall appropriately respond to you regarding these matters within ten (10) business days of receipt of this finding.

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While the Attorney General will not file suit in this matter, nothing within the APRA or the OMA 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); 42-46-8. Please be advised that we are closing your file as of the date of this letter, although we reserve the right to reopen this matter should the Fire District fail to remedy this matter as directed herein.

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 "Michael W. Field". The signature is written in a cursive, flowing style.

Michael W. Field  
Assistant Attorney General

Cc: Noelle K. Clapham, Esq.