



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
PR 14-29

Mark McBurney, Esquire

Re: **Clark v. West Glocester Fire District**
(January 29, 2014)

Dear Attorney McBurney:

The investigation into the Access to Public Records Act (“APRA”) complaint filed on behalf of your client, Mr. Trevor Clark, is complete.¹ In sum, you contend that on or about October 30, 2013, Mr. Clark received notice from the West Glocester Fire District (“Fire District”) that the Fire District would convene a November 19, 2013 meeting to consider terminating him from the Fire District’s employment. As related by you, on October 31, 2013, Mr. Clark contacted you, as his attorney, and you advised him to request his personnel file from the Fire District. Indeed, the evidence presented demonstrates that on October 31, 2013, Mr. Clark submitted a memorandum to the “West Glocester Fire Department” with a subject matter entitled “Personnel File.” The entirety of the memorandum indicated “Please take this letter as a formal request for a complete and full copy of my personnel file.” Your complaint also indicates that on October 31, 2013, Mr. Clark made an oral request for his “personal” file, but no further details concerning this oral request are set forth in your complaint. In addition to the foregoing, you also relate that on November 1, 2013, you “filed a written complaint with [the Fire District] regarding irregularities in the treatment of and access to Mr.] Clark’s personnel file.” This November 1, 2013 letter raised several issues relating to Mr. Clark’s employment situation, and also indicated “so that Mr. Clark may be afforded due process, or alternatively under the Access to Public Records Act, please provide” the following enumerated documents. Although dated November 1, 2013, in all

¹ The allegations contained herein are related to the allegations and request detailed in Clark v. West Glocester Fire District, PR 14-28. For reasons that are unknown to us, you filed two separate complaints. The filing of multiple complaints regarding the same subject-matter should be discouraged.

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material respects your November 1, 2013 letter appears to be identical to the November 2, 2013 letter described in Clark v. West Gloucester Fire District, PR 14-28.

By letter dated November 7, 2013, the Fire District responded to the substance of the above-described enumerated requests in a letter to you, indicating that Items 1-3 requested in your November 1, 2013 letter were provided; that Items 4-8 requested in your November 1, 2013 letter were denied; and that with respect to Items 9 and 10 in your November 1, 2013 letter, Item 9 was not available and Item 10 was available at the Rhode Island Secretary of State's website. See Clark, PR 14-28.

While not relevant to our ultimate finding, your complaint summarizes the reason for the November 1, 2013 request and this basis does provide some relevant background:

“Mr[.] Clark and I reasoned that his personnel file must show some paper trail of these four charges – especially something as serious as sexual harassment – and that this would provide us with the time, date, and place due process information indispensable for Mr[.] Clark to defend himself at the [Fire District's] termination hearing. Alternatively, and more likely, we reasoned, the absence of any paper trail in his personnel file * * * would allow Mr[.] Clark to defend himself at this termination hearing[.]”

Based upon the foregoing, you allege that the Fire District violated: (1) R.I. Gen. Laws § 38-2-7(a) by not responding directly to Mr. Clark regarding his October 31, 2013 oral request for his personnel file; (2) R.I. Gen. Laws § 38-2-7(a) by not responding directly to Mr. Clark regarding his November 1, 2013 written request for his personnel file; (3) R.I. Gen. Laws § 38-2-7(a) by not providing Mr. Clark his appeal rights in the Fire District's November 7, 2013 denial letter; (4) R.I. Gen. Laws § 38-2-3(f) by not making an appointment for Mr. Clark to examine “temporarily unavailable records requested twice by [Mr.] Clark” on October 31, 2013; (5) R.I. Gen. Laws § 38-2-3(d); and (6) R.I. Gen. Laws § 38-2-3(j), since you relate that the Fire District's “clear purpose in twice denying Mr[.] Clark and keeping his personnel file away from him for 22 days until two days after the [Fire District's] November 19, 2013 termination hearing was to deny him due process.” Additional relevant facts will be set forth as necessary.

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

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First, you contend that the Fire District violated R.I. Gen. Laws § 38-2-7(a) when it failed to respond directly to Mr. Clark regarding the October 31, 2013 and November 1, 2013 requests.² We find no violation. Specifically, the Fire District's November 7, 2013 denial indicates that the responding attorney represents the Fire District "relative to your correspondence dated November 1, 2013 and your client, Trevor Clark." The November 7, 2013 letter continues that the responding attorney has "been authorized to respond on behalf of the [Fire District] to yours' and your client's request(s) contained in that correspondence." Considering that your November 1, 2013 letter to the Fire District indicated that you "represent Trevor Clark," we can hardly find it a violation of the APRA that the Fire District responded to the above described multiple requests in one letter addressed to you, rather than directly to Mr. Clark.

Next, you allege that the Fire District violated R.I. Gen. Laws § 38-2-7(a) when the Fire District failed to apprise you of the APRA appeal rights in the Fire District's November 7, 2013 letter. This precise allegation – regarding the same November 7, 2013 letter – was examined in Clark, PR 14-28. Accordingly, we need not reexamine this issue.

You also contend that the Fire District violated R.I. Gen. Laws § 38-2-3(d). In its entirety, you contend that this provision is implicated because, according to your complaint, "[t]he unavailability of a designated public records officer shall not be deemed good cause for failure to timely comply with a request" As suggested by the ellipsis, however, your complaint omits certain language contained within R.I. Gen. Laws § 38-2-3(d). In its entirety, R.I. Gen. Laws § 38-2-3(d) provides that "[t]he unavailability of a designated public records officer shall not be deemed good cause for failure to timely comply with a request to inspect and/or copy public records pursuant to subsection (e)." (Emphasis added). Accordingly, in order to address your allegation, it is necessary to reference "subsection (e)."

In relevant part, R.I. Gen. Laws § 38-2-3(e) requires a public body to respond to an APRA request within ten (10) business days, but also provides that a "public body may have up to an additional twenty (20) business days to comply with the request 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 also R.I. Gen. Laws § 38-2-7(b)(requiring response within 10 business days "[e]xcept that for good cause, this limit may be extended in accordance with the provisions of subsection 38-2-3(e) of this chapter").

Here, R.I. Gen. Laws § 38-2-3(d), in conjunction with the other provisions of the APRA, make clear that the APRA allows a public body to extend the time to respond to an APRA request "for good cause," see R.I. Gen. Laws § 38-2-7(b), but that the "unavailability of a designated public records officer shall not be deemed good cause for failure to timely comply with a request to inspect and/or copy public records pursuant to subsection (e)." R.I. Gen. Laws § 38-2-3(d). Since there is no evidence – or even an allegation – that the Fire District extended the time to respond to the instant requests, the provision you cite – that the unavailability of a designated

² The November 1, 2013 letter was signed by you and not Mr. Clark.

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public records officer shall be deemed good cause to extend the time to respond – simply has no application to this case. Accordingly, we find no violation.

Similarly, you contend the Fire District violated R.I. Gen. Laws § 38-2-3(f), which provides that:

“[i]f a public record is in active use or in storage and, therefore, not available at the time a person or entity requests access, the custodian shall so inform the person or entity and make an appointment for the person or entity to examine such records as expeditiously as they may be made available.”

As we understand this allegation, you contend that because Mr. Clark’s personnel file was “in active use or in storage,” pursuant to the APRA, the Fire District was required to “make an appointment for the person or entity to examine such records as expeditiously as they may be made available.” *Id.* But, as we detailed in Clark, PR 14-28, you never alleged that the Fire District violated the APRA by failing to provide access to Mr. Clark’s personnel file, and instead, you suggested that the Fire District violated R.I. Gen. Laws § 28-6.4-1. In fact, your May 29, 2014 correspondence acknowledges that “the APRA seemingly applies no heightened duty to provide timely defense documents requested by a governmental employee facing a termination hearing.” Moreover, as related in Clark, PR 14-28, R.I. Gen. Laws § 28-6.4-1, entitled “Inspection of Personnel Files,” provides the specific statutory authority for an employee to access his or her own personnel file and this statutory authority provides that access shall be granted “at any reasonable time other than the employee’s work hours and upon the written request of an employee.” R.I. Gen. Laws § 28-6.4-1.

Under the circumstances of this case, we simply conclude that Mr. Clark’s request to access his personnel file was governed by R.I. Gen. Laws § 28-6.4-1, and not the APRA. Your correspondences support this conclusion, *see supra*, as well as the fact that in Clark, PR 14-28, you alleged that the Fire District’s actions violated R.I. Gen. Laws § 28-6.4-1, and not the APRA. It should also be noted that the specific provisions set forth in R.I. Gen. Laws § 28-6.4-1 concerning an employee accessing their own personnel file, *i.e.*, “at any reasonable time,” govern the facts of this case rather than the general provisions of the APRA, *i.e.*, “make an appointment for the person or entity to examine such records as expeditiously as they may be made available.” R.I. Gen. Laws § 38-2-3(f). *See Whitehouse v. Moran*, 808 A.2d 626, 629 (R.I. 2002)(specific statute over general statute). Accordingly, we find no APRA violation.

Lastly, you contend that the Fire District violated R.I. Gen. Laws § 38-2-3(j), which provides in relevant part that “[n]o public records shall be withheld based on the purpose for which the records are sought.” In this respect you suggest that the Fire District denied Mr. Clark access to his personnel file in an effort to deny him “due process” at his termination hearing. No evidence has been presented to support this conclusion and it is notable, as discussed *supra*, that you never contend that Mr. Clark’s personnel file is a public record and we have great difficulty concluding that an employee’s personnel file, in its entirety, is a public record.

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Although the Attorney General has found no violations, 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,



Michael W. Field

Assistant Attorney General

Cc: Noelle K. Clapham, Esq.