State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

August 27, 2014
PR 14-23

Mark McBurney, Esquire

Re: Clark v. Department of Public Safety

Dear Mr. McBurney:

The investigation into the Access to Public Records Act ("APRA") complaint filed against the Department of Public Safety ("DPS") on behalf of your client, Mr. Trevor Clark, is complete. In relevant part, you contend that on January 15, 2014, you filed an APRA request, which you calculate to have been due on January 30, 2014. According to your complaint, on February 7, 2014, you were contacted by the DPS and at this time the DPS orally asked to extend the due date for your APRA request until February 14, 2014 based upon a family emergency situation. You agreed to this extension. Subsequently, on February 14, 2014, the DPS again telephoned you to seek a further extension, which you refused. Nonetheless, except for Request No. 3, see infra, the DPS responded to your January 15, 2014 APRA request by letter dated February 14, 2014. As the above mentioned events unfolded, on February 3, 2014, you sent the DPS a separate APRA request seeking, inter alia, a BCI record of a specifically named individual. You contend that you received the DPS's response in an untimely manner since the postmark date on the envelope evinced February 19, 2014. By letter dated February 21, 2014, you filed the instant complaint relating the above events.

At the outset, we note that in examining whether an APRA violation 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 DPS violated the APRA. See R.I. Gen. Laws § 38-2-7. In other words, we do not write on a blank slate.

I. Allegations Relating to February 14, 2014 Reply

You begin by contending that the DPS violated the APRA since its February 7, 2014 telephonic request for an extension due to a family emergency situation did not comply with the APRA. In particular, you contend the telephonic request was "not timely, not written, and not based on 'the voluminous nature of the request,' or any other requirement mentioned in RIGL 38-2-3(e)." Instead, you relate, the extension was requested for a "family emergency."

Here, we find no violation. In particular, the DPS has submitted an affidavit indicating that it did not receive your January 15, 2014 APRA request until January 23, 2014. See Miller v. City of East Providence, PR 11-18 ("Based upon the March 28, 2011 receipt date, the City was required to respond to your request on or before April 11, 2011."). While ten (10) business days would have elapsed on February 6, 2014, we are advised that on February 5, 2014, the State's Adverse Weather Policy was in effect. Ultimately, we deem it unnecessary to determine whether the implementation of the Adverse Weather Policy affects the time to respond to an APRA request because the undisputed evidence is that upon inquiry from the DPS on February 7, 2014, you agreed to grant the DPS an extension to respond until February 14, 2014. Having granted this extension to February 14, 2014, we find that you are estopped from complaining that the DPS's February 7, 2014 telephonic request was improper and untimely.

Next, you raise several related allegations that the DPS violated the APRA when it asserted an extension of time to respond to Request No. 3 as related in its February 14, 2014 letter. To put this allegation in context, by letter dated February 14, 2014, the DPS responded to your January 15, 2014 APRA request, providing access to various documents. The DPS noted, however, that "[t]here is one (1) additional document that implicates privacy interests versus the public's interest in disclosure" and that the DPS is "currently balancing those interests and assessing whether the privacy interest outweigh the public's right for disclosure relative to said document." The DPS added that in order to properly conduct a balancing test, it "ask[ed] that you provide * * * an explanation as to the public's interests in obtaining the information you are seeking in Request Number 3" and that "[i]n order to appropriately and effectively make such a determination, we are extending the time within which to respond to your specific Request Number 3 pursuant to R.I.G.L. Section 38-2-7." Your correspondences to this Department makes clear that you "explicitly decline to provide the RIDPS 'an explanation'" and you claim that the DPS's assertion of an extension, as set forth in its February 14, 2014 letter, violated the APRA. You also assert that the DPS violated the APRA when it required you to provide an explanation of the public interest. We disagree.

The APRA provides that "[n]o public records shall be withheld based on the purpose for which the records are sought[.]" R.I. Gen. Laws § 38-2-3(j). Here, no evidence has been presented that the DPS "withheld [records] based on the purpose for which the records [were] sought." Instead, by letter dated February 14, 2014, the DPS provided you access to various documents and indicated that one document remains outstanding where a balancing test had to be conducted weighing the public interest in disclosure versus the privacy interest. As framed by the DPS, in order to appropriately balance the competing interests, the DPS requested that you articulate "the public's interests in obtaining the information you are seeking in Request Number 3."

The DPS's response mirrors the approach endorsed by the United States Supreme Court in National Archives and Records Administration v. Favish, 541 U.S. 157 (2004). In Favish, the Court explained:

> "[i]n the case of Exemption 7(C), the statute requires us to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State. The statutory direction that the information not be released if the invasion of personal privacy could reasonably be expected to be unwarranted requires the courts to balance the competing interests in privacy and disclosure. To effect this balance and to give practical meaning to the exemption, the usual rule that the citizen need not offer a reason for requiring the information must be inapplicable." Id. at 172. (Emphasis added).

In the following paragraph the Court continued that:

> "[w]here the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." Id. (Emphasis added).

In this case, the DPS's February 14, 2014 response (with respect to Request No. 3) was nothing more than an application of Favish. Moreover, unlike Sulser v. Department of Public Safety, PR 14-22, which concerned an application of R.I. Gen. Laws § 12-1-4 that was not examined in Department of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749 (1989), both Favish and the instant case concern the same exemption. Compare R.I. Gen. Laws § 38-2-2(4)(D)(c)(exempting law enforcement records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy") with 5 U.S.C. § 552(b)(7)(C)(exempting records compiled for law enforcement purposes where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy"). For this reason, we conclude that the DPS did not violate the APRA when it asked that you assert a public interest that could be balanced against the privacy interests. In doing so, it is significant to our conclusion that we find no evidence that the DPS's inquiry was made in bad-faith. Moreover, while you identify in your correspondences that the DPS provided you insufficient information to assert a "public interest," no evidence was presented that you sought additional information from the DPS in order to appropriately respond.[1] Instead, as related in your correspondence to this Department, you "explicitly decline[d]" to respond to the DPS's inquiry.

[1] We express no opinion on whether the APRA would have required the DPS to provide additional information in order for you to properly assert a "public interest." Additionally, although you "explicitly" declined to respond to the DPS's inquiry for the "public interest," in your correspondences to this Department you provide a substantial response to what you claim is

Additionally, for essentially the same reasons as set forth above, we find that the DPS did not violate the APRA when it did not provide you a reasonable segregable portion of the one withheld document, or alternatively, failed to indicate that the one withheld document cannot be redacted. See R.I. Gen. Laws § 38-2-3(b). As noted, supra, you "explicitly" declined to provide a "public interest" to the DPS, and therefore, find that the DPS did not violate the APRA. Moreover, you contend that the DPS violated the APRA when it extended the time period to respond to your Request No. 3, pending receipt of your articulation of the "public interest" in disclosure. Frankly, rather than "extend" the time to respond pending your response, the DPS probably should have "tolled" the time to respond pending your response, but under these facts – particularly considering that you did not respond – whether termed an "extension" or a "tolling," both responses are substantively similar. We find no violation.

Next, you claim that the DPS violated the APRA when it sought to impose costs for your January 15, 2014 APRA request. Your assertion is based upon the arguments that: (1) because the DPS responded to your January 15, 2014 APRA request in an untimely manner, any costs have been waived, see R.I. Gen. Laws § 38-2-7(b); (2) the DPS imposed costs for several sets of duplicative documents; and (3) the DPS charged you for eleven documents, none of which were responsive to your request.

With respect to your first argument, we have already determined that the DPS's response was not untimely, and therefore, R.I. Gen. Laws § 38-2-7(b) was not implicated.[2] On your second argument, while you assert that you were assessed costs for "several sets of duplicate documents (five pages in total)," your complaint fails to identify the duplicative documents. In an attempt to identify the "duplicative documents," this Department reviewed the documents submitted by the DPS as part of its February 14, 2014 response. We similarly reviewed the same documents attached to your complaint. We found no duplicative documents, and accordingly, reject this argument. Lastly, you contend that none of the eleven documents provided by the DPS were responsive to Request No. 3. This allegation requires some discussion.

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the "public interest" that outweighs any privacy interests. As suggested, supra, your complaint that the DPS violated the APRA does not come to us in a posture that enables us to conduct a de novo review to determine whether the one (1) withheld document is a public record. Instead, this matter comes before this Department alleging that the DPS violated the APRA when it responded to your APRA request, and accordingly, it is necessary for this Department to review the DPS's response. As detailed herein, because you "explicitly" declined to provide the DPS a "public interest," we review this matter consistent with those facts and do not independently balance the public and privacy interests. In any event, under these facts, we believe the balancing test should initially be conducted by the agency possessing the documents after reviewing all appropriate facts. As we understand the situation, this has yet to be done.

[2] You also assert that the DPS waived its right to assert a defense since its response was untimely. For the reasons already described, we reject this claim.

In your January 15, 2014 APRA request, Request No. 3 sought:

> "[a]ny and all documents showing that the State Fire Marshal's office conducted any due diligence before appointing [a particular individual] to the position of Assistant Deputy State Fire Marshal."

In your complaint, you contend that the DPS provided you eleven documents in response to Request No. 3, but that nine of the documents are dated after December 7, 2005. This date is significant, according to you, because on December 7, 2005, the particular individual specified in Request No. 3 was appointed, a fact you claim was known by the DPS since the DPS provided you that date pursuant to a November 2013 APRA request made by you. Thus, you claim that nine of the documents provided fall outside the timeframe requested, i.e., documents evidencing due diligence before appointing the particular individual. Similarly, you claim that the other two documents, although dated before December 7, 2005, do not evidence "due diligence." Accordingly, you claim that you were improperly charged for the eleven documents provided in response to Request No. 3.

Our review of the evidence differs from your complaint in certain respects. For one, we discovered twelve documents provided by the DPS, four of which were dated before December 7, 2005. Having reviewed these four documents, we conclude that the DPS could have reasonably concluded that these four (4) documents were responsive to Request No. 3. With respect to the remaining eight (8) documents, we conclude that the DPS improperly charged you the cost of copying these documents as they were not responsive to Request No. 3. To be clear, we do not exclude the possibility that documents dated after December 7, 2005 could have been responsive to your request, but in this case, we fail to see how these documents were responsive to your request concerning "due diligence" performed prior to appointing a particular individual and in its response, the DPS provided no substantive explanation concerning the responsiveness of these eight (8) documents. Accordingly, although the evidence is unclear whether you have ever paid the amount charged by the DPS, we conclude that you should have not been charged for the cost of copies for these eight (8) documents, totaling $1.20.[3]

II. Allegations Relating to February 19, 2014 Reply

With respect to the allegations relating to what you term the DPS's February 19, 2014 reply, you claim that this response was untimely, and therefore, the DPS violated the APRA and waived the right to assert any costs or defenses. Here, you claim that on February 3, 2014, you sent an APRA request to the DPS, which the DPS responded to by letter postmarked February 19, 2014. Since the time frame from the date of your mailed request to the date of the DPS's postmarked response exceeds ten (10) business days, you claim this response violated the APRA.

[3] Our finding has no effect on the search and retrieval cost assessed. Having reviewed the totality of the record, it appears all twelve (12) documents were retrieved from the same source and no evidence has been presented that the eight (8) documents discussed above increased the search and retrieval cost.

The DPS responds by affidavit from its legal counsel Danica A. Iacoi, Esquire, who affirms that on February 7, 2014 the DPS received your APRA request dated February 3, 2014. Ms. Iacoi continues that the DPS responded to the February 3, 2014 APRA request (received February 7, 2014) by letter dated February 17, 2014. Based upon these facts, we find no violation. In particular, this Department has received no evidence to contradict the DPS's assertion that it received your APRA request dated February 3, 2014 on February 7, 2014. Whether this Department applies the February 17, 2014 response date provided by the DPS or the February 19, 2014 postmark date asserted by you, both dates represent a timely response by the DPS within ten (10) business days of the receipt of your February 3, 2014 APRA request. See R.I. Gen. Laws § 38-2-7(a); Miller v. City of East Providence, PR 11-18 ("Based upon the March 28, 2011 receipt date, the City was required to respond to your request on or before April 11, 2011."). Accordingly, we find no violation.

Next, you claim that the DPS violated the APRA when it imposed one (1) hour of search and retrieval costs relating to the February 3, 2014 APRA request. You assert that: (1) because the DPS's response was untimely, (2) because the DPS sought to "piggyback" on its February 14, 2014 APRA response that was also untimely, and (3) because the DPS denied your February 3, 2014 APRA request, its assessment was improper. The DPS defends its position, noting that "[c]osts are assessed upon the time and copies of documents provided" and does not "rest on whether the requesting party 'likes' what the documents contain or finds them responsive to their 'investigation.'"

Here, your February 3, 2014 APRA request sought three (3) categories of documents. Categories one and two sought Bureau of Criminal Identification ("BCI") records "provided" by a particular person to the State Fire Marshal's Office or "obtained" by the State Fire Marshal's Office concerning the same particular person, and category three sought the contents of a personnel file for the same particular person from the State Fire Marshal's Office. The DPS responded that categories one and two were exempt from public disclosure pursuant to, inter alia, R.I. Gen. Laws § 12-1-4 and Reporters Committee, and that it did not maintain a personnel file for the particular individual requested, and therefore, could not provide any responsive documents. See R.I. Gen. Laws § 38-2-3(h). As noted, supra, the DPS's February 17, 2014 denial letter indicates that it expended one (1) hour of search and retrieval at an expense to you of $15.00 and the DPS's response to this Department indicates that the DPS's "imposition of costs for the time necessary to conduct search and retrieval as well as copying costs for the [DPS's] February 14, 2014 and its February 17, 2014 responses are justified pursuant to Section 38-2-4(b)."

Rhode Island General Laws § 38-2-4(b) provides that "[h]ourly costs for a search and retrieval shall not exceed fifteen dollars ($15.00) per hour and no costs shall be charged for the first hour of a search or retrieval." In 2012, the APRA was amended to provide that "[f]or purposes of this subsection, multiple requests from any person or entity to the same public body within a thirty (30) day time period shall be considered one request." R.I. Gen. Laws § 38-2-4(b). Moreover, DARE v. Gannon, 819 A.2d 651, 661 (R.I. 2003), makes clear that the "costs of redaction should be borne by the requesting party because it is part of the process of retrieving and producing the requested documents." (Emphasis added).

Here, we are satisfied that the DPS's one (1) hour search and retrieval fee associated with its February 17, 2014 denial letter appropriately fell within the purview of R.I. Gen. Laws § 38-2-4(b). In particular, we conclude that the DPS was entitled to assess a search and retrieval charge for the time to compose its February 17, 2014 denial letter. Such a conclusion necessarily follows the Rhode Island Supreme Court's instructions that the cost of redaction "should be borne by the requesting party because it is part of the process of retrieving and producing the requested documents." DARE, 819 A.2d at 661 (emphasis added). Similarly, the time and costs associated with responding to an APRA request "should be borne by the requesting party because it is part of the process of retrieving and producing the requested documents." See e.g., R.I. Gen. Laws § 38-2-7(a)("Any denial of the right to inspect or copy records * * * 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 and indicating the procedures for appealing the denial."). Of course, any such charge must be reasonable. R.I. Gen. Laws § 38-2-4(b).

While in this case the DPS did not "produc[e] the requested documents," but instead denied the requested documents, a rule that would allow a public body to charge for the time expended as "part of the process" for "producing" requested documents, but not allow a public body to charge for the time expended as "part of the process" for "denying" requested documents, is at odds with DARE and the APRA. See e.g., R.I. Gen. Laws § 38-2-7(a). Indeed, in such a scenario, a requester could make serial APRA requests for records known to be exempt from public disclosure – or for records already denied – requiring a public body to expend limited resources to respond repeatedly. Id. Having reviewed the entire record, most notably the February 17, 2014 letter, we cannot conclude that the one (1) hour assessed for composing the February 17, 2014 letter violated the APRA. Moreover, for reasons already explained herein, we reject your claims that the DPS's response by letter dated February 17, 2014 was untimely and that its response by letter dated February 17, 2014 sought to incorporate search and retrieval times improperly assessed through its February 14, 2014 APRA response. See R.I. Gen. Laws § 38-2-4(b)(multiple requests within 30 day timeframe considered as one request for search and retrieval purposes).

In a (somewhat) related allegation, you also contend that the DPS violated R.I. Gen. Laws § 38-2-7(c) when it was "mute" on whether it maintained any BCI records of the individual requested. We denied such an allegation in Sulser v. Department of Public Safety, PR 14-22 and do so again on the same grounds. In doing so, you essentially ask this Department to mandate that a public body perform a search and retrieval for documents – with a resulting search and retrieval cost to the requester – even though the documents are ipso facto exempt from public disclosure. In a slightly different context, the Rhode Island Supreme Court reversed a trial court that assessed sanctions upon a public body where it objected to providing documents sought through discovery, rather than notify the requesting party that the requested documents were not maintained. The Court reversed the sanctions and explained:

> "[i]f a party has a valid objection or a privilege to assert concerning improper discovery requests, it need not first ascertain whether the requested documents exist before presenting such an objection or asserting such a privilege. * * * But parties who promulgate improper discovery requests are not entitled to send their

> victims scurrying to see if the requested documents exist before any objection to such requests can be certified. Nor should they be rewarded by having sanctions imposed on those who timely object to such request before conducting an unnecessary search-and-review mission, much less disclosing the results of same to the requesting party. The reason this is so is that the determination of and the identification to an opposing party of whether and to what extent certain requested documents or information exists can itself be of use and value to litigants who have improperly requested such information. In such circumstances, disclosure would compromise the very purpose of asserting the objection in the first place. Moreover, responding to discovery requests can also entail an expensive and time consuming search for and review of large quantities of records to determine which documents are subject to the request and which are not and to ascertain whether any privileged documents have been requested. Before parties are put to the burden of complying with such requests, they are entitled to present valid and timely objections to doing so, subject always to the risk of paying for the other side's costs under Super. R. Civ. P. 37(a) if the court overrules their objections, orders the documents to be produced, and finds that the objection was not substantially justified after all and that that there are no 'other circumstances [that] make an award of expenses unjust." D'Amario v. State, 686 A.2d 82, 86 (R.I. 1996)(emphasis added).

Here, D'Amario leads to the conclusion that the DPS did not violate R.I. Gen. Laws § 38-2-7(c) when the DPS did not confirm or refute that it maintained a BCI record for a particular individual. Doing so would have implicated the precise interest protected by R.I. Gen. Laws § 12-1-4. See Sulser v. Department of Public Safety, PR 14-22. Indeed, a contrary rule would require a public body to spend time and resources searching and retrieving documents that, on their face, are exempt from public disclosure. In such a case, not only would the interests protected by R.I. Gen. Laws § 12-1-4 (and similar statutes) be implicated, but the individual requesting the document would be required to pay a public body's search and retrieval costs only to be told that the requested document is exempt. Notably, even your February 21, 2014 complaint takes issue with this scenario. See February 21, 2014 complaint, p. 5 ("the RIDPS summarily denied my request, providing no documents whatsoever, but still imposed a retrieval fee"). We find no violation

Lastly, you claim that the DPS violated R.I. Gen. Laws § 38-2-3(b) when it failed to provide reasonable segregable portions of the requested BCI record, or alternatively failed to indicate that it could not provide a reasonable segregable portion. We rejected this claim in Sulser, and for the same reasons, we similarly find no violation in this case. Notably, the DPS's February 17, 2014 denial explained that R.I. Gen. Laws § 12-1-4 "mandates that [BCI records are] for law enforcement purposes, is confidential and is not considered a public record." For the reasons articulated in Sulser, we also find no evidence that the DPS violated R.I. Gen. Laws § 38-2-3(j) when it denied your request.

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 and 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).

Here, we find neither remedy appropriate. We find no evidence of a willful and knowing, or reckless, violation. Moreover, at least as of the DPS's May 12, 2014 response to this Department, we are advised by the DPS that you have not paid any of the APRA costs assessed. Consistent with this finding, we conclude that your APRA charge should be reduced $1.20, or alternatively, if you have already paid the APRA charges, this amount should be reimbursed.

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.

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

Very truly yours,

Malena Lopez Mora
Special Assistant Attorney General
Extension 2307

Cc: Ms. Lisa Holley, Esquire