



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 31, 2015

PR 15-56

Mr. Larry Anderson

Re: Anderson v. Little Compton School Department and School Committee

Dear Mr. Anderson:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Little Compton School Department and School Committee (“Department” and/or “Committee”) is complete. You allege the Department and/or the Committee violated the APRA when it improperly denied your APRA request dated July 28, 2014. You further allege the denial did not indicate the procedures for appeal.

In response to your complaint, we received a substantive response from the Department and/or the Committee’s legal counsel, Benjamin M. Scungio, Esquire, who also provided an affidavit from the Chair of the School Committee, Mr. Donald Gomez.

On July 28, 2014, you made an APRA request to the Superintendent of the Little Compton School Department. You sought, among other things:

“[a] copy of the complete ‘written statement’ read by School Committee Chairman Donald Gomez at the July 9, 2014 meeting of the Little Compton School Committee in which Mr. Gomez made remarks about the organization Little Compton Community First[.]”

The School Department responded to your APRA request on August 13, 2014, providing documents not at issue in this finding and indicating, in pertinent part:

“You will need to contact Mr. Gomez for his statement since it was not distributed to us.”

You filed the instant complaint, suggesting, among other things, that pursuing the suggested course, i.e., contacting Mr. Gomez, “would in effect represent a concession by [you] that the requested document is not in fact a ‘public record’ under the ‘custody and control’ of the relevant ‘public body,’ i.e., the Little Compton School Department/Little Compton School Committee.”

In his response to this Department, Attorney Scungio states, in pertinent part:

“these notes were not in the care, custody or possession of the School District at the time of the request and further, these are personal notes of the Chair of the School Committee. He relied upon these notes when making public comment at a School Committee meeting. These notes were not disseminated at that meeting. Only his verbal comments were, which do not strictly conform to the notes.”

Mr. Gomez states, in pertinent part:

“Mr. Anderson alleges that he has been denied a copy of a certain written statement which was read by [me] at a public session of the School Board on July 9, 2014. He claims that the written statement/notes from which [I] referenced is a public record and should be produced to him.

At the July 9, 2014 School Committee Meeting, [I] did make a verbal statement referencing [my] written comments/personal notes.

The written statement/notes were not disseminated at that meeting or any public meeting of the Little Compton School Committee.

[I] never distributed a copy of any written statement to the School District or to individual Committee Members.

The ‘written statement’ constitutes personal notes/draft/work papers and is not a public record.

The statement in question is not now, nor ever was in the possession of the School District.

All documents in the possession, care and custody of the Superintendent of Schools were timely forwarded to Mr. Anderson in accordance with his request.

R.I. Gen. Laws § 38-2-3 requires that public records maintained or kept on file by any public body, whether or not those records are required by any law or by any rule or regulation, shall be public records and every person or entity shall have the right to inspect and/or copy those records at such reasonable time as may be determined by the custodian thereof.

Ms. Cheryl Silvia, the Superintendent's assistant, clearly indicated that the District did not have or maintain the questioned record in compliance with R.I. Gen. Laws § 38-2-7(c) * * *

Had the 'statement' been in the School District's possession, it would have been exempt from the APRA statute pursuant to R.I. Gen. Laws § 38-2-2(4)(K) as any such document constituted either notes, working papers and/or work product (which document was never submitted at a public meeting of a public body).

The question of whether [I] ever privately showed [my] notes to any third party outside a public meeting is not relevant to the issue in that disclosure of the statement to any third party outside a public meeting does not make such statement/notes a public document."

We acknowledge your rebuttal.

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 Department and/or the Committee 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 to copy such records. See R.I. Gen. Laws § 38-2-3(a). Also, the APRA defines a "public body" to mean "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 * * * 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). Lastly, the APRA defines a "public record" to mean "all documents, papers, letters, maps, books, tapes * * * or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." R.I. Gen. Laws § 38-2-2(4).

Here, we begin with the Department's and/or the Committee's argument that the requested document is exempt from public disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(K), as well as your counter-argument that because the Superintendent's denial did not reference R.I. Gen. Laws § 38-2-2(4)(K), the Department and/or the Committee waived this argument. The entire basis for the Department and/or the Committee exempting the requested document related "[y]ou will need to contact Mr. Gomez for his statement since it was not distributed to us."

Rhode Island General Laws § 38-2-2(4)(K) exempts from disclosure, “[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.” More specifically, in your complaint, you assert – correctly – that the Department and/or the Committee “does not cite [R.I. Gen. Laws § 38-2-2(4)(K)] in [the APRA denial], * * * so [you] don’t see how it can provide the basis for denying [you] access to the requested record.” You also reference R.I. Gen. Laws § 38-2-7(a), which states, inter alia, “[e]xcept for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” Based upon the evidence presented, and in particular the Department’s and/or the Committee’s denial, there is no question that the denial failed to reference – in any manner – R.I. Gen. Laws § 38-2-2(4)(K). See R.I. Gen. Laws § 38-2-7(a) (“any denial of the right to inspect or copy records...shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial”)(emphasis added).

Having reached this conclusion, we are presented with whether the Department and/or the Committee, despite its omission, may assert R.I. Gen. Laws § 38-2-2(4)(K) at this juncture. We respond in the negative and observe that the APRA provides that “[e]xcept for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” R.I. Gen. Laws § 38-2-7(a). Here, despite your reference to this provision in your complaint, the Department and/or the Committee has failed to address the “good cause shown,” and we decline to speculate on whether “good cause” has been shown in the absence of the Department’s and/or the Committee’s argument. In the absence of any argument or identifiable “good cause,” we must conclude that “any reason not specifically set forth in the denial” has been waived. Accordingly, we do not consider whether the requested document would be exempt from public disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(K). See Boss v. Woonsocket Superintendent’s Office, PR 14-31.

While R.I. Gen. Laws § 38-2-2(4)(K) may not serve as a valid exemption in this case, we must consider whether the Department’s and/or the Committee’s statement that “[y]ou will need to contact Mr. Gomez for his statement since it was not distributed to us,” constitutes a proper exemption. Respectfully, none of the correspondences submitted for our review focus on this ultimate issue. For the reasons explained below, we conclude that the Department’s and/or the Committee’s suggestion that you contact the Chairman of the School Committee “for his statement,” constitutes a legal nullity, i.e., no evidence or argument has been presented that the Chairman of the School Committee is a “public body” under APRA.

In Robinson v. Malinoff, 770 A.2d 873 (R.I. 2001), a police officer formerly employed by the City of Newport (“City”) brought an action to enjoin the City from releasing documents concerning an internal disciplinary investigation. After Officer Robinson’s (“Robinson”) resignation, the Newport Daily News, published by the Edward A. Sherman Publishing Company (“Sherman”), requested from the City “all reports of investigations concerning Robinson.” Id. at 874. Robinson filed a complaint in Newport Superior Court, seeking to enjoin the City from disclosing any information from his personnel file. Id. Sherman intervened as a party defendant and moved for summary judgment against Robinson – as opposed to the City – contending it was entitled to the “requested records” under the APRA. Id. The Superior Court

granted Sherman's motion and concluded that "Robinson's personnel file records should be disclosed as public records under the APRA." Id. at 876.

On appeal, the Rhode Island Supreme Court held that the hearing justice "completely overlooked" the procedural fact that Sherman's motion for summary judgment was directed at Robinson and not the City. Id. With particular significant to this matter and the Department's and/or the Committee's denial, the Supreme Court explained that "[t]he APRA only creates a cause of action for an individual or entity denied access to records maintained by a public body against the public body that is the custodian of the records. Id. (emphasis added). The Court continued that it was "aware of no case in which an individual or entity has been able to obtain disclosure of records maintained by a public body by means of an action against a person not in possession of the records and not associated with that public body." Id. at 877.

To be sure, there are differences between Robinson and the instant matter. Most notably, the Department and/or the Committee claims that the Chairman was in possession of his statement, which "was not distributed to us." But, notwithstanding what we acknowledge are differences between Robinson and the instant matter, the relevant holding of Robinson applies to this matter and the Department's and/or the Committee's suggestion that you "will need to contact Mr. Gomez for his statement." In this respect, no evidence (or even argument) has been presented by the Department and/or the Committee that Mr. Gomez, by himself, falls within the ambit of the APRA.

Indeed, under APRA, a "public body" may include a "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) (emphasis added). In East Bay Newspapers v. Mt. Hope Trust, PR 10-39, we explained that the emphasized provision described a situation where a private person or entity was acting in an agency type relationship with the governmental entity. While we have given some thought to whether Mr. Gomez falls within the purview of R.I. Gen. Laws § 38-2-2(1) – despite our doubt – we need not resolve this issue because the Department and/or the Committee never suggests that Mr. Gomez, by himself, is a "public body" within the meaning of R.I. Gen. Laws § 38-2-2(1). In the absence of any argument by the Department and/or the Committee that its denial was appropriate because Mr. Gomez, by himself, is subject to the APRA, we deem it imprudent and unnecessary to decide this issue without the benefit of any arguments or research.

As a consequence of the foregoing, the Department and/or the Committee has taken the position that your APRA request to the Superintendent was denied because the statement "was not distributed to us," yet the Department and/or the Committee provides no argument or representation that Mr. Gomez, by himself, was subject to the APRA. While we need not resolve whether the Chairman's notes/statement was exempt from public disclosure, see supra, we have little doubt that the Chairman's notes/statement fell within the ambit of the APRA. See R.I. Gen. Laws § 38-2-2(4)(defining "public record" as "all documents, papers, letters, maps * * * or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency")(emphasis added). The end result of the Department's and/or the Committee's positions (or lack thereof) is

that the notes/statement is a document that falls within the ambit of R.I. Gen. Laws § 38-2-2(4), but the Department and/or the Committee provides no apparent enforceable avenue for you or any other citizen to obtain a document that is subject to the APRA. It is not lost upon this Department that in similar situations – in Rhode Island and elsewhere – the public body receiving the request has made an inquiry of its members or employees to determine whether responsive documents exist. See e.g. Hopkins v. Duncan Township, 812 N.W.2d 27 (Mich. App. 2011)(Clerk “asked the board members whether they had any notes”); Reilly v. Providence Economic Development Partnership, PR 14-11 (“PEDP has reached out to Attorney Teverow to inquire whether or not Attorney Teverow maintains any additional responsive documents”).

Lastly, it appears that the Department and/or the Committee has no APRA procedures for APRA requests to be directed to individual members, such as Mr. Gomez, and instead the only APRA procedure that we are aware of requires APRA requests to be directed to the Superintendent for documents maintained by the School Department. While we acknowledge that Mr. Gomez may have been in actual possession of the requested document and not the Department and/or the Committee, we have not been directed to any authority (or representation) by the Department and/or the Committee that Mr. Gomez, by himself, is subject to the APRA and we have no reason to believe the General Assembly intended to allow documents to fall into a legal abyss in situations similar to this one. Rather, the legal authority that we have discovered contradicts the Department’s and/or the Committee’s position. While we have grappled with this issue for some time, in the end, the Department’s and/or the Committee’s failure to provide legal authority or representation to support its position is fatal to its case. R.I. Gen. Laws § 38-2-10.

Regarding your allegation that the denial did not cite the appeal language pursuant to R.I. Gen. Laws § 38-2-8, we find that the Department and/or the Committee violated the APRA. No argument has been presented that the denial cited the avenue for appeal and our review of the denial letter finds no avenue for appeal cited. See R.I. Gen. Laws § 38-2-7(a)(denial must indicate “the procedures for appealing the denial”).

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***.” See R.I. Gen. Laws § 38-2-9(d). We conclude that insufficient evidence exists to find a “knowing and willful” or “reckless” violation. Notwithstanding, we direct the Department and/or Committee to provide you with a copy of the “written statement read by the School Committee Chairman at the July 9, 2014 meeting” within ten (10) business days of this finding.¹ If you do not receive the written statement within ten

¹ The Department and/or Committee, in its response to your APRA complaint, states “[i]f the Attorney General’s Office is of the belief that these notes/work papers are subject to APRA and should have been disclosed, the Attorney General is free to release the documentation to Mr. Anderson.” Respectfully, this Department will not be forwarding Mr. Gomez’s statement to you and it is the Department’s and/or Committee’s responsibility to provide you access in accordance

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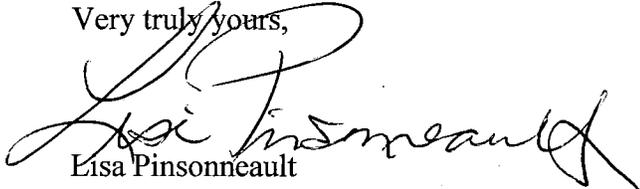
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(10) business days, kindly advise this Department so that we may review this matter further to ensure compliance with the APRA. We are closing our file as of the date of this finding, although we reserve the right to reopen this matter in the event that the Department and/or the Committee fails to comply with this finding and the APRA.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Lisa Pinsonneault
Special Assistant Attorney General

Cc: Benjamin M. Scungio, Esquire

with the APRA and this finding. The Department's and/or the Committee's apparent distinction in its denial between the "public body" and Mr. Gomez, supports are conclusion.