



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

November 25, 2013  
PR 13-24

Mr. Alfred Costantino

**Re: Costantino v. Smithfield School Committee**

Dear Mr. Costantino:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Smithfield School Committee (“School Committee”) is complete.<sup>1</sup> By correspondence dated September 6, 2013, you allege the School Committee violated the APRA when its denial letter dated June 25, 2013 did not comply with the requirements of the APRA. More specifically, you allege the School Committee failed to state the specific reason for denying your June 17, 2013 APRA request and failed to indicate the procedures for appealing the denial.

In response to your complaint, we received a response in affidavit form from the School Committee’s legal counsel, Aubrey L. Lombardo, Esquire. Attorney Lombardo states, in pertinent part:

“With respect to Mr. Costantino’s allegation that the School Department refused ‘to state the specific reason for the denial,’ the School Department denies said allegation.

The June 25, 2013 response from Attorney Washington to Mr. Costantino’s request \* \* \* clearly states that ‘Pursuant to Rhode Island General [L]aws, the minutes of a closed session, in this circumstance, are not public records’ as a reason for denial.

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<sup>1</sup> It is not without some hesitation that we review your complaint since the allegations raised in this complaint could have been raised in a prior complaint you filed, but were not. See Costantino v. Smithfield School Committee, PR 13-22. As a matter of economy, all issues that can be raised at a time a complaint was filed should be raised and the failure to do so risks an adverse decision.

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Pursuant to R.I. Gen. Laws 38-2-2(4)(J), 'any minutes of a meeting of a public body which are not required to be disclosed pursuant to chapter 46 of title 42' are not deemed public.

Therefore, the explanation given in the School Department's response to Mr. Costantino \* \* \* satisfies the requirement for a 'writing giving the specific reasons for the denial within ten (10) business days of the request pursuant to R.I. Gen. Laws § 38-2-7(a).

With respect to Mr. Costantino's allegation that the School Department failed to advise Mr. Costantino with respect to his rights of appeal:

The School Department's response letter to Mr. Costantino's request does not include the procedures for appealing the denial pursuant to R.I. Gen. Laws § 38-2-7.

It was believed that Mr. Costantino was aware of the appeals procedure, as he had filed an administrative appeal to the Attorney General's Office against the School Department in response to a previous denial by the School Department in response to a request for records \* \* \*

Mr. Costantino did, in fact, file two timely appeals to the School Department's denial of his June 17, 2013 public records request \* \* \*

Notwithstanding the above, Brennan, Recupero, Scungio, Cascione & McAllister, LLC \* \* \* acknowledges that its July 25, 2013 letter to Mr. Costantino was not in compliance with the provision of R.I. Gen. Laws § 38-2-7, requiring that a denial of access to records include in writing 'the procedures for appealing the denial.'

The law firm has amended its practice and put all attorneys on notice that any future denial of an APRA request shall include language indicating the procedures for appealing a denial in compliance with R.I. Gen. Laws § 38-2-7."

We acknowledge your reply dated October 11, 2013.

At the outset, we note 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 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 School Committee violated the APRA. See R.I. Gen. Laws § 38-2-7. 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 records 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 extending the time period necessary to comply. “Any denial of the right to inspect or copy records, in whole or in part...shall be made to the person or entity requesting the right 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.” See R.I. Gen. Laws § 38-2-7(a) (Emphases added).

In the instant case, you made an APRA request on June 17, 2013 wherein you sought a copy of a portion of the January 5, 2009 executive session minutes. Legal counsel for the School Committee denied your request by correspondence dated June 25, 2013. The denial states, in pertinent part:

“Pursuant to Rhode Island General Laws, the minutes of a closed session, in this circumstance, are not public records.”

While reasonable minds may differ, on the specific facts presented, we conclude that the School Committee’s denial failed to provide “the specific reasons for the denial.” R.I. Gen. Laws § 38-2-7(a). This Department has previously held that “a statement that the information sought ‘is not public information’ is not sufficient to comply with the Act’s mandate.” See Nye v. Town of Westerly, PR 95-21. In our view, the School Committee’s response, see supra, merely referenced the documents you were requesting, i.e., closed session minutes, and declared these documents not to be public records under the Rhode Island General Laws. It may also be of some import in this case that as a matter of law, the School Committee’s response was incorrect and that only sealed executive session minutes, in contrast to the School Committee’s representation of “the minutes of a closed session” are exempt from public disclosure. See R.I. Gen. Laws § 38-2-2(4)(J). As such, the School Committee violated the APRA with respect to this allegation.

We next turn to your allegation that the School Committee failed to include the procedures for appealing the denial. By its own admission, the School Committee admits that it omitted, from its denial, the procedures for appeal. Legal counsel for the School Committee also states that it has amended its practice to thwart any future potential violations and to ensure compliance with R.I. Gen. Laws § 38-2-7. We observe the fact and believe it noteworthy to mention that you did file two (2) appeals with respect to this APRA request and additionally filed an appeal concerning a prior APRA request.<sup>2</sup> As such, you were, in fact, aware of the appeals process. Notwithstanding the same, the School Committee violated the APRA when it failed to include in its denial the procedures for appeal.

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

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<sup>2</sup> See Costantino v. Smithfield School Committee, OM 12-28, PR 12-08.

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 or 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).

In this case, we find that neither remedy is appropriate. In terms of injunctive relief, we do not believe such a remedy is appropriate under the circumstances. In Costantino v. Smithfield School Committee, PR 13-22, this Department decided the substance of your complaint, namely your request to view the minutes, or a portion thereof, of the January 5, 2009 executive session meeting. We determined that under the APRA, properly sealed executive session minutes are not public. See R.I. Gen. Laws § 38-2-2(4)(J). As explained in Costantino, PR 13-22, the minutes of the January 5, 2009 executive session meeting were properly sealed by a majority of the votes. There is also no evidence to conclude that the School Committee willfully or knowingly, or recklessly, violated the APRA. See Catanzaro v. East Greenwich Police Department, PR 13-08 (discussing recklessness).

Notwithstanding the above, this finding serves as notice to the School Committee that its omissions violated the APRA and may serve as notice of a violation for any future similar case. Although the Attorney General will not file suit in this matter, nothing in the APRA prohibits an individual from obtaining legal counsel for the purposes of instituting injunctive or declaratory relief within the Superior Court. Please be advised that we are closing your 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,



Lisa A. Pinsonneault  
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LP/pl

Cc: Aubrey L. Lombardo, Esquire