



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

May 20, 2014

PR 13-04B

Mr. Robert D. Wieck

**Re: CCF, LLC v. Department of Transportation**

Dear Mr. Wieck:

On March 6, 2013, this Department issued its finding regarding your Access to Public Records Act ("APRA") complaint filed on behalf of your client, CCF, LLC against the Rhode Island Department of Transportation ("RIDOT"). On behalf of your client, you alleged the RIDOT withheld or refused to produce responsive records. Since this Department was neither presented nor discovered any evidence to support the conclusion that the RIDOT did not produce all documents responsive to the APRA request, this Department concluded that the RIDOT did not violate your APRA. See CCF, LLC v. Department of Transportation, PR 13-04. Subsequent to that finding, you served a subpoena upon Universal Properties Group wherein you claim Universal Properties Group produced documents that demonstrate the RIDOT did indeed fail to adequately respond to your APRA request, specifically the production of eighteen (18) documents, representing emails and attachments to emails. As such, you asked this Department to re-open our file and suggest that "CCF believes that it has conclusively proven that RIDOT withheld responsive documents."<sup>1</sup>

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<sup>1</sup> Obviously, none of this evidence was presented prior to our finding in CCF, LLC v. Department of Transportation, PR 13-04. Accordingly, this matter more appropriately falls into the category of a matter for reconsideration based upon subsequent evidence. While we have questions regarding whether this Department should reconsider its finding based upon evidence that seemingly could have been discovered prior to our finding, but was not, we bypass this procedural issue to reach the merits.

In response to your original APRA complaint to this Department, we received an affidavit from the Chief Real Estate Specialist in the Property Management Division for the RIDOT, Mr. Robert Jackson. Mr. Jackson stated, in pertinent part:

“I am employed as the Chief Real Estate Specialist in the Property Management division for Rhode Island Department of Transportation (RIDOT).

During the normal course of business, I maintain all files assigned to me.

The Temporary/Conditional Easement between RIDOT and FKL New London, LLC, is a file that has been assigned to me and one that I maintain.

In response to an APRA request, I provided RIDOT Legal Division with the complete Property Management file regarding the above mentioned easement.”  
(Emphasis added).

As discussed above, subsequent to our finding in this case, you issued a subpoena duces tecum requiring Mr. Scott Nelson at the Universal Properties Group to appear for a deposition at your office and to produce certain documents. In response to that subpoena, Mr. Nelson produced a number of emails between himself and Mr. Jackson at the RIDOT. You submit that among the documents produced pursuant to the subpoena issued to Universal Properties Group were eighteen (18) pages, including emails and attachments, not previously produced by RIDOT pursuant to your APRA request. As such, you claim the emails were improperly withheld.

In response to your assertion that the RIDOT improperly withheld responsive documents, we received an affidavit from Mr. Robert Jackson, who states in pertinent part:

“I am employed as Special Projects Coordinator in the Property Management division for Rhode Island Department of Transportation (RIDOT).

During the normal course of business, I create and maintain all files for Property Management transactions assigned to me.

The Temporary/Conditional Easement between RIDOT and FKL New London, LLC is a Property Management transaction that has been assigned to me and one that I created and maintained a file on behalf of RIDOT.

Upon receipt of an open records request, it is my practice to provide the entire contents of the Property Management file that is responsive to the request to the Legal Division

The Complainant’s February and July 2012 open records requests sought:

Any and all files with respect to easement between RIDOT and FKL New London Ave, LLC for use by a McDonald's restaurant as a main exit and entrance on state property.

It is my usual and customary practice to either print or electronically maintain my e-mails that correspond to a specific Property Management transaction.

It is my usual and customary practice to physically file e-mails that have a material affect on the Property Management transaction within the Property Management file.

Upon receipt of the subject appeal, I performed a search of my e-mails to ascertain whether there were e-mails or documents that were not contained within the previously produced Property Management file.

After performing a search of my e-mails, I discovered emails including responses to same, which amounted to pages SN10-SN-11; SN27-SN34; SN37; SN39 and SN40-SN41 which I had not physically filed in my Property Management File and not produced to the complainant.

However, all attachments and drafts that were transmitted vis-à-vis the above referenced e-mail were produced to the Complainant as they were filed within the Property Management file.

Additionally, SN35, SN36, SN38 were provided previously as part of the response to the complainant's July 19, 2012 Open Records Request.

I did not intend to withhold any information, and through the production of the Property Management file originally, I thought that I had complied with the complainant's terms of the Open Records Request." (Emphases added).

Since your allegation that the eighteen (18) documents produced via subpoena to Universal Properties Group should have been produced by RIDOT pursuant to your APRA request, we must begin by comparing the APRA request with the request for records contained in the subpoena. The plain language of both requests is not identical. The original APRA request sought to:

"inspect and/or copy any and all files with respect to an easement agreement between the RIDOT and FKL for use by a McDonald's restaurant as a main entrance and exit on state property located near 2500 New London Turnpike, East Greenwich, RI." (Emphasis added).

The language of the subpoena sought:

“[a]ny and all Documents, Correspondence, and/or Communications between FKL and the Rhode Island Department of Transportation (‘RIDOT’) relating to and/or concerning the temporary and conditional easements FKL requested in its Physical Alteration Permit Application No. 110928 to the RIDOT for 2500 New London Turnpike, East Greenwich, Rhode Island.

[a]ny and all Documents, Correspondence, and/or Communications between Universal and the Rhode Island Department of Transportation (‘RIDOT’) relating to and/or concerning the temporary and conditional easements FKL requested in its Physical Alteration Permit Application No. 110928 to the RIDOT for 2500 New London Turnpike, East Greenwich, Rhode Island.” (Emphases added).

Respectfully, we cannot conclude, based upon the evidence before us, that the RIDOT improperly withheld documents responsive to the APRA request. Specifically, the APRA request sought “files” with respect to an easement agreement between the RIDOT and FKL. (Emphasis added). The subpoena sought “Documents, Correspondence and/or Communications.” Considering Mr. Jackson’s subsequent affidavit, which represents that the non-produced emails were not maintained within the requested “file,” the e-mails that you subsequently received via the subpoena were simply not responsive to your APRA request. Stated differently, your APRA request sought “files” and no evidence has been produced that you were not presented with the appropriate file(s). 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 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.”).

In this respect, it has also been observed:

“it is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested. The rationale for this rule is that [the Freedom of Information Act] was not intended to reduce government agencies to fulltime investigators on behalf of requesters. Therefore, agencies are not required to maintain their records or perform searches[,] which are not compatible with their own document retrieval systems. ‘The linchpin inquiry is whether the agency is able to determine ‘precisely what records [are] being requested.’” Assassination Archives and Research v. Central Intelligence Agency, 720 F.Supp. 217 (D.D.C. 1989).

Implicitly, you acknowledge the distinction we recognize in this supplemental finding since the plain language of your APRA request and your subpoena differed. Accordingly, for these reasons, we find the RIDOT’s search did not violate the APRA and re-affirm our finding.

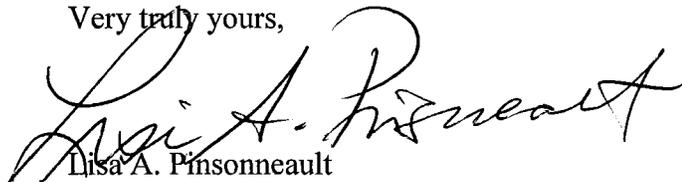
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Although the Attorney General will not file suit in this matter at this time, nothing in the APRA precludes an individual from pursuing a complaint in the Superior Court. Please be advised our file remains closed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa A. Pinsonneault". The signature is written in a cursive, flowing style with a large initial "L".

Lisa A. Pinsonneault  
Special Assistant Attorney General  
Extension 2297

LP/pl

Cc: Lisa Martinelli, Esq