



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 18, 2016
PR 16-04

Andrew Shapiro

Re: Shapiro v. Town of Warren

Dear Mr. Shapiro:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Town of Warren (“Town”) is complete. By email correspondence dated August 7, 2015 and later amended on September 3, 2015, you allege that the Town violated the APRA when it failed to provide a written response to your April 1, 2015 APRA request, in violation of R.I. Gen. Laws § 38-2-7. You also allege that the Town violated the APRA when it failed to provide all documents responsive to your April 1, 2015 APRA request.

On September 10, 2015, Peter Skwirz, Esquire, legal counsel for the Town, submitted a response to your complaint. In pertinent part, the Town provides that:

“On April 10, 2015, the Warren Town Clerk, Julie Coelho, sent an email...to Mr. Shapiro to let him know that the documents responsive to his APRA request were available for pick up from the Warren Town Clerk’s office. Mr. Shapiro was provided with all responsive documents...in a timely fashion...”

Mr. Shapiro’s allegation that responsive documents are being withheld is entirely unfounded and untrue...”

In addition to the Town’s response, Ms. Julie Coelho, Town Clerk, submitted an affidavit. In relevant part Ms. Coelho attests:

“I received an APRA request from Andrew Shapiro on April 1, 2015, requesting a number of documents.

After a diligent search of all Town records, I produced all documents responsive to Mr. Shapiro’s APRA request...in a timely fashion.

All of the documents provided to Mr. Shapiro...are all of the documents responsive to Mr. Shapiro's APRA request that are in the possession of the Town. There are no other responsive documents left to be produced in response to Mr. Shapiro's April 1, 2015, APRA request."

We acknowledge your rebuttal and will address the relevant points in this finding.

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

Your complaint raises two APRA allegations. One, the Town violated the APRA when it failed to provide you with a written response to your April 1, 2015 APRA request in violation of R.I. Gen. Laws § 38-2-7; and two, the Town failed to provide all documents responsive to your April 1, 2015 APRA request.

Allegation number one (1)

Rhode Island General Laws § 38-2-3(e) provides, in relevant part, that "[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a 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 addition, R.I. Gen. Laws § 38-2-7(a) provides, in pertinent part, "[a]ny denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial within ten (10) business days of the request..."

Here, the evidence shows that the Town notified you on April 10, 2015 – within ten (10) business days - that the documents you requested were available for your review at the Town Clerk's office. The Town's response, in pertinent part, provided that the documents you requested were available and that "[b]ecause there is a large amount of documents would you please come into [the Town Clerk's Office] to review the file and determine which documents you would like copies of?" Indeed, the Town disclosed 112 pages of documents responsive to certain aspects of your request, but the Town did not address – nor did it provide – documents responsive to the part of your APRA request seeking certain attorney invoices. The APRA makes clear that "[a] public body that receives a request to inspect or copy records that do not exist or are not within its custody or control shall, in responding to the request in accordance with this chapter, state that it does not have or maintain the requested records." R.I. Gen. Laws § 38-2-7(c). As set forth above, in its April 10, 2015 response, the Town in no way addressed your request for attorney invoices and this understandably left you – as well as this Department during our review – in a position where it was unknown why the Town failed to provide you (or

exempt) these documents. In the end, our investigation reveals that the attorney invoices were not provided to you because no such documents exist, see R.I. Gen. Laws § 38-2-3(h), but the Town's failure to provide this notification on April 10, 2015 violated the APRA. It should go without saying that this violation – as well as the time devoted to resolving this issue – could have been easily avoided.

Allegation number two (2)

On April 1, 2015 you requested access to the following:

“(1) Provide copies of all written communications between the Town Manager’s office, the Town Attorney’s office, together with any and all other written correspondence between the town committees and departments regarding the development application, hearings, negotiations, scheduling of meetings, or court actions in the matter of Application #14-31; GRF Associates, LLC and GRF Associates, LLC and Gary D’Ambra, applicants; Touisset Farms Subdivision, Touisset Road. These communications shall include, but not be limited to copies of all emails together with any other hard copy method of communication. These documents shall apply to any and all comments or statements written between the town officials and employees who acted in this manner – with the exception of elected officers. The requested information shall include copies of all internal town communications together with any communication between the town and the applicant. (2) Provide copies of all invoices for Legal Services that have been submitted to the Town of Warren by the Town’s Attorney’s office for any and all legal time expended on this matter. (3) Provide copies of all invoices for legal services incurred by the Town attorney’s office for attorney or stall time expended answering the APRA Complaint filed against the Town by Andrew Shapiro and currently being investigated by the RI Attorney General’s Office relative to this matter.”

In your complaint, you list three (3) categories of responsive documents you allege the Town has failed to disclose. Specifically, you claim that the Town has failed to:

- “1. Provide any and all written correspondence regarding the GRF development application, hearings, negotiations, scheduling of meetings, or court actions.¹
2. Copies of all internal communications between town department heads, the town manager, the town attorney and the applicant.
3. Copies of all invoices for Legal Services that have been submitted to the Town by the Warren Town Attorney’s office for any legal services expended on this matter.”

¹ This summary of your APRA request differs from the plain language of your April 1, 2015 APRA request. See infra.

After reviewing all the evidence presented, we find no violation. Here, both the Town Clerk and Attorney Skwirz assert that all documents responsive to your request and that were in possession of the Town were provided to you and no evidence has been presented that the Town is in possession of additional responsive documents not made available to you. For instance, with respect to category number (2), while you argue that “[c]onsidering the number of problems that the parties were required to negotiate (post issuance of the original Development Permit) there should be volumes of communications between the Town and GRF,” the fact that you believe there should be “volumes of communications” is not evidence that additional “communications” exist and have been withheld. More importantly, the Town’s affidavit contradicts your assertion. Specifically, the Town affirms that “[a]fter a diligent search of all Town records,” the Town Clerk “produced all documents responsive to Mr. Shapiro’s APRA request,” and that “[a]ll of the documents provided to Mr. Shapiro * * * are all of the documents responsive to Mr. Shapiro’s APRA request that are in the possession of the Town.” As noted earlier, over 100 pages of documents were made available for your review, albeit some documents were duplicative.

Similarly, we are aware of no evidence to suggest that the Town withheld “[c]opies of invoices for Legal Services that have been submitted to the Town by the Warren Town Attorney’s office for any legal services expended on this matter.” Instead, the evidence shows that on April 1, 2015, the Town Clerk emailed your APRA request to, among others, the Town’s legal counselors and asked that “everything relating to Zoning Application #14-31 GRF Associates, LLC and GRF Associates, LLC and Gary D’Ambra, applicants; Touisset Farms Subdivision, Touissett Road” be forwarded to her attention. And, while it appears that no invoices for legal services were provided to you, the Town Clerk attests that all documents responsive to your request have been disclosed and that “[t]here are no other responsive documents left to be produced.” Our further review confirms this assertion and you provide no argument to suggest that the Town is in possession of responsive documents.

Finally, with respect to category one (1), in your rebuttal, you argue that:

“The Town has not provide [sic] information regarding any aspect of the settlement **Agreement** negotiations, revised terms and conditions of the original development permit, settlement of drainage disputes (including substantial expenditure by the Town), unorthodox bonding requirements, site inspection agreements and reports, fire hydrant and water supply line placement and cost of responsibility for any one of a number of other issues that it is believed were resolved by the **Agreement**, prior to trial and following the commencement of construction...” (Bold in original).

Respectfully, none of the documents referenced above were explicitly requested by you in your April 1, 2015 APRA request and instead your request sought access to copies of “written communications,” “written correspondences,” and “internal town communications” between the Town Manager’s office, the Town Attorney’s office, Town committees or departments, and/or the applicant. While some documents may very well be responsive – if they existed – such as negotiations, other documents identified by you as missing simply would not be responsive to your request, such as a site inspection report (unless such a report was forwarded in a

correspondence). Therefore, any documents that are not “correspondences” or “communications” to the above referenced individuals are not responsive to your April 1, 2015 APRA request.² In this vein, we note that "it is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested." Assassination Archives and Research v. Central Intelligence Agency, 720 F.Supp. 217 (D.D.C. 1989). See also Palazzo v. Rhode Island Senate, PR 11-21.

Lastly, in an attempt to persuade this Department that the Town’s search was not complete and/or that the Town is withholding responsive documents, you assert that various Town officials, such as the Town Manager, the Town’s attorney, the Fire Chief, and the Public Works Director failed to respond to the Town Clerk’s request to forward any documents responsive to your April 1, 2015 APRA request. The reasoning or support behind your conclusion is uncertain and has not been specified by you, but our review of the 112 documents that were provided to you finds documents to/from all but one of the above-referenced officials, which were not copied, sent, or received by another person, except for you. Such a conclusion contradicts your assertion that these three (3) individuals failed to provide the Town Clerk with responsive documents and even in the case of the one remaining individual (the Fire Chief) our review finds that the Fire Chief was sent/received/copied on documents provided to you, albeit other officials also appear to have been in possession of these documents. Moreover, our review also finds that Ms. Diane Soares, who was not included in the Clerk’s email, nonetheless responded to the Clerk’s request for “everything relating to Zoning Application #14-31 GRF Associates, LLC and GRF Associates, LLC and Gary D’Ambra, applicants, Touisset Farms Subdivision, Touisset Road.” This conclusion suggests that Ms. Soares may have provided documents on behalf of (or possibly in addition to) the officials included in the Town Clerk’s email.

In the end, our review must consider whether the Town’s search and retrieval for documents responsive to your April 1, 2015 APRA request was adequate and sufficient under the circumstances. See Murphy v. City of Providence, PR 15-07. On this critical point, we have been presented with no evidence to the contrary and for all reasons stated herein, we find that the Town’s search and retrieval for documents responsive to your April 1, 2015 APRA request did not violate the APRA.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). Also a court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***.” See R.I. Gen. Laws § 38-2-9(d).

² It bears mentioning that your complaint and rebuttal largely focus on the fact that the Town did not provide you with a copy of a settlement agreement. Despite the fact that no evidence has been presented that a settlement agreement exists, at no moment in your APRA request do you seek access to a settlement agreement.

Here, we find neither remedy appropriate. Specifically, while we conclude that the Town violated the APRA when it failed to address your request for attorney invoices, our investigation reveals that no such documents exist. In addition, there is insufficient evidence to find that the Town committed a knowing and willful, or reckless violation. Nevertheless, this finding shall serve as notice to the Town that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, at this time, 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, but reserve the right to reopen our file if necessary.

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 "Malena Lopez Mora". The signature is written in a cursive, flowing style.

Malena Lopez Mora
Special Assistant Attorney General
Ext: 2307

Cc: Peter Skwirz, Esquire