



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

July 23, 2015

PR 15-43

Mr. Thomas Ryan & Mrs. Mary Ryan

Re: Ryan v. Rhode Island Housing

Dear Mr. & Mrs. Ryan:

The investigation into the Access to Public Records Act (“APRA”) and Open Meetings Act (“OMA”) complaint filed against Rhode Island Housing (“RIH”) is complete. By letter dated April 27, 2015, you related that RIH violated the OMA when it failed to maintain minutes for its December 16, 2013 meeting, and violated the APRA when RIH extended the time to respond to an April 2, 2015 APRA request you made to RIH seeking “any and all documents regarding us and our property located at * * * as well as any communications between Rhode Island Housing and any other entity regarding us and/or our property, the date(s) and the purpose of those communications.” Your April 2, 2015 APRA request did not contain a timeframe for RIH to search for responsive records.

Thereafter, by letter dated May 11, 2015, you supplemented your complaint. Specifically, you complain that RIH violated the APRA with respect to your March 5, 2015 APRA request. In doing so, you reference your April 27, 2015 complaint and note that this complaint related that “RIH had not provided copies of minutes of any of the meetings, including, but not limited to the December 16, 2013.” You also relate that:

“RIH was also requested to provide information regarding notices of any upcoming [Madeline Walker Advisory Committee] meetings. RIH did not acknowledge that request, nor have they provided the information. Also, it appears that in their response dated March 27, 2015, RIH did not provide a complete listing of the names of the [Madeline Walker Advisory Committee] members from 2006 to the present. We were not aware of this until after we filed our complaint.”

In response to your complaint, we received an affidavit from RIH legal counsel, Michael V. Milito, Esquire. Mr. Milito denies that RIH violated the OMA when it did not maintain open session minutes for a December 16, 2013 Madeline Walker Advisory Committee (“Advisory Committee”) meeting because a quorum of members was not present for a “meeting” on that date. Accordingly, as a matter of law, Mr. Milito claims that the OMA did not apply to any December 16, 2013 “meeting.”

With respect to the APRA allegation set forth in your original complaint, Mr. Milito details that “the interaction between the Ryans and Rhode Island Housing has spanned over the course of approximately seven (7) years, across a number of departments and with numerous individuals, some of whom are no

longer employed by or affiliated with Rhode Island Housing, the public records that were to be produced in response to their April 2, 2015 request were voluminous and, particularly in instances where the records sought were in the files and electronic accounts of former employees, difficult to search for and retrieve.” Mr. Milito adds that:

“Rhode Island Housing’s invocation of its right to extend the time for response to the APRA request was reasonable and for good cause. Rhode Island Housing staff constraints were compounded by the Ryans numerous requests and email dialogues. Only four days prior to the APRA request, Rhode Island Housing staff had completed the response to a separate inquiry made by the Ryans into information about [the Madeline Walker Advisory Committee] meeting alleging a violation of the OMA. The ongoing complaints and inquires from the Ryans placed a significant burden upon Rhode Island Housing’s resources in responding to the instant OMA request.”

Later in his response, Mr. Milito relates that to respond to the APRA request, RIH:

“designated specific staff to coordinate the search and retrieval process. Those staff members held meetings to map out a strategy for coordinating the response. Staff drafted instructions for persons they believed might have information related to the request. Along the way, after examining documents, coordinating staff realized that additional personnel may have information and follow up requests were made to those individuals. These same staff persons were designated to supervise and coordinate the search and retrieval process. Legal staff reviewed hundreds of pages of documents to ensure that only ‘public records’ responsive to the request were provided. Legal staff also reviewed all of the documents to ensure that no protected confidential or private information was provided.”

In total, Mr. Milito avers that over seventeen hundred (1,700) pages of responsive documents were made available for you.

By letter dated July 9, 2015, you provided this Department with a rebuttal and over fifty (50) exhibits. As relevant, your rebuttal will be discussed below.

At the outset, we note that in examining whether a violation of the OMA or 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 OMA and 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 RIH violated the OMA or the APRA. See R.I. Gen. Laws §§ 42-46-8; 38-2-8. In other words, we do not write on a blank slate.

We begin with your allegation that RIH violated the OMA when it failed to maintain minutes for the December 16, 2013 Madeline Walker Advisory Committee meeting. In order for the OMA to apply, a “quorum” of a “public body” must convene for a “meeting” as these terms are defined by the OMA. See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). A “quorum” is defined as “a simple majority of the membership of a public body.” R.I. Gen. Laws § 42-46-2(d). For purposes of the OMA, a “meeting” is defined as “the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws § 42-46-2(a). See Zarella et al. v. East Greenwich Town Planning Board, OM 03-02. All three of

these elements (a quorum, meeting, and public body) must be present in order for the OMA to apply; the OMA is not applicable when one or more of these elements is absent. Id.

Here, the evidence is clear that a quorum of members did not convene for the December 16, 2013 meeting. In particular, R.I. Gen. Laws § 44-9-8.3(b) provides in relevant part that “[t]here shall be an advisory board consisting of six (6) members: one person appointed by the Rhode Island League of Cities and Towns; one person appointed by the Consumer Credit Counseling Services of Rhode Island; one person appointed by Rhode Island Legal Services; one person appointed by the Housing Network of Rhode Island, one appointed by the Urban League of Rhode Island and one appointed by the Center for Hispanic Policy and Advocacy.” While Mr. Milito relates that only three (3) of the six (6) Advisory Committee members – but only representatives of two (2) of the six (6) organizations – were present for the December 16, 2013 meeting, this issue is of little moment since under either scenario “a simple majority of the membership of a public body,” see R.I. Gen. Laws § 42-46-2(d), had not convened.

Respectfully, your rebuttal provides no evidence to contradict this assertion, and in fact, provides evidence supporting Mr. Milito’s conclusion. Moreover, your various assertions and exhibits indicating that the Advisory Committee either had convened, had met, or would convene (or meet) does not contradict the undisputed evidence that a quorum of Advisory Committee members was not present for the December 16, 2013 meeting. Indeed, at one point your rebuttal references three (3) Advisory Committee meeting where a quorum of members attended; notably, the December 16, 2013 meeting was not included. See July 9, 2015 rebuttal, p. 3. As such, the OMA did not apply to the December 16, 2013 meeting, and RIH did not violate the OMA by not maintaining minutes for the December 16, 2013 meeting.

Next, you contend that RIH violated the APRA when it extended the time to respond to your April 2, 2015 APRA request, which eventually produced seventeen hundred (1,700) pages. Your July 9, 2015 rebuttal devotes substantial argument to this issue. We find no violation.

The APRA states that, unless exempt, all records maintained by any public body shall be public 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, for “good cause,” extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. The public body may extend the time to respond by an additional twenty (20) business days 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.” See R.I. Gen. Laws § 38-2-3(e). “Any such explanation must be particularized to the specific request made.” Id.

The evidence is clear that your APRA request was broad, seeking “any and all documents regarding us and our property located at * * * as well as any communications between Rhode Island Housing and any other entity regarding us and/or our property, the date(s) and the purpose of those communications.” It is also noteworthy that your APRA request contained no timeframe and, eventually, produced over seventeen hundred (1,700) pages. Although you claim that the requested documents were “readily available,” had previously been the subject of a prior RIH review, and were (in some cases) duplicative, at best, the evidence demonstrates that your assertion would pertain to only some of the responsive documents. The evidence also makes clear that at the time of your April 2, 2015 APRA request, you had

already submitted other requests to RIH. While it is unclear whether these “other” requests were submitted pursuant to the APRA, it is clear that in addition to the volume of documents responsive to your April 2, 2015 APRA request, you had also submitted other requests to RIH. See R.I. Gen. Laws § 38-2-3(e). In brief, even if RIH had conducted a prior review, reviewing documents under the APRA to determine whether documents should be released to the public at-large is an entirely separate analysis. See Bernard v. Vose, 730 A.2d 30, 31 (R.I. 1999)(“The Access to Public Records Act * * * opens public records to inspection by the general public”). We find no violation. See e.g., Bath v. Rhode Island Office of Health and Human Services, PR 15-16.¹

Lastly, you complain that RIH failed to provide you copies of minutes to any Advisory Committee meetings. You also state that RIH failed “to provide information regarding notices of any upcoming [Advisory Committee] meetings” and that RIH did not “provide a complete listing of the names of [Advisory Committee] members from 2006 to the present time.” In relevant part, RIH indicates that it “does not maintain copies of the minutes for those meetings [requested],” and that RIH provided you “with a list of the individuals that attended Committee meetings on behalf of each ‘member organization.’”

Here, we also find no violation. In particular, the undisputed evidence establishes that RIH did not maintain copies of the Advisory Committee minutes requested. As such, RIH did not violate the APRA when it did not provide documents that were not maintained. 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”). In a similar vein, you complain that RIH failed to provide you “information” concerning notices for upcoming Advisory Committee meetings. While your March 5, 2015 correspondence did not request that RIH provide you access to any documents – and instead sought an answer to a question² – even if we ignore this issue no evidence exists that RIH maintained records “regarding notices of any upcoming [Advisory Committee] meeting.” Accordingly, RIH’s failure to provide such records – or to answer this question – did not violate the APRA. *Id.* See also Pitochelli v. Town of Johnston, PR 14-20 (“This Department has stated on numerous occasions that the APRA governs the public’s right to access public documents, but does not mandate or require that public bodies answer questions.”). Finally, you complain that RIH violated the APRA when it failed to respond to your March 5, 2015 APRA request for “[a] roster of the members of the Advisory Board and/or Committee both past and present since its

¹ Your rebuttal takes issue with RIH’s substantive response to your April 2, 2015 APRA request, contends that RIH had not provided all responsive documents, and appears to raise additional issues not previously raised in your complaint. These issues were first raised in your rebuttal and provided no opportunity for RIH to respond. This Department made clear in its May 5, 2015 acknowledgment letter that your rebuttal should address only the issues already raised and should not raise new issues. For this reason, we decline to address issues raised for the first time in your rebuttal. See Access/Rhode Island v. Providence Police Department, PR 15-33; Boss v. City of Woonsocket’s School Board Review Committee, OM 14-19; Mudge v. North Kingston School Committee, OM 12-35 (Department of Attorney General will not consider allegations first raised in rebuttal).

² In relevant part, your March 5, 2015 correspondence indicated “Could you please * * * state where we can find the notices for the upcoming Madeline Walker Advisory Board and/or Committee meetings.”

creation.” Again, no evidence exists that such a document exists, and therefore, RIH’s failure to provide this document did not violate the APRA.³ See R.I. Gen. Laws § 38-2-3(h).

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,



Michael W. Field
Assistant Attorney General

Cc: Michael V. Milito, Esq.

³ In its March 27, 2015 response, RIH provide “[a] list of all representatives that are known to [RIH] past and present.” Although you were provide a narrative response, the APRA and our findings make clear that if a public body maintains responsive documents, the responsive documents must be provided and a narrative response will not suffice. See Chase v. Department of Corrections, PR 11-36. As discussed, supra, no evidence has been presented or discovered that the requested “roster” exists. See R.I. Gen. Laws § 38-2-3(h).