



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

August 21, 2015

PR 15-48

Mark McBurney, Esquire

Re: Cullen v. City of Pawtucket

Dear Attorney McBurney:

The investigation into the instant Access to Public Records Act (“APRA”) complaint filed against the City of Pawtucket (“City”) is complete. By correspondence dated November 7, 2014, you filed the instant complaint “oh behalf of my client, John Cullen,” and alleged that the City violated the APRA when it wrongfully denied access to certain documents sought in an APRA request submitted on October 10, 2014. As described, infra, the October 10, 2014 APRA request was from you and did not mention Mr. Cullen in any manner.

Pawtucket’s City Solicitor, Mr. Frank Milos, Esquire, submitted a substantive response to the complaint on behalf of the City. In relevant part, Attorney Milos states:

“The City contends that Mr. Cullen does not have standing to pursue this complaint.

As per the APRA, ‘[a]ny person or entity denied the right to inspect a record of a public body may petition the chief administrative officer of that public body for a review of the determinations made by his or her subordinated’ or ‘may file a complaint with the attorney general’.

On or about October 10, 2014, Attorney Mark McBurney submitted an APRA request which, among things, requested ‘all documents related to the City of Pawtucket v. Frank Sylvester’. The APRA request was not made by the complainant, John Cullen. The APRA request was not joined by the complainant, John Cullen. The APRA request also was not made by Attorney McBurney on behalf of John Cullen.

The City contends that plain language of the APRA precludes a third party, such as John Cullen, from filing an appeal on behalf of the party purportedly aggrieved by the public body's denial of his or her request. The City further contends that only the person who actually submitted the APRA request in question, Attorney Mark McBurney, has standing to assert a claim of wrongful nondisclosure.

Because he is not the party purportedly aggrieved by the City's action, Mr. Cullen is not the proper party to bring this appeal.

For the foregoing reasons, the City contends that the complaint should be denied and dismissed."

In relevant part, your rebuttal indicates:

"The City's first claimed defense claims Mr Cullen lacks standing to bring this complaint. Please find attached two affidavits (from Mr Cullen and myself) stating under oath that I was acting on Mr Cullen's behalf in filing the instant APRA request and complaint, as I have acted on his behalf in many other matters..."

At the outset, we observe 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 a violation 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 City violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

Before we can address the merits of your complaint, we must first address the City's objection to your client's procedural ability to properly challenge the City's denial of certain documents sought pursuant to an October 10, 2014 APRA request. Therefore, as a preliminary matter, we must decide whether your client has standing to bring this complaint. As your November 7, 2014 complaint makes clear, you had filed the instant complaint "on behalf of my client, John Cullen."

The Rhode Island Supreme Court has characterized the consideration of standing as a "fundamental preliminary question." Watson v. Fox, 44 A.3d 130, 135 (R.I. 2012). "In a frequently cited passage, the United States Supreme Court explained that to satisfy the standing requirement, a complaining party must allege 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions.'" Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). As explained by our Supreme Court, "when standing is at issue, the focal point shifts to the claimant, not the claim, and a court must determine if the plaintiff 'whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable' or, indeed, whether or not it should be

litigated.” Id. In order to satisfy the legal standing requirement, a plaintiff must allege “that the challenged action has caused him injury in fact, economic or otherwise.” Id. “[M]ere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved.’” Id. at 136.

While the foregoing discussion concerns general principles of standing as set forth by the Rhode Island Supreme Court, it is also relevant that the APRA provides the standards for filing an APRA action. For instance, R.I. Gen. Laws § 38-2-7(a) provides that “[a]ny 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[.]” (Emphasis added). Other APRA provisions address the issue more directly. Specifically, in the event of a denial, a “petition” may be filed with the chief administrative officer of the public body, but this appeal avenue is limited to “[a]ny person or entity denied the right to inspect a record of a public body.” See R.I. Gen. Laws § 38-2-8(a) (emphasis added). If the chief administrative officer denies the review petition, “the person or entity seeking disclosure may file a complaint with the attorney general,” and if meritorious, the Attorney General may file a lawsuit in Superior Court “on behalf of the complainant.” R.I. Gen. Laws § 38-2-8(b)(emphasis added).

These APRA provisions make clear that in order to have suffered an alleged injury, *i.e.*, in order to acquire legal standing, a complainant must have requested access to a record and been denied the right to inspect a record. See also Canavan v. City of Central Falls, PR 00-18 (lack of standing of City Council member to file an APRA complaint since the City Council, and not the member, made the APRA request); Schmidt v. Ashaway Volunteer Fire Association et. al., PR 99-21 (“in order for this Department to have jurisdiction to inquire into an APRA matter, the complainant must first have requested a record from a public body, and second, the complainant must have been denied access to the requested record”).

In Fieger v. Federal Election Commission, 690 F.Supp.2d 644 (E.D. Mich. 2010), the Federal District Court examined a lawsuit brought by Attorney Fieger alleging a violation of the Freedom of Information Act (“FOIA”).¹ In Fieger, Attorney Fieger did not make the FOIA request upon which his lawsuit was based, but rather an attorney in his law office made two (2) separate FOIA requests. Both FOIA requests were signed by the attorney on behalf of the law firm, “Fieger, Fieger, Kenney, Johnson & Giroux.” Id. at 647. Even though Attorney Fieger was the law firm’s principal owner, the Federal District Court determined that Attorney Fieger lacked standing to file the lawsuit. The Court explained that “a person whose name does not appear on a request for records has no standing to prosecute a lawsuit to compel disclosure of those records.” Id. at 648 (emphasis added). Later, the Court added that “a plaintiff who bases a FOIA lawsuit upon the request for information by another person does not satisfy the prudential requirement that he must assert a violation of his own legal rights.” Id. at 649. Other cases also make this point. See *e.g.*, McDonnell v. United States, 4 F.3d 1227, 1236-37 (3rd Cir.

¹ The Rhode Island Supreme Court has recognized that “[b]ecause APRA generally mirrors the Freedom of Information Act...we find federal case law helpful in interpreting our open record law.” See Brady v. Pawtucket Teachers Alliance, 556 A.2d, 556, 558 n.3 (R.I. 1989).

1993)(“We think a person whose name does not appear on a request for records has not made a formal request for documents within the meaning of the statute. Such a person, regardless of his or her personal interest in disclosure of the requested documents, has no right to receive [] the documents.”); Three Forks Ranch Corp. v. Bureau of Land Management, 358 F.Supp.2d 1, 3 (D.D.C 2005)(“although the request made by Mr. Von Holt mentions Three Forks Ranch, it is not clear that the request is being made on behalf of his client”). See also Canavan v. City of Central Falls, PR 00-18 (lack of standing of City Council member to file an APRA complaint since the City Council, and not the member, made the APRA request); Schmidt v. Ashaway Volunteer Fire Association et. al., PR 99-21 (“in order for this Department to have jurisdiction to inquire into an APRA matter, the complainant must first have requested a record from a public body, and second, the complainant must have been denied access to the requested record”).

Here, it is undisputed that an APRA request was submitted by you to the City on October 10, 2014. Specifically, the APRA request, made on your law firm’s letterhead, stated in its entirety:

“Dear Frank [Milos]:

Under the APRA please provide:

- all documents related to the City of Pawtucket v. Frank Sylvester
- any document indicating the salary Frank Sylvester draws from the City of Pawtucket
- the most recent vehicle registration tax assessment for all vehicles owned by any person named Sylvester at []
- all emails between Don Grebien and Frank Sylvester from 1/1/2013 to date of receipt.

Sincerely,

Mark McBurney”

It is also undisputed that on October 27, 2014, the City responded to the above APRA request. In relevant part, the City’s response states:

“Dear Attorney McBurney:

This office is in receipt of your Access to Public Records (‘APRA’) request dated October 10, 2014 requesting the following...In response to your request, please see the following:

....

As per R.I. Gen. Laws § 38-2-8, if you believe that the City has not been responsive to your request, you may contact [sic] to or you may appeal to Mayor Donald R. Grebien...You may also file a complaint with the Department of Attorney General...”

Similar to the facts in Fieger, Mr. Cullen's name does not appear on the October 10, 2014 APRA request nor does the October 10, 2014 APRA request make any suggestion that the request is being made by or on behalf of Mr. Cullen. Even the City's October 27, 2014 response to the APRA request is addressed to you and identifies you as the requester and the recipient of some of the requested documents. Moreover, since the City denied access to certain documents sought in the APRA request, the City's response informs you of your right to appeal its decision. In addition, your November 7, 2014 APRA complaint appears to acknowledge that the APRA request was filed by you, and not on behalf of Mr. Cullen. Specifically, in paragraph five (5) of the "FACTS" section of your complaint, you indicate that "[o]n 10/10/14, I filed an APRA request 10/10/14 (Exhibit 1) for documents related to Pawtucket v. Sylvester..." (Emphasis added). Also, in paragraph five (5) of the "Allegations" section of your complaint, you reference "Pawtucket's failure to provide that document pursuant to my recent APRA request..." (Emphasis added). Indeed, it is not until your November 7, 2014 APRA complaint to this Department that Mr. Cullen's name is first introduced or associated with the October 10, 2014 APRA request.²

In Access/Rhode Island v. West Warwick School Department, PR 15-24, Access/Rhode Island filed an APRA complaint against the West Warwick School Department alleging several APRA violations including failure to timely respond to three (3) APRA requests submitted to the School Department by a third party organization, MuckRock. Since the APRA requests were made by MuckRock and provided no indication that any APRA requests or inquiry were made by or on behalf of Access/Rhode Island, this Department concluded that Access/Rhode Island lacked legal standing to file a complaint or lawsuit. Nevertheless, Access/Rhode Island requested, and this Department concluded, that it was in the public's interest to review the Access/Rhode Island complaints pursuant to the Attorney General's independent statutory authority to advance the public interest. See R.I. Gen. Laws § 38-2-8(d). In so concluding, we opined that "the determination to invoke this authority must be made on a case-by-case basis after considering the totality of circumstances." Id. Numerous factors were considered by this Department before deciding to proceed on the merits, including, but not limited to, Access/Rhode Island's substantive reasons why it would be in the public interest for this Department to address the several allegations contained in the fifteen (15) APRA complaints Access/Rhode Island filed against various government agencies.

Here, you have provided no argument as to why this Department should exercise its independent authority to review your allegations "on behalf of the public." Id. Moreover, it bears mentioning that the affidavits submitted in support of your complaint are deficient. Specifically, you have submitted affidavits purportedly on behalf of you and Mr. Cullen establishing, after the fact, that the October 10, 2014 APRA request was indeed made on behalf of Mr. Cullen. But even assuming such an after-the-fact representation could cure the standing issue we have described

² Your rebuttal indicates that on November 3, 2014, you filed a second APRA request and this APRA request "was addressed to the City Solicitor and clearly identifies John Cullen as my client." This representation further calls into question Mr. Cullen's standing to file the instant complaint relating to the October 10, 2014 APRA request.

herein, your affidavit lacks your signature and the date the document was executed. More importantly, Mr. Cullen's affidavit, which purports to attest that "Mark was and is acting on my behalf in filing the 10/10/14 APRA request," is neither signed by Mr. Cullen nor notarized by a Notary Public. Our Supreme Court has held that an affidavit that is not notarized is not "a competent or valid affidavit," see Scarborough v. Wright, 871 A.2d 937, 938 (R.I. 2005), and in this case, although your affidavit is notarized (Mr. Cullen's affidavit is not notarized) neither affidavit is signed by the purported affiant. See Chrysler First Financial Services Corp. v. Van Daam, 604 A.2d 339, 342 (R.I. 1992)("[t]he unsworn statement is devoid of an acknowledgment that the assertions made within are sworn to before a notary. We note that such an unsworn statement alone does not qualify as an affidavit..."). Therefore, both affidavits are a legal nullity and were not considered by this Department in reaching our conclusion. For all these reasons, you lack standing to file this complaint on Mr. Cullen's behalf and we have neither been presented with a reason (nor do we discern a reason) to investigate this matter in the public interest. See R.I. Gen. Laws §38-2-8(d).

Although the Attorney General has found no violation and will not file suit in this matter, 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,


Malena Lopez Mora
Special Assistant Attorney General
Ext. 2307

Cc: Frank Milos, Esquire.