



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 30, 2014
PR 14-11

Ms. Judith Reilly
1 Courageous Ct, #109
Salem, Massachusetts 01970

Re: Reilly v. Providence Economic Development Partnership

Dear Ms. Reilly:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Providence Economic Development Partnership (“PEDP”) is complete. By email correspondence dated November 14, 2013, you allege the PEDP violated the APRA when it failed to completely respond to your APRA request wherein you sought “summary documentation” of how much Mr. Gordon Fox was paid for his services as the PEDP’s closing attorney from 2005 through early 2010. In particular, following an earlier APRA request for 1099 tax forms, your September 18, 2013 APRA request sought:

“[i]f indeed no 1099s exist, then I would like to expand my request to encompass any summary documentation that would show how much Mr. Fox was paid for his work during those years, for instance, but not limited to, an accounting report showing checks issued to Mr. Fox by PEDP, [by PEDP’s then-attorney] Mr. [Joshua] Teverow, the City, or any other party that was channeling those Federal funds to Mr. Fox for his work.”¹

On October 2, 2013, the PEDP responded to your September 18, 2013 APRA request, provided you certain responsive documents maintained by the PEDP, and indicated:

¹ Your September 18, 2013 correspondence was actually addressed to Mayor Angel Taveras in his capacity as the chief administrative officer for PEDP and sought to appeal the PEDP’s earlier denial of your request for 1099 tax forms. Within your September 18, 2013 appeal is what you describe as your instant APRA request quoted above. We question whether your instant request, contained within your administrative appeal, properly constitutes an APRA request made consistent with the City’s APRA procedures. See R.I. Gen. Laws § 38-2-3(d). Nonetheless, since the City does not raise this issue, we need not address it.

“[a]dditionally, PEDP has reached out to Attorney Teverow to inquire whether or not Attorney Teverow maintains any additional responsive documents. Due to the difficulty in searching for and retrieving such records, the PEDP respectfully requests an additional twenty (20) business days to supplement this response.”

You allege that the PEDP did not demonstrate “good cause” for extending its response time an additional twenty (20) business days.

In response to your complaint, we received a substantive response from the PEDP’s legal counsel, John J. Garrahy, Esquire, who provided sworn affidavits from the City of Providence Assistant City Solicitors and members of the Public Records Unit, Kathryn M. Sabatini, Esquire and Amy L. Crane, Esquire.

Attorney Garrahy states, in pertinent part:

“The PEDP maintains that it has provided all of the records within its purview in response to all of Ms. Reilly’s requests. In an effort to be fully responsive, the PEDP reached out to its then legal counsel [Attorney Teverow] to determine whether or not he maintained any PEDP records responsive. Due to the fact that any such records would not be physically accessible to the PEDP staff, the PEDP is of the opinion that there was ‘good cause’ to extend its time to respond. Moreover, the PEDP maintains that it only has the ability to request, compel or otherwise provide documents belonging to it and does not have the authority to compel individual business records of outside parties.

Therefore, the PEDP maintains that it responded to all of Ms. Reilly’s requests within the time set forth by statute and provided all records within its purview in response to all requests. Accordingly, it is the PEDP’s contention that it did not violate the Access to Public Records Act.”

Assistant City Solicitor Crane affirms, in pertinent part:

“On September 19, 2013, I received a copy of an appeal of an August 27, 2013 decision issued by the Public Records Unit from [Ms.] Judith Reilly. * * *

In her appeal, Ms. Reilly sought an ‘explanation for why (redacted) copies of the [1099 tax] forms were not issued to [her]’ and also asked for ‘any summary documentation that would show how much Mr. Fox was paid for his work during [2005-2010], for instance, but not limited to, an accounting report showing checks issued to Mr. Fox by PEDP, Mr. Teverow, the City or any other party that was channeling those Federal funds to Mr. Fox for his work.’

In response to Ms. Reilly’s September 18, 2013 appeal, I inquired with PEDP and City Controller’s Office as to whether or not PEDP or the City maintained any 1099’s for [Mr.] Gordon Fox for the period of 2005-2010 and, if not, if the PEDP

or City Controller's Office maintained any accounting report reflecting payments made to [Mr.] Gordon Fox for the same period.

I also called Attorney Teverow's Office seeking to inquire whether or not he possessed responsive records and left a message asking him to return my call.

I was informed by the City Controller's Office that there were no 1099's or records of payment made to [Mr.] Gordon Fox for the period of 2005-2010.

I received documents from PEDP reflecting the fees paid for closings and a list of closings conducted by [Mr.] Gordon Fox for the period 2005-2010.

On October 2, 2013, the Executive Director for PEDP provided a letter in response to Ms. Reilly's appeal explaining that there were no 1099's maintained as none existed. * * *

The Public Records Unit responded to the portion of Ms. Reilly's appeal seeking additional documents [i.e., the September 18, 2013 APRA request], by providing all of the documents received from PEDP on October 2, 2013. * * *

The Public Records Unit also requested an additional twenty (20) business days to supplement its response in the event that Attorney Teverow maintained additional PEDP documents responsive to the request. * * *

Any documents maintained by Attorney Teverow are not within the physical possession or control of PEDP staff and therefore, 'good cause' existed at the time due to the difficulty in determining, locating, or otherwise retrieving documents.

That at some point within the twenty (20) business days of the October 2, 2013 response, I spoke with Attorney Teverow who stated that he did not have any PEDP documents responsive to Ms. Reilly's request.

* * *

Th[e] PEDP does not maintain or otherwise have any authority with respect to personal business records of individuals.

To my knowledge, all documents that the City and PEDP maintain have been provided to Ms. Reilly in response to all of her requests.

That in addition to Ms. Reilly's requests, the Public Records Unit had approximately thirty (30) other records requests pending during the period of September 19, 2013-November 1, 2013.^[2]

² In response to this averment, you assert that "[t]he total workload of the Public Records Unit is not relevant to whether twenty additional business days were needed for search and retrieval for

We acknowledge your reply dated December 13, 2013.

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 PEDP 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 a public body shall be public records and every person shall have the right to inspect and/or copy such record. 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. A public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving the request. If the inspection or copying is not permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request. In such cases the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body. See R.I. Gen. Laws § 38-2-3(e).

We begin with your allegation that you have not received all documents responsive to your September 18, 2013 APRA request. We view this allegation in two parts: (1) does the PEDP physically maintain additional documents responsive to your request and (2) does an agent of the PEDP, namely its former legal counsel, Mr. Teverow, physically maintain documents responsive to your request. Based upon the evidence presented, including the extensive affidavit from Assistant City Solicitor Crane, we cannot conclude that the PEDP violated the APRA by withholding or refusing to produce responsive records. Specifically, we have been presented with no evidence to contradict Ms. Crane's assertions and/or to suggest that the PEDP itself physically maintains documents responsive to your September 18, 2013 APRA request that it has not already timely provided to you. Taken as a whole, we do not interpret your correspondences to suggest that the PEDP itself physically maintains undisclosed responsive documents. Instead, your correspondences can fairly be interpreted to suggest that you believe the PEDP's then-attorney, Mr. Teverow, may physically maintain documents responsive to your September 18, 2013 APRA request. See e.g., November 12, 2013 Complaint, p. 2 ("I find it very difficult that Mr. Teverow does not have records of how much he paid Mr. Fox on behalf of PEDP during any portion of the time period of 2005 through early 2010."). Even though Mr. Teverow is a private

one particular request." The plain language of the APRA does not support this conclusion. See R.I. Gen. Laws § 38-2-3(e) ("In such cases the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body.") (emphasis added).

attorney, your suggestion that Mr. Teverow may have responsive documents concerning your September 18, 2013 APRA request requires a separate APRA analysis.

The APRA defines a “public body” as:

“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 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)(emphasis added).

Based upon the foregoing provision, even though Mr. Teverow is a private attorney, any records that Mr. Teverow maintains “on behalf of and/or in place of” PEDP, may fall within the ambit of the APRA. Id.

To explain, in Reilly & Olneyville Neighborhood Association v. Providence Department of Planning and Development and/or Providence Redevelopment Agency, PR 09-07B, this Department considered the scope and interpretation of the last clause of R.I. Gen. Laws § 38-2-2(1) as set forth above. We reviewed the plain language of this provision and in doing so we were struck with the similarity of the above emphasized language and the definition of an “agent.”

As we explained in Reilly, “[f]or example, an ‘agent’ is defined as:

‘[a] person authorized by another (principal) to act for or in place of him; one entrusted with another’s business. One who represents and acts for another under the contract or relation of agency. A business representative, whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do. One who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.

One authorized to transact all business of principal, or all of principal’s business of some particular kind, or all business at some particular place.’ Black’s Law Dictionary, p. 63 (6th Edition)(internal citation omitted)(emphases in original).

Similarly, the Restatement (Third) defines agency as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the

principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) Agency § 1.01. (Emphasis in original).

See also East Bay Newspaper v. Mt. Hope Trust, PR 10-39 (Mt. Hope Trust ("MTH") was a completely separate and independent financial entity from the Town of Bristol, proving that the MHT's relationship with the Town of Bristol fell short of demonstrating that the MHT was "acting on behalf of and/or in place of any public agency"); Collette v. Town of Charlestown, PR 13-20; Campbell v. Town of Tiverton, PR 12-13; MacDougall v. Quonochontaug Central Beach Fire District, PR 13-17.

Because R.I. Gen. Laws § 38-2-2(1) and this Department's prior findings raised the specter that documents maintained by Mr. Teverow may fall within the APRA, and in light of Ms. Crane's affidavit that she contacted Mr. Teverow "who stated that he did not have any PEDP documents responsive to Ms. Reilly's request," see Ms. Crane affidavit, ¶ 13, this Department deemed it appropriate to contact Mr. Teverow directly. In this respect, it is significant that Mr. Teverow was not (and is not) a party to the instant APRA complaint, to our knowledge was not provided any of the correspondences related to the instant matter, and the only evidence presented to this Department concerning the potentially dispositive issue relating to what documents Mr. Teverow may or may not maintain was presented through Ms. Crane's affidavit.³ Even your November 12, 2013 complaint argued that it would be appropriate for this Department to receive evidence directly from Mr. Teverow.

In light of this consideration, this Department contacted Mr. Teverow, advised him of R.I. Gen. Laws § 38-2-2(1) and this Department's related findings, provided the text of your September 18, 2013 APRA request, and asked that Mr. Teverow provide this Department with any responsive documents for an in camera review. This Department also asked Mr. Teverow to advise whether he and/or PEDP objected to disclosure of any responsive documents and invited Mr. Teverow to provide any other argument or evidence that may be relevant. In response to our inquiry, Mr. Teverow provided this Department with a seven (7) page document concerning legal fees paid to Mr. Gordon Fox for PEDP work from 2005 through early 2010.

Following this Department's in camera review of the seven (7) page document, this Department again contacted Mr. Teverow to explain that – as detailed above – this Department was of the preliminary opinion that PEDP documents maintained by him fell within the purview of the APRA and that this Department was of the preliminary opinion that the seven (7) page document was not exempt by the APRA. Despite the foregoing, this Department also advised Mr. Teverow that since the Department's preliminary opinion was without the benefit of any person or entity contesting the APRA status of the seven (7) page document, if Mr. Teverow and/or the PEDP believed the seven (7) page document was exempt, this Department would entertain and review any arguments in support of this position. Rather than present a non-disclosure argument, Mr. Teverow and the PEDP advised this Department that they will rely upon the preliminary

³ This in no way suggests that this Department takes issue with the representations made through Ms. Crane's affidavit. Instead, in the interest of conducting a proper and fair review, this Department determined it was appropriate to contact Mr. Teverow directly.

determination made by this Department and will provide you with the seven (7) page document. Since the seven (7) page document has been (or will be) provided to you, it is unnecessary for this Department to definitively determine whether Mr. Teverow, as PEDP's former attorney, falls within R.I. Gen. Laws § 38-2-2(1) and whether the seven (7) page document is indeed a public record under the APRA. See e.g., AVCORR Management, LLC v. Central Falls Detention Facility Corporation, PR 12-15 ("since you are already in possession of this document our resolution of this question [i.e., whether it is a public record] is unnecessary").

The disclosure of the seven (7) page document at this juncture raises the further issue concerning whether the PEDP failed to provide the seven (7) page document in a timely manner. Again, it bears noting that this complaint was filed against PEDP, and not Mr. Teverow, and that PEDP's substantive response never focused on the timeliness issue. To be fair, your complaint does not expressly raise this issue. See November 18, 2013 Letter from Special Assistant Attorney General Lisa Pinsonneault to Ms. Judith Reilly (confirming allegation as "you allege the PEDP violated the APRA when it failed to completely respond to your APRA request wherein you sought documentation of how much Mr. Gordon Fox was paid for his services as PEDP's closing attorney from 2005 through early 2010. You also alleged that the PEDP did not demonstrate 'good cause' for extending its response time an additional twenty (20) business days."). Accordingly, none of the parties – or non-parties – has adequately addressed this issue and this Department may properly determine that this precise issue is not properly before us. See Costantino v. Smithfield School Committee, PR 13-22; Mudge v. North Kingstown School Committee, OM 12-35.

To the extent that this allegation may have been raised, however, this Department has long held that to determine whether a public body has conducted an adequate search for requested records is a determination that must be made on a case-by-case basis and focus on the reasonableness of the public body's search. See e.g., Beagan v. Albion Fire District, PR 11-15; Duxbury v. Town of Coventry, PR 13-16; MacDougall v. Quonochontaug Central Beach Fire District, PR 13-17. Here, based upon the totality of the evidence, there is insufficient evidence to conclude that the PEDP conducted an inadequate or untimely search. Specifically, PEDP provided you access to the documents it physically maintained and contacted Mr. Teverow to determine whether he physically maintained documents. While PEDP represents that it contacted Mr. Teverow and was advised that "he did not have any PEDP documents responsive to Ms. Reilly's request," see Ms. Crane Affidavit, ¶ 13, in our opinion this factor only supports the reasonableness of the PEDP search for responsive records. Moreover, even if we assume that Mr. Teverow was "acting on behalf of and/or in place of any public agency," i.e., the PEDP, during the 2005 through early 2010 timeframe responsive to your APRA request, it is our understanding that at the time of the PEDP's inquiry Mr. Teverow no longer served as legal counsel for the PEDP. We know of no authority, and as discussed supra no arguments have been presented to us on this point, where a public body such as PEDP would be responsible for the statements or conduct of a person who no longer is "acting on behalf of and/or in place of [the PEDP]."⁴

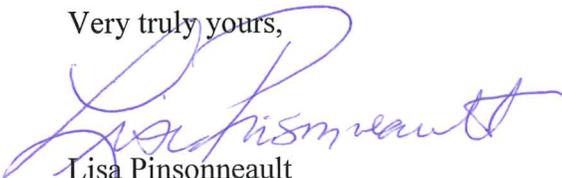
⁴ This is no way suggests that this Department takes issue with the representations made by Mr. Teverow.

Lastly, you allege that the PEDP did not have “good cause” to extend the time to respond to your APRA request. See R.I. Gen. Laws § 38-2-3(e). In an October 2, 2013 letter to you, Assistant City Solicitor Crane indicated that the PEDP had contacted Mr. Teverow to inquire whether or not he maintained any additional responsive documents and that “[d]ue to the difficulty in searching for and retrieving such records, the PEDP respectfully request[ed] an additional twenty (20) business days to supplement this response.”⁵ In our opinion, the PEDP’s extension of time to contact its former legal counsel who was no longer “acting on behalf of and/or in place of [the PEDP]” to determine whether any responsive records were maintained demonstrates “good cause” and we find no violation. See R.I. Gen. Laws § 38-2-3(e) (“difficulty in searching for and retrieving or copying the requested records”). In this respect, it is again noteworthy that it is our understanding that at the time of the PEDP’s inquiry, Mr. Teverow was no longer providing legal services on behalf of the PEDP.

While the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual 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 your file as of the date of this letter. If our understanding is incorrect and you have not been provided access to the seven (7) page document, or if you do not receive this document within ten (10) business days of the date of this finding, please contact this Department.

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

Very truly yours,



Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: John J. Garrahy, Esquire

⁵ Attached to this response was a “loan summary sheet that lists all of the loan closings that took place for the period of time requested including legal fees incurred.” Also attached was a “list of loans in which Mr. Gordon Fox conducted the closings for the period of time requested.”