



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

June 12, 2014  
PR 14-13

Jennifer A. Fitzgerald, Esquire

**Re: Fitzgerald v. Warwick Police Department**

Dear Attorney Fitzgerald:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Warwick Police Department ("Police Department") is complete. By email correspondence dated January 31, 2014, you allege the Police Department violated the APRA when it refused to respond to your APRA request dated November 23, 2013. More specifically, you allege the Police Department did not comply with your request within ten (10) business days and the proposed fee was contrary to the APRA. Additionally, you allege the Police Department failed to respond to your written request for a detailed itemization of the costs involved.

In response to your complaint, we received a substantive response from the Police Department's legal counsel, Peter D. Ruggiero, Esquire, along with a sworn affidavit from Major Robert S. Nelson of the Warwick Police Department. Attorney Ruggiero states, in pertinent part:

"Based upon my review of the situation, I have instructed the Warwick Police Department to release the requested records in this matter without any processing charge or copy fee. I attribute this complaint to a misunderstanding between the parties not addressed pursuant to the relevant provision of the local appeal provision contained in the \* \* \* APRA. The Warwick Police Department, pursuant to my direction, has forwarded the requested records to the complainant at no charge or cost.

In this matter, the required local appellate process was not followed by the complainant. \* \* \* Nevertheless, once the matter was brought to my attention, I reviewed the situation and directed the Warwick Police Department to cease applying the \$5.00 processing charge for public records requests. I also advised the Warwick Police Department to revise their public records requests policies to comport with the provisions of the APRA. In that regard, I provided them with a sample APRA policy document for their review and consideration. The Warwick Police Department has assigned Major Robert S. Nelson of their command staff to supervise this activity. The updated APRA policies will be presented to the Warwick Law Department for review and comment prior to their implementation.

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[T]he complainant did not file an appeal alleging denial of her access to public records request pursuant to the relevant provisions of the APRA; in this case to the Warwick Mayor's office."

Major Nelson states, in pertinent part:

"The Warwick Police Department, Records Division received a request for records dated November 23, 2013 on November 26, 2013 \* \* \* \* from [Ms.] Jennifer A. Fitzgerald.

On December 2, 2013, a records clerk telephoned Ms. Fitzgerald and left a message that the sought after records were ready for pick up.

On December 3, 2013, a records clerk faxed a letter of notification of charges and fee invoice to Ms. Fitzgerald.

On December 4, 2013, a telephone call and message was left for Ms. Fitzgerald indicating the \$5.00 per person fee and that reports were complete and awaiting payment.

Between December 4, 2013 and December 8, 2013, no phone calls were returned and no further inquiry into the charges for retrieval of the sought after records was made to the Warwick Police Department by Ms. Fitzgerald.

Between December 4, 2013 and December 8, 2013, no other contact to inquire about the matter was initiated by Ms. Fitzgerald.

On or about December 8, 2013, the Warwick Police Department received a letter from Ms. Fitzgerald indicating her objection to the fees. Ms. Fitzgerald requested an itemization of charges.

No one from Warwick Police Department Records Division responded to the request for itemization because the invoice was previously faxed with itemization of charges on December 3, 2013.

After the December 8, 2013 letter, no phone calls were returned and no further inquiry into the charges for retrieval of the sought after records was made to the Warwick Police Department by Ms. Fitzgerald.

After the December 8, 2013 letter, no other contact to inquire about the matter was initiated by Ms. Fitzgerald.

On February 7, 2014, the Warwick Police Department received notification of complaint from [the] Attorney General's Department regarding a written complaint from Ms. Fitzgerald for violation of [the] APRA statute."

We acknowledge your reply dated February 24, 2014.

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 Police Department violated the APRA. See R.I. Gen Laws § 38-2-8. In other words, we do not write on a blank slate.

As an initial matter, and as you note in your reply, we respectfully reject the Police Department's argument that, pursuant to R.I. Gen. Laws § 38-2-8, your appeal to this Department is improper because you did not first petition the chief administrative officer of the Police Department. Under R.I. Gen. Laws § 38-2-8(a) "[a]ny person . . . denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that public body . . ." R.I. Gen. Laws § 38-2-8(a) (emphasis added). The plain language of R.I. Gen. Laws § 38-2-8 does not require that a complainant exhaust his or her administrative remedies prior to filing an APRA complaint with this Department. See Downey v. Carcieri, 996 A.2d 1144, 1150-51 (R.I. 2010) (holding that under the plain language of R.I. Gen. Laws § 38-2-8 a complainant is not required to exhaust all administrative remedies prior to filing a complaint in Superior Court). To the contrary, and as evidenced by the use of the word "may" in the statute, a complainant has the option to petition the chief administrative officer, but is not required to do so prior to filing a complaint with this Department. We continue with our analysis.

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 § 38-2-7. 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. It appears, based upon the evidence presented, that you made an APRA request on November 23, 2013 (received on November 26, 2013) to the Police Department in accordance with its APRA procedures. In that APRA request, you sought:

"Any and all records relating to the arrest, detention, investigation, prosecution, and/or sentencing of: 1.) \* \* \* and 2.) \* \* \*<sup>1</sup> on or about July 22, 2011 – July 26, 2011."

While both parties pay varying degrees of attention to whether the Police Department contacted you to advise that the requested documents were available, in our minds this factor is largely irrelevant because the Police Department conditioned receipt of the requested records upon two \$5.00 per report charges. It appears on December 3, 2013, you received an invoice from the Police Department indicating that the "research/reports" for the two individuals would be five dollars (\$5.00) per individual for a total of ten dollars (\$10.00). By correspondence dated December 4, 2013, you informed the Police Department that the fee was unreasonable in light of the records you were requesting. You also indicated that the Police Department's practice of charging a "flat" fee of five dollars (\$5.00) for all records requests without consideration of the actual time involved in each individual request was "patently unlawful." Additionally, you requested that the Police Department provide you with a detailed itemization of the specific costs involved with your request. The Police Department did not respond to your request.

Based upon the evidence presented, we find that the Police Department improperly charged you for your APRA request. The APRA provides that "[a] reasonable charge may be made for the search or retrieval

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<sup>1</sup> We decline to name these individuals for privacy reasons. Because this issue has not been raised it is also unnecessary for us to determine whether the requested records are "public records."

of documents,” which shall not exceed fifteen (\$15.00) per hour, with the first hour free. R.I. Gen. Laws § 38-2-4(b). A public body may also assess a charge “per copied page of written documents provided,” but “shall not exceed fifteen (\$.15) per page for documents copyable on common business or legal size paper.” R.I. Gen. Laws § 38-2-4(a). Attorney Ruggiero, in his response, has indicated that he has instructed the Police Department to cease this “flat” fee application and adhere to the requirements of R.I. Gen. Laws § 38-2-4(a). While we appreciate this instruction going forward, the Police Department violated the APRA with respect to the allegation that the proposed fee was not accordance with the requirements of the APRA. Moreover, although the Police Department responded to your APRA request within ten (10) business days by providing you with an invoice for the requested copies, as discussed, supra, this invoice improperly assessed charges pursuant to the APRA. Since the APRA states that “the production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under § 38-2-4,” and since you were not properly assessed charges, the Police Department violated the APRA when it conditioned receipt (and did not permit access to the requested documents within 10 business days) on an improper charge. See § 38-2-7(c) (emphasis added).

You further allege that the Police Department did not provide you with a detailed itemization of the costs associated with your APRA request. The APRA further provides that “[a] public body upon request, shall provide an estimate of the costs of a request for documents prior to providing copies, R.I. Gen. Laws § 38-2-4(c), and “[u]pon request, the public body shall provide a detailed itemization of the costs charged for search and retrieval.” R.I. Gen. Laws § 38-2-4(d). (Emphases added). It appears, based upon the evidence presented, the Police Department did not provide you with this detailed itemization, despite your request after you received the invoice containing the “flat” fee invoice. This also violated the APRA.<sup>2</sup>

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 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 terms of injunctive relief, we do not believe such a remedy is appropriate under the circumstances as it appears you are now in receipt of all records requested and these records have been provided to you at no cost. Because the Police Department was charging a “flat fee” of five (\$5.00) dollars per report, notwithstanding the cost requirements contained in the APRA, we do have concerns whether the Police Department recklessly, or willfully and knowingly, violated the APRA. The fee for copying records under the APRA has been consistent for decades. We have trouble understanding, and the Police Department does not provide guidance, as to why it was not complying with the costs allowed for under the APRA. This Department provides guidance in recent findings for what type of violation may be considered reckless. See Catanzaro v. East Greenwich Police Department, PR 13-08; O’Rourke v. Bradford Fire District, PR 13-11. See also DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994); Carmody v. Rhode Island Conflict of Interest Comm’n, 509 A.2d 453 (R.I. 1986) (willful and knowing).

We shall allow the Police Department ten (10) business days within receipt of this finding to respond to our concern that the instant violation is “reckless” or willful and knowing in accordance with Catanzaro

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<sup>2</sup> It appears you allege the Police Department also violated the APRA by having a practice of assessing a flat fee for all records, but you have no standing to raise this issue and instead we examine this allegation with respect to your specific request.

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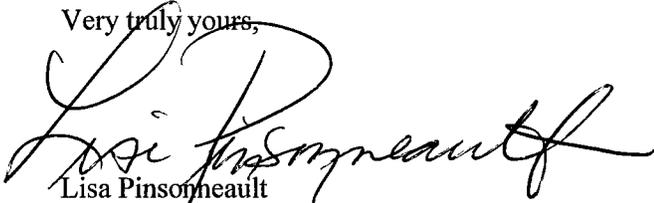
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and O'Rourke or DiPrete and Carmody. The Police Department's response should not be conclusory. Should you wish, you may also provide this Department a substantive response on this same issue within ten (10) business days of receipt of this finding. Thereafter, a supplemental finding will be issued concerning whether the instant violation is "reckless" or willful and knowing.

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

Very truly yours,

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

Lisa Pinosmeault  
Special Assistant Attorney General  
Extension 2297

LP/pl

Cc: Peter D. Ruggiero Esq.  
peter@rubroc.com