



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

November 2, 2015

PR 15-53

Mr. Marc Lacroix

Re: Lacroix v. Rhode Island Higher Education Assistance Authority

Dear Mr. Lacroix:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Higher Education Assistance Authority (“RIHEAA”) is complete.¹ By email correspondence dated March 4, 2015, you allege RIHEAA violated the APRA when it failed to respond to your APRA request dated December 18, 2014. More specifically, your December 18, 2014 APRA request sought the following:

“[p]lease provide any and all documents, materials, reports, etc that were distributed or used at the [following] RIHEAA Board of Directors and Committee meetings: Personnel Committee – November 5, Board of Directors – November 5, Board of Directors – November 14, Board of Directors – November 21, Executive Director Search Committee – December 5, Executive Director Search Committee – December 19, Board of Directors – December 19.”

It also appears from the record that at the time of your December 18, 2014 APRA request you had a civil rights/alleged wrongful termination lawsuit pending against the RIHEAA.

¹ It appears that the RIHEAA is no longer a cognizable entity and instead its duties have been assumed under the Office of Postsecondary Education. This development plays no role in our finding.

In response to your complaint, we received a substantive response from the RIHEAA's legal counsel, Joseph R. Palumbo, Esquire. Attorney Palumbo states, in pertinent part:

"I serve as general counsel to RIHEAA. APRA requests are routinely forwarded to me for response. I received Mr. Lacroix's APRA request via e-mail on December 14, 2014. At that time, Mr. Lacroix was represented by Attorney Edward Formisano in connection with various employment related claims against RIHEAA. In response to a prior request for documents, I informed Mr. Lacroix by e-mail on December 9, 2014 that all such requests must be made through his attorney. I copied Mr. Formisano on the December 9th e-mail * * * I was trying to adhere to Rule 4.2 of the Code of Professional Responsibility which prohibits communication with someone who is represented by a lawyer without the lawyer's consent.

I received no follow up from Mr. Lacroix's counsel indicating whether he wanted the requested documents or consenting to my having direct contact with Mr. Lacroix. Consequently, I took no further action to respond to the December 14th request for documents.

As soon as I received Mr. Lacroix's complaint, I reviewed the documents that were requested and determined that all of them were public documents under APRA. I am enclosing all of the documents requested by Mr. Lacroix. None of the documents have been withheld or redacted. I have sent copies of this letter and the requested documents to Mr. Lacroix.

The only reason the documents were not produced before [] was because I never heard back from Mr. Lacroix's counsel authorizing me to deal directly with Mr. Lacroix. I was reluctant to respond directly to Mr. Lacroix and thereby run the risk of violating the Code of Professional Responsibility. Had Mr. Lacroix's counsel asked me to produce the documents directly to Mr. Lacroix, I would have promptly responded.

* * *

The failure to produce the documents was based on my good faith belief that I should avoid any communication directly with Mr. Lacroix and was not due to any willful misconduct."

We acknowledge your rebuttals dated March 25 and March 30, 2015. In your March 30, 2015 rebuttal, you provide a copy of email exchanges between Attorney Palumbo and yourself. Your December 18, 2014 APRA request was emailed at 10:37 PM. On December 18, 2014, at 11:02 PM, you emailed Attorney Palumbo inquiring as to the status of what appears to be an unrelated matter, namely the Loudermill hearing transcripts. That email states, in pertinent part:

“I have still not received the transcripts. It has been 7 weeks+ since the pre-termination hearing. Is there a reasonable explanation for the delay?

Also, I do not see the need to make requests through Mr. Formisano. I have discussed this with him. Please provide any information that I am entitled to directly to me if I so request.”²

In an email dated December 19, 2014, Attorney Palumbo states, in pertinent part:

“I have mailed the transcripts to you. If you don’t receive the same within one week let me know.

All further requests for information must be sent by your lawyer to RIHEAA’s defense counsel in connection with your ADA claim. Please do not send any further communications to RIHEAA staff.”

Attorney Palumbo copied your attorney, Ed Formisano, Esquire, on this email.

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 RIHEAA 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). 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. If no response is received within ten (10) business days, the lack of response will be deemed a denial. See R.I. Gen. Laws § 38-2-7(b).

It appears, at the time of your APRA request, you were involved in civil litigation against the RIHEAA, wherein Attorney Formisano represented you. Based upon the evidence

² It appears your email is in response to an email from Attorney Palumbo dated December 9, 2014, the pertinent part of which follows: “I will re-send the transcripts of the 2012 and 2014 hearings. Please make all further requests through your counsel, Ed Formisano.” It appears this email was copied to Attorney Formisano.

presented, it appears you made an APRA request, which you allege did not involve the pending litigation. Attorney Palumbo raises Rhode Island Supreme Court Rules of Professional Conduct, Rule 4.2, which states:

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

Here, after considerable review and reflection, we find no violation. Our basis for this conclusion is Rule 4.2. In particular, based upon the evidence presented, it appears that at the time of your APRA request, you were represented by Attorney Formisano in a lawsuit you had brought against RIHEAA. While you claim that the subject matter of your APRA request was unrelated to the subject-matter of your lawsuit, we have found nothing in the record that demonstrates this representation was made to RIHEAA or to Mr. Palumbo while your December 18, 2014 APRA request was pending. Although the subject-matter of your December 18, 2014 APRA request may have been independent from your pending litigation – at the very least you so contend in your correspondences to this Department – we are hard pressed to find that Mr. Palumbo’s actions in December 2014 violated the APRA based upon the events as they were occurring in December 2014. Obviously, the fact that you had litigation occurring against RIHEAA at the time of this APRA request is a significant factor in our analysis and placed Mr. Palumbo – or any other similarly situated attorney – in the position of responding directly “with a person the lawyer knows to be represented by another lawyer[.]” See R.I. Supreme Court Art. V, Rule 4.2.

Our conclusion is further supported by the plain language of Rule 4.2, which allows an attorney to communicate with “a person the lawyer knows to be represented by another lawyer,” when “the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” In this respect, an unrelated December 18, 2014 email from you to, among others, Mr. Palumbo, does indicate:

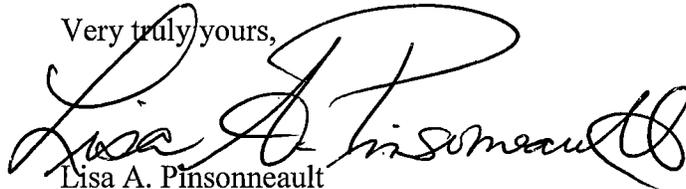
“Also, I do not see the need to make requests through Mr. Formisano. I have discussed this with him. Please provide any information that I am entitled to directly to me if I so request.”

But, as noted above, this email was not related to your APRA request – also made on December 18, 2014 – and more importantly, this email does not provide “the consent of the other lawyer,” as required by Rule 4.2. In what might be considered an effort to address the restrictions imposed by Rule 4.2, Mr. Palumbo copied Attorney Formisano on various correspondences – as did you – making clear RIHEAA’s position that correspondences should come from Attorney Formisano and not directly from you. We have been provided no evidence that Attorney Formisano provided “consent” as required by Rule 4.2. Faced with these circumstances and viewing this situation as it occurred in December 2014, we find no APRA violation.

Although the Attorney General will not file suit in this matter, nothing in the APRA prohibits an individual from obtaining legal counsel for the purposes of instituting injunctive or declaratory relief within the Superior Court. Please be advised that we are closing your file as of the date of this correspondence.

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 A. Pinsonneault". The signature is fluid and cursive, with a large, looping initial "L" and "P".

Lisa A. Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Joseph R. Palumbo Esq.