



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 24, 2013
PR 13-27

Mr. William D. LeMoult
16 Hampden Street
Barrington, Rhode Island 02806

RE: LeMoult v. Town of Barrington

Dear Mr. LeMoult:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Town of Barrington (“Town”) is complete. By correspondence dated June 23, 2013, you allege the Town violated the APRA when it refused to provide you with records regarding the representation by the Town on the Board of the East Bay Community Development Corporation (“EBCDC”) and when it refused to provide you with records concerning a database used by the Town.

In response to your complaint, we received a substantive response from the Town’s legal counsel, Michael A. Ursillo, Esquire, along with an affidavit from the Town Planner, Mr. Philip Hervey. For ease of transition and before setting forth the Town’s response to your complaint, we deem it necessary to provide the relevant portions of your APRA request and the Town’s response. Your APRA request sought, in pertinent part:

“B. [T]he data base used by the Town of Barrington to examine ‘the housing needs and problems of its resident[s] in all income levels’ based on 2010 census data regardless of the source of the provision of such data, whether it be from Federal or state agencies or institutions.”

The Town’s response: The U.S. Department of Housing and Urban Development (HUD) Comprehensive Housing Affordability Strategy (CHAS) data referenced in the Comprehensive Community Plan are from the 2000 Census. The data [is] available on-line at: <http://socds.huduser.org/chas/index.html>.

“D. The identities of each and every person . . . who has served on or attended meetings of the Board of the East Bay Community Development Corporation (EBCDC) * * *”

The Town’s response: This is not a records request. However, it is noted that the Town has not had a representative on the East Bay CDC Board since the early 2000s.

“E. Please state the capacity in which such person or persons identified in ‘D’ above served on behalf of the Town of Barrington, and the status or function of such person within the Town of Barrington while acting as a Board member of the EBCDC whether such status be elected, appointed or employed.”

The Town’s response: See bullet “D” above.

“F. Please include, in connection with the requests at ‘D’ and ‘E’ above, any all ‘public records’ concerning the service of any person or persons described in ‘D’ and ‘E’ above . . . including any records concerning remuneration paid to such EBCDC board member(s) from the Town of Barrington, the EBCDC, or any other source * * * ”

The Town’s response: See bullet “D” above.

“G. The name and status or function of any person or persons * * * functioning in any capacity for the Town of Barrington, whether elected, appointed or employed, who is or ever has been an investor in EBCDC under the provisions of the Tax Reform Act, or who has participated in investment in EBCDC through a Tax Credit Syndicator or other financing organization subject to the benefit of tax credits as a result of such investment(s), or any such person who has or has ever had a financial interest of any kind in the EBCDC.”

The Town’s response: To the best of my knowledge, there are no records that relate to this request. Further, I am unaware of anyone associated with the Town, as described in the records request letter, who has or has had a financial interest as an investor or in any other capacity with regard to East Bay CDC or any of its financial dealings.

Attorney Ursillo’s response to your APRA complaint states, in pertinent part:

“The position of the Town of Barrington is that pursuant to R.I. Gen. Laws § 38-2-3(a) only ‘records maintained or kept on file’ by the Town shall be ‘public records.’ The Town does not have records associated with any person serving on the Board of the EBCDC on behalf of the Town of Barrington. The Town of Barrington cannot provide what it does not have.

[Mr.] Philip Hervey’s response to this request, although brief, was both accurate and legally sufficient. ‘D’ requests the identities of such person(s). Although clearly not a request for records, Mr. Hervey did advise Mr. LeMoult that ‘the Town has not had a representative on the East Bay CDC Board since the early 2000s.’ In his affidavit, Mr. Hervey further explains that his response to Mr. LeMoult was not based on having uncovered a record of an appointment to the Board but he was ‘merely advised that back in the early 2000s there was a person from Barrington on the EBCDC Board.’ Because there are no records associated with any person serving on the Board, Mr. Hervey’s response to ‘E’ and ‘F’ are equally appropriate.

Furthermore, Mr. Hervey expounded on his previous answers in response to request ‘G’ which asked for ‘the name and status or function of any person or persons . . . functioning in any capacity for the Town of Barrington . . . who is or ever has been an investor in EBCDC . . .’ Mr. Hervey responded: ‘To the best of my knowledge there

are no records that relate to this request. Further, I am unaware of anyone associated with the Town, as described in the records request letter, who has or has had a financial interest as an investor or in any other capacity with regard to the East Bay CDC or any of its financial dealings.’ In his affidavit Mr. Hervey explains ‘what I meant by ‘or in any other capacity’ is that I am unaware of anyone from the Town being associated with EBCDC in any capacity at all.’

[Mr. LeMoult] also alleges that the Town of Barrington refused to provide records concerning the data base used by the Town to examine housing needs. * * * The position of the Town of Barrington is that the Town does not maintain its own data base on housing needs, but relies on the US Department of Housing and Urban Development (HUD) Comprehensive Housing Affordability Strategy (CHAS) data from the 2000 census date. This was adequately explained by Mr. Hervey and an on-line reference to the CHAS index was provided to Mr. LeMoult in the Planner’s April 10, 2013 response.”

We acknowledge receipt of your reply to the Town’s response.

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 Town violated the APRA. See R.I. Gen. Laws § 38-2-8. 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 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. A public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7.

You made an APRA request to the Town on April 1, 2013. It appears, based upon the evidence presented, that the Town responded to your APRA request on or about April 10, 2013.

You initially allege that the Town refused to provide documents concerning the representation by the Town on the Board of the EBCDC. More specifically, you allege that pursuant to the APRA, “[e]ach public body shall make, keep, and maintain written or recorded minutes of all meetings.” R.I. Gen. Laws § 38-2-3(c). You submit that a “public body” is defined under the APRA to include any “person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.” R.I. Gen. Laws § 38-2-2(1). (Emphasis added). As such, since the Town had a representative on the EBCDC Board, you suggest this that representative was “acting on behalf of and/or in place of a public agency, namely the Town, and therefore, its failure to keep minutes (which we assume would have been a responsive record to your APRA request) was a violation of the APRA. Specifically, you state that “[s]ince the Town of Barrington is without minutes of the meetings of a representative of the Town on the Board of the EBCDC it violates the statutes by its failure to keep minutes of such meetings, its failure to keep such minutes available for access by the public, and its failure to produce such records upon proper request by a member of the public.” To be clear, as we understand it, you suggest that the Town, through its representative, was required to maintain minutes of EBCDC meetings.

Under the APRA, a “public body” is defined as:

“any executive, legislative, judicial, regulatory, or administrative body of the state, or any political subdivision thereof; including, but not limited to, any department, division, agency, commission, board, office, bureau, authority, any school, fire, or water district, or other agency of Rhode Island state or local government which exercises governmental functions, any authority as defined in section 42-35-1(b), or any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.” R.I. Gen. Laws § 38-2-2(1).

Respectfully, no evidence has been presented that Barrington’s representative on the EBCDC Board was a “person * * * acting on behalf of and/or in place of any public agency.” In East Bay Newspaper v. Mt. Hope Trust, PR 10-39, we determined that such language required an agency relationship. Additionally, there is no evidence that this representative was acting as an agent for the Town. An agency relationship exists when: (1) the principal manifests that the agent will act for him, (2) the agent accepts the undertaking; and (3) the parties agree that the principal will be in control of the undertaking. Lawrence v. Anheuser-Busch, Inc., 523 A.2d 864, 867 (R.I. 1987). Rather, the evidence presented is that this Town representative was simply that, a representative of the Town of Barrington serving on the EBCDC Board. Having reviewed the above definitions of “agency,” we conclude that the last clause of R.I. Gen. Laws § 38-2-2(1), which states that a “public body” includes any “person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency,” concerns other persons or entities that enter into an agency-type relationship with a governmental entity. Such an interpretation is consistent with the plain language set forth in R.I. Gen. Laws § 38-2-2(1). See also East Bay Newspaper v. Mt. Hope Trust, PR 10-39.

As we observed above, our sole focus is to determine whether the Town’s representative on the EBCDC Board is “any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.” R.I. Gen. Laws § 38-2-2(1). Based upon the evidence presented, find no evidence to support an agency relationship.¹

You further allege that the Town refused to provide you with records concerning the database used by the Town to examine “the housing needs and problems of its resident[s] in all income levels.” The Town submits that it does not maintain its own database on housing needs, but rather relies on the United States

¹ We find it noteworthy that in your June 15, 2013 submission, you indicate, in pertinent part, that:

“[o]bviously * * * the EBCDC would certainly have such records, and that they would be easily obtainable by the Town, rather than relying on the memory or limited knowledge of the [T]own Planner or Town Manager regarding such a matter.”

Although we do not proffer an opinion on whether or not the EBCDC would have responsive documents, we find it curious that you addressed your APRA to the Town and not to the EBCDC itself, assuming that the EBCDC is a public body under the APRA. See also R.I. Gen. Laws § 38-2-3(h)(“[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[.]”)

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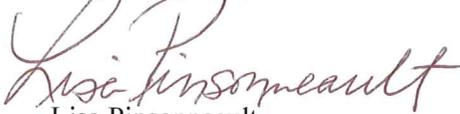
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Department of Housing and Urban Development (HUD) Comprehensive Housing Affordability Strategy (CHAS) data from the 2000 census date. In its response to your APRA request, the Town provided you with the link. In response to this Department's inquiry, the Town's legal counsel confirmed that the HUD database is the only database used to determine this information and that the Town does not have a separate database or other "public record" to provide. Respectfully, you have provided no evidence that would contradict the Town's position. As such, we find no violation with respect to this allegation. R.I. Gen. Laws § 38-2-3(f).

While the Attorney General will not file suit in this matter, nothing within the APRA 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). Please be advised that we are closing your 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,



Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Michael Ursillo, Esquire