UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN OLIVEIRA Plaintiff,	:	
v.	:	C.A. No. 02-303 T
JACK EVANS, GERHARD OSWALD, TOWN OFFICIALS, Defendants.[1]	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Defendants' Motion for Summary Judgment (Document #15). Plaintiff John Oliveira ("Plaintiff") has objected to the motion. Pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a), this matter has been referred to me for preliminary review, findings, and recommended disposition. A hearing was conducted on April 28, 2003. After considering the parties' oral arguments, reviewing the memoranda submitted, and performing independent research, I recommend that Defendants' Motion for Summary Judgment be granted.

Overview

In April of 2002, Plaintiff was cited by the Town of Bristol, Rhode Island (the "Town"), for allegedly violating the Town's Zoning Code and the State's Building Code. Plaintiff contested the violations in the Town's Municipal

[1] In the Amended Complaint (Document #11), Plaintiff spells the last name of Defendant Evans as "Evan" and the first name of Defendant Oswald as "Gerhald." Amended Complaint at 1. The court has corrected the spellings to "Evans" and "Gerhard."

Court and sought records from the Town's Building Department. When the records were not produced, he filed this pro se action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that Town officials used their authority to violate his constitutional rights to equal protection and due process of law. Specifically, Plaintiff claims that Defendant Jack Evans, the Town's Code Compliance Coordinator, and Defendant Gerhard Oswald, the Town's Zoning Enforcement Officer, (collectively "Defendants")[2] denied him the right to inspect and copy records in their possession. Because I find that Plaintiff has not shown any denial of equal protection and that an adequate state post-deprivation remedy exists which negates his due process claim, I recommend that Defendants' Motion for Summary Judgment be granted.

Facts

On April 10, 2002, Defendants sent Plaintiff a letter which stated that he was in violation of the Town's zoning ordinance regulating open air storage and also of the State Building Code. See Defendants' Rule 12.1 Statement of Undisputed Facts in Support of Motion for Summary Judgment (Document #16) ("Defendants' SUF") ¶ 1;[3] Defendants'

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[2] The offices held by Defendants are identified in the April 10, 2002, letter from Defendants to Plaintiff. See Defendants' Memorandum of Law in Support of Motion for Summary Judgment (Document #15) ("Defendants' Summary Judgment Mem."), Exhibit ("Ex.") A (Letter from Defendants to Plaintiff of 4/10/02).

[3] Plaintiff states that "[a]ll the Defendants' facts are in dispute." Plaintiff John Oliveira's Objection to Defendant's [sic] Rule 12.1 Statement of Undisputed Facts Motion for Summary Judgment, Fact One in Dispute (Document #35) ("Plaintiff's Objection to SUF") at 3. However, it is clear that Plaintiff does not dispute that Defendants Jack Evans and Gerhard Oswald ("Defendants") sent Plaintiff a notice stating that Plaintiff was in violation of the Town Zoning Ordinance and State Building Code. See Defendants'

Memorandum of Law in Support of Motion for Summary Judgment (Document #15) ("Defendants' Summary Judgment Mem."), Exhibit ("Ex.") A (Letter from Defendants to Plaintiff of 4/10/02). The zoning ordinance violation stemmed from the presence on Plaintiff's property of allegedly old tires, junk, used scrap lumber, and three large propane tanks. See id. The Building Code violations were based on the allegedly dilapidated condition of the front stairs and front porch of Plaintiff's house and from peeling and falling paint from the house. See id. Plaintiff disputes that there were any violations. See Plaintiff John Oliveira's Objection to Defendant's [sic] Rule 12.1 Statement of Undisputed Facts Motion for Summary Judgment, Fact One in Dispute (Document #35) ("Plaintiff's Objection to SUF"). For purposes of the present Motion, the court will assume that there were no violations.

Plaintiff contested the alleged violations in the Town's Municipal Court. See Defendants' SUF (Document #16) ¶ 2; Plaintiff's Objection to SUF (Document #35) at 3.[4] Plaintiff requested that Defendant Oswald provide him with copies of "all private complaints" which had been received by Mr. Oswald's office from March 29, 2001, to July 11, 2002. See Plaintiff John Oliveira's Objection to Defendant's [sic] Motion for Summary Judgment (Document #34) ("Plaintiff's Objection to Summary Judgment"), Ex. C (Letter from Plaintiff to Oswald of 7/11/02). Plaintiff repeated this request in

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Summary Judgment Mem. (Document #15), Ex. A (Letter from Defendants to Plaintiff of 4/10/02). Rather, Plaintiff disputes that there were violations. See Plaintiff's Objection to SUF (Document #35) at 3.

[4] Again, although Plaintiff states he disputes all of Defendants' facts, it is clear that he does not dispute that he contested the violations in the Municipal Court.

another letter to Mr. Oswald dated August 9, 2002.[5] See id., Ex. D (Letter from Plaintiff to Oswald of 8/9/02).

Plaintiff alleges in the Amended Complaint[6] (Document #11) that Defendants failed to produce the records. See Amended Complaint (Document #11) ¶¶ 2B, 2C; see also Plaintiff's Objection to Summary Judgment (Document #34) at 2. However, in other filings Plaintiff indicates that Defendants produced (or allowed Plaintiff to copy) one or more records. See Plaintiff's Objection to Summary Judgment (Document #34), Ex. B (Memo from Evans to Plaintiff dated 8/7/02)(bearing Plaintiff's handwritten notation that "1 copy not copies sent"); Plaintiff John Oliveira['s] Motion to Take Deposition of Defendants (Document #31)[7] at 3 ("Plaintiff John Oliveira spent over four (4) hours reviewing records at Town Hall and copied sixteen (16) pages of records—time from 9 a.m. to after

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[5] Plaintiff sent an identically worded letter to Defendant Evans which was also dated August 9, 2002. See John Oliveira Plaintiff[']s Objection and Memorandum of Law to Defendant's [sic] Motion to Quash Depositions Notice (Document #25) ("Plaintiff's Deposition Mem.") Ex. A (Letter from Plaintiff to Evans of 8/9/02).

[6] The operative complaint in this matter is the Amended Complaint (Document #11) filed on September 27, 2002. See Memorandum and Order Granting Plaintiff's Second Motion to File Amended Complaint (Document #10) ("Memorandum and Order dated 10/1/02") at 5 n.3. Plaintiff captioned this document "Plaintiff John Oliveira's Re-Entering His Amended Complaint Now Signed and Notarized to Comply with Rule 7(b)1 and Rule 8 and Rebuts Defendants' Objection Dated 9/20/2002 to Plaintiff's Amended Complaint." The court designated this document as the Amended Complaint, but ruled that ¶ 4 was surplusage and should be disregarded. See Memorandum and Order dated 10/1/02 (Document #10) at 3.

[7] The full title of Document #31 is "Plaintiff John Oliveira Motion to Take Deposition of Defendants This is a USCC 43-1983 Action Violation of Civil and Constitutional Rights and Travel of the Case to be Helpful to the Court."

1 p.m.”). Defendants dispute that Plaintiff’s request for records was denied. See Defendants’ Summary Judgment Mem. at 5 n.2. Rather, Defendants allege that the documents were made available for inspection by Plaintiff at his convenience, but that Plaintiff failed to follow through and review the documents. See id.

The violations against Plaintiff were ultimately either dismissed voluntarily by the Town or dismissed by the Town’s Municipal Court for insufficient evidence. See Plaintiff’s Objection to SUF (Document #35) at 3; see also Defendants’ Summary Judgment Mem. (Document #15), Ex. D (Order of the Municipal Court of the Town of Bristol regarding Notice of Violation dated April 10, 2002, against Plaintiff).

Travel

On July 8, 2002, Plaintiff filed the Complaint (Document #1) in this court. Although the Complaint indicated that it was an action pursuant to 42 U.S.C. § 1983 and alleged violation of Plaintiff’s constitutional rights to equal protection and due process, the facts which formed the basis for the action were not stated. See Complaint (Document #1). Defendants filed an Answer (Document #3) to the Complaint on July 16, 2002, asserting among other defenses that the Complaint failed to state a claim upon which relief may be granted and that the court lacked subject matter jurisdiction. See Answer (Document #3) ¶¶ 2, 4.

Plaintiff filed a motion to amend the Complaint on August 6, 2002. See Plaintiff’s Motion to Amend Complaint (Document #5). However, he failed to attach a copy of the proposed amended complaint. The court found that the Complaint was deficient because it did not state facts which provided a basis for the action and for Plaintiff’s entitlement to

relief. See Order Denying Without Prejudice Plaintiff's Motion to Amend Complaint dated 8/29/02 (Document #6) ("Order dated 8/29/02") at 1-2. The court denied the motion to amend but did so without prejudice.[8] See Order dated 8/29/02 (Document #6) at 2.

On September 12, 2002, Plaintiff filed a second motion to file an amended complaint. See Plaintiff's Motion to Amend Complaint per Magistrate's Order and Supplement New Violation by Defendants and Grounds for Federal Court Jurisdiction ("Second Motion to File Amended Complaint") (Document #8). The court treated an attachment to the Second Motion to File Amended Complaint as being the Proposed Amended Complaint. See Memorandum and Order Granting Plaintiff's Second Motion to File Amended Complaint dated October 1, 2002 ("Memorandum and Order dated 10/1/02") (Document #10) at 2. This satisfied the first requirement of the Order dated 8/29/02 (Document #6). See Memorandum and Order dated 10/1/02 at 2. Satisfaction of the other requirements of the August 29th Order — i.e. to set "forth clearly the factual basis for the action, the basis for ... jurisdiction, and the relief which Plaintiff seeks," Order dated 8/29/02 at 3 — was, in the court's view, "a closer question," Order dated 10/1/02 at 2. The Proposed Amended Complaint did not explain the original case or controversy which had prompted the filing of the Complaint. See id.

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[8] Plaintiff appealed this Magistrate Judge's August 29, 2002, Order Denying Without Prejudice Plaintiff's Motion to Amend, see Plaintiff's Appeal from Magistrate Judge to District Court Judge Under 28 U.S.C.A. §636(C) Request Judge to Receive Further Allowed by 636(C) - New Evidence U.S.C.C. 42-1983 Violation Constitutional Violation by Named Defendants (Document #7) ("Plaintiff's Appeal dated 9/6/02"), but his appeal was denied by Chief Judge Ernest C. Torres on October 8, 2002, see Order denying Plaintiff's Appeal dated 9/6/02 (Document #12) at 2.

However, the court assumed that Plaintiff intended by the Proposed Amended Complaint to pursue only the claims alleged in that document and overlooked Plaintiff's failure to explain the original case or controversy. See id. at 2-3. The court also treated as surplusage ¶ 4 of the Proposed Amended Complaint which was incomprehensible. See id. at 3.

With these allowances and applying a relaxed pleading standard in consideration of Plaintiff's pro se status, the court found that the Proposed Amended Complaint alleged:

> that Defendants violated [Plaintiff's] rights under the Fourteenth Amendment by not allowing him "to inspect and copy an[y] records in Defendant[s'] possession," Proposed Amended Complaint ¶ 2 .... Plaintiff alleges that he submitted a written request for such inspection to Defendants on July 11, 2002, and that they failed to comply within the ten days specified in R.I. Gen. Laws § 38-2-7. See id. ¶ 2 A, B. Plaintiff also appears to claim a violation of his rights because Defendants allegedly failed to comply with a July 9, 2002, directive from a municipal court judge that Plaintiff be provided "with an exact copy of these findings in that report and well before the next continuance date August 13, 2002," see id. ¶ 4A. By way of relief, Plaintiff seeks to have this court order Defendants "to produce a copy of building inspection report as Municipal Court instructed." See id. at 2.

Memorandum and Order dated 10/1/02 (Document #10) at 3-4 (third alteration in original). Based on the above finding, the court granted Plaintiff's Second Motion to File Amended Complaint (Document #8). See id. at 4. The court also ruled that an identical copy of the Proposed Amended Complaint which Plaintiff had filed on September 27, 2002, was "the operative Amended Complaint." Id. at 5 n.3.

A Rule 16 Conference was conducted before this Magistrate Judge on October 22, 2002, and a pretrial order was entered.

See Pretrial Order (Document #13). The Pretrial Order established a discovery closure date of April 21, 2003. See id. at 1.

Defendants filed the instant motion for summary judgment (Document #15) on December 16, 2002. Plaintiff responded on December 19, 2002, by filing a motion to stay proceedings in this case and the case of John Oliveira v. Mark Sales, Nancy Giorgi, C.A. No. 02-383 ML. See Plaintiff's Motion to Stay (Document #17). The alleged basis for the stay was that Plaintiff was "filing motion[s] requesting Federal Court Judges for decisions in writing of Court actions in aforesaid case proceedings ...." Id. at 2. Plaintiff requested that he be given thirty days after receipt of the written decisions "to respond to proceedings." Id. Defendants filed an objection to the Motion to Stay on December 31, 2002. See Defendant's Conditional Objection to Plaintiffs' [sic] Motion for a Stay (Document #19). Defendants indicated that they did not object to a thirty day extension of the time for Plaintiff to respond to their motion for summary judgment. See Defendant's Memorandum in Support of Conditional Objection to Plaintiffs' [sic] Motion for a Stay (Document #19)[9] at 2. However, they did object to a stay for the purpose of allowing Plaintiff to obtain written decisions from the judges and also for the purpose of conducting depositions. See id.; see also Plaintiff's Motion to Stay filed in C.A. No. 02-383 ML (Document #16) at 2.

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[9] Defendants' Conditional Objection to Plaintiffs' [sic] Motion for a Stay ("Defendants' Objection to Stay") and Defendants' Memorandum in Support of Conditional Objection to Plaintiffs' [sic] Motion for a Stay were both docketed under a single document number, Document #19.

In the meantime, Plaintiff filed notices on December 23, 2002, to depose Evans on January 13, 2003, and to depose Oswald on January 15, 2003. See Notice to Take Deposition (Document #18).[10] Defendants moved to quash the deposition notices on January 9, 2003. See Defendants' Motion to Quash Depositions Notice ("Motion to Quash") (Document #20). On January 13, 2003, Plaintiff filed an objection to the Motion to Quash. See John Oliveira Plaintiff[']s Objection and Memorandum of Law to Defendant's [sic] Motion to Quash Depositions Notice (Document #25) ("Plaintiff's Deposition Mem."). The court conducted a hearing on the Motion to Quash on January 13, 2003, and temporarily stayed the taking of Defendants' depositions, pending the issuance of a written decision.[11] On January 17, 2003, the court issued a memorandum and order granting the Motion to Quash. See Memorandum and Order Granting Defendants' Motion to Quash Depositions Notice (Document #27). The court found that the Amended Complaint, construed liberally, could only be viewed as alleging procedural due process violations, see id. at 8-9, and that, therefore, the pending motion for summary judgment involved a pure question of law, namely whether an adequate state post deprivation remedy exists, see id. at 9. However, the denial was without prejudice to Plaintiff's right to present further argument that he should be allowed to depose Defendants. See

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[10] The two notices of deposition were stapled together and docketed under a single document number, Document #18.

[11] At the January 13, 2003, hearing the court also denied Plaintiff's motion to recuse this magistrate judge for an alleged ex parte communication with counsel for Defendants. See Order Denying Motion for Recusal (Document #24). The court found that Plaintiff's belief that there had been an ex parte communication was mistaken. See id. at 2.

id. at 10. Also on January 17, 2003, the court denied Plaintiff's Motion to Stay proceedings, but granted his request for a thirty day extension to respond to Defendants' Motion for Summary Judgment. See Order Denying Motion to Stay (Document #28).

On January 22, 2003, the court issued an order which stated that Plaintiff had until February 17, 2003, to submit additional argument regarding why he should be allowed to depose Defendants and until March 3, 2003, to file his response to Defendants' Motion for Summary Judgment. See Order Clarifying and Further Extending Time for Plaintiff's Responses (Document #29). Plaintiff submitted what appeared to be additional argument or motions regarding his desire to depose Defendants on January 31, 2003, see Plaintiff John Oliveira['s] Motion to Take Deposition of Defendants (Document #31), and February 4, 2003, see Amendment to Plaintiff's Motion to Take Deposition Based on Defendants' Refusal to Produce the Name of Complainant on Office Form Complaint (Document #32). The court denied both motions in a written order on February 18, 2003, after again finding that resolution of the question of whether an adequate state remedy exists did not require the deposition of Defendants. See Order Denying Plaintiff's Motions to Take Deposition (Document #33) at 2-3.

Plaintiff filed an objection to Defendants' Motion for Summary Judgment and an objection to Defendants' SUF on March 3, 2003. See Plaintiff's Objection to Summary Judgment (Document #34); Plaintiff's Objection to SUF (Document #35). On April 23, 2003, Plaintiff filed an amended objection to Defendants' Motion for Summary Judgment. See Plaintiff John Oliveira's Amended Objection to Defendants Oswald and Evans

Motion for Summary Judgment ("Plaintiff's Amended Objection to Summary Judgment") (Document #36). Two days later, on April 25, 2003, Plaintiff filed what appeared to be a motion for summary judgment, alleging that Defendants had failed to respond within twenty days to "Plaintiff's 1st Amended Complaint." Plaintiff John Oliveira's Motion and Affidavit Attached for Summary Judgment Based on 20 Day Rule ("Plaintiff's Motion for Summary Judgment") (Document #37).

The court conducted a hearing on Defendants' Motion for Summary Judgment on April 28, 2003. Thereafter, the matter was taken under advisement.

Law

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Kearney v. Town of Wareham, 316 F.3d 18, 21 (1st Cir. 2002)(quoting Rule 56(c)). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000). In ruling on a motion for summary judgment, the court must examine the record evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000). However, the non-moving party may not rest merely on the allegations of the complaint, but must set forth specific

facts as to each issue upon which he would bear the ultimate burden of proof. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d at 53. "[C]onclusory allegations, improbable inferences, and unsupported speculation," Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000), are insufficient to avoid summary judgment, see id.

Discussion

I. Equal Protection

Plaintiff claims that his right to equal protection under state law has been violated. See Amended Complaint (Document #11) ¶ 1;[12] see also Plaintiff's Amended Objection to Summary Judgment at 1. "An equal protection claim is found only upon a showing of a 'gross abuse of power, invidious discrimination, or fundamentally unfair procedures' or some sort of unjustified disparate treatment with respect to similarly situated applicants." Collins v. Nuzzo, 244 F.3d 246, 251 (1st Cir. 2001) (quoting Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 832 n.9 (1st Cir. 1982)); see also Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000)(same). Clearly, Defendants' refusal to provide records could not reasonably be held to be a "gross abuse of power," and Plaintiff has not alleged invidious discrimination or unjustified disparate treatment of similarly situated persons who have requested records.

A successful equal protection claim can be brought by a "class of one," Donovan v. City of Haverhill, 311 F.3d 74, 77

[12] Not all of the paragraphs of Plaintiff's Amended Complaint bear separate numerical or letter designations. As a consequence, in some instances, this court's citation to the Amended Complaint is to a numbered or lettered paragraph which is closest to the cited material or which appears to encompass the cited material.

(1st Cir. 2002), but the plaintiff must allege that he has "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," id.; see also Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 104 (1st Cir. 2002)(same). Plaintiff has not alleged (nor has he pointed to any evidence in the record) that he has been intentionally treated differently from other persons who have requested records from Defendants. "[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Napier v. Town of Windham, 187 F.3d 177, 182 (1st Cir. 1999)(quoting Anderson v. Liberty Lobby, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986))(alteration in original). Even assuming that Plaintiff was treated differently than others similarly situated, Plaintiff has not alleged that there is no rational basis for the difference in such treatment. See Wojcik v. Mass. State Lottery Comm'n, 300 F.3d at 104 ("An equal protection claim will only succeed if the decision to treat an individual differently than those similarly situated is wholly 'arbitrary or irrational.'")(affirming grant of summary judgment against employee who failed to identify specific evidence concerning specific individuals who received more lenient treatment and also failed to adduce evidence of arbitrary or irrational motive for his termination). Consequently, Plaintiff's equal protection claim fails.[13]

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[13] In Baker v. Coxe, 230 F.3d 470 (1st Cir. 2000), the plaintiffs alleged that state officials had infringed the plaintiffs' equal protection and due process rights by refusing to issue a permit to build a pier. The First Circuit affirmed the dismissal of this claim,

II. Due Process

Defendants argue that, even assuming Plaintiff possesses a recognizable constitutionally protected property interest in the records,[14] Plaintiff has an adequate state law remedy, and, thus, his claim for deprivation of his procedural due process rights must fail. See Defendants' Summary Judgment Mem. (Document #15) at 4. In support of this argument Defendants cite Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), wherein the Supreme Court explained that:

> In procedural due process claims, the deprivation by

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using language which could well be applied to Plaintiff's case merely by substituting the word "record" for the word "permit" in the following passage:

> We have held that even an arbitrary denial of a permit in violation of state law--even in bad faith--does not rise above the constitutional threshold for equal protection and substantive due process claims. We have thus observed a marked difference between the inevitable misjudgments, wrongheadedness, and mistakes of local government bureaucracies and the utterly unjustified, malignant, and extreme actions of those who would be parochial potentates.

Id. at 474 (citation omitted).

[14] In order to establish a due process claim, Plaintiff must first establish a property interest. See Macone v. Town of Wakefield, 277 F.3d 1, 9 (1st Cir. 2002)(citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972)); see also Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 219 (1st Cir. 1994)("The protections of procedural due process are not triggered unless [Plaintiff] can show [he] has been deprived of a protectable liberty or property interest.")(citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985); Bd. of Regents of State Colls. v. Roth, 408 U.S. at 569, 92 S.Ct. at 2705). "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" Fireside Nissan v. Fanning, 30 F.3d at 219 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 538, 105 S.Ct. at 1491 (quoting Roth, 408 U.S. at 577, 92 S.Ct. at 2709)).

> state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. **The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process**. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Id. at 125-26, 110 S.Ct. at 983 (bold added)(citations omitted); see also Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 999 (1st Cir. 1992)(quoting Zinermon). Defendants also note that the Supreme Court has held that even intentional deprivations of property do not violate the Due Process Clause "provided ... that adequate state post-deprivation remedies are available." Defendants' Summary Judgment Mem. at 4 (quoting Hudson v. Palmer, 468 U.S. 517, 533, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984))(alteration in original).

Defendants point to the Rhode Island Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-2-15 (1997 Reenactment)(2002 Supplement), specifically § 38-2-8,[15] as

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[15] R.I. Gen. Laws § 38-2-8 provides:

> 38-2-8. Administrative appeals. — (a) Any person or entity denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that public body for a review of the determinations made by his or her subordinate. The chief administrative officer shall make a final determination whether or not to allow public inspection within ten (10) business days after the submission of the review petition.
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> (b) If the chief administrative officer determines that the record is not subject to public inspection, the person

providing an adequate state law remedy. See Defendants' Summary Judgment Mem. at 5. That statute provides that a person who is denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that body for a review of the determinations made by his or her subordinate. See R.I. Gen. Laws § 38-2-8(a) (1997 Reenactment). The chief administrative officer is required to make a final determination whether or not to allow public inspection within ten business days after submission of the review petition. See id. If the chief administrative officer determines that the record is not subject to public inspection, the person may file a complaint with the state attorney general. See R.I. Gen. Laws § 38-2-8(b). The attorney general is then required to investigate the complaint, and, if the attorney general determines the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief in the superior court of the county where the record is

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> or entity seeking disclosure may file a complaint with the attorney general. The attorney general shall investigate the complaint and if the attorney general shall determine that the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief on behalf of the complainant in the superior court of the county where the record is maintained. Nothing within this section shall prohibit any individual or entity from retaining private counsel for the purpose of instituting proceedings for injunctive or declaratory relief in the superior court of the county where the record is maintained.
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> (c) The attorney general shall consider all complaints filed under this chapter to have also been filed pursuant to the provisions of § 42-46-8(a), if applicable.

R.I. Gen. Laws § 38-2-8 (1997 Reenactment)(2002 Supplement); see also R.I. Gen. Laws § 38-2-7(b)(deeming a failure to respond within ten days to a request to inspect or copy public records to be a denial).

maintained. See id. A failure to respond to a request to inspect or copy a public record within the ten business day period is deemed to be a denial. See R.I. Gen. Laws § 38-2-7(b).

In the Amended Complaint Plaintiff, in fact, alleges that his request to inspect and copy the records was made pursuant to R.I. Gen. Laws § 38-2-3 which gives every person the right to inspect and copy those records, see Amended Complaint (Document #11) ¶ 2A, and that Defendants failed to respond within the ten business days prescribed by § 38-2-7(b), see id. ¶¶ 2A, 2B, 2C. He asserts that Defendants' failure to comply is actionable under 42 U.S.C. § 1983 because it violates the constitutional guarantees of equal protection and due process of law. See id. ¶ 1.[16]

In short, Defendants contend that the statutory review procedure available to Plaintiff through the Rhode Island Access to Public Records statue provides him with an adequate remedy. See Defendants' Summary Judgment Mem. at 5 (citing Hogar Club Paraiso, Inc. v. Llavona, 208 F.Supp.2d 178, 180 (D.P.R. 2002) (finding that preliminary injunction hearing held after revocation of nursing home license constituted adequate post deprivation state remedy and that this was sufficient to meet requirements of due process)). As a consequence there can be no violation of due process rights, and Defendants argue that summary judgment should enter in their favor. See id.

Plaintiff disputes that there is an available state remedy. See Plaintiff's Objection to Summary Judgment at 2. He asserts

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[16] See note 12.

that:

> There is no state remedies [sic] when Defendants failed to produce the name of private complainants on complaint form. Defendants admit under oath at Municipal Court Defendant Evans wrote the private complaint himself. There was no private complaint. Fraud on Federal Court Plaintiff. There is no review procedure or state relief.

Plaintiff's Objection to Summary Judgment (Document #34) at 2-3. Although it is not entirely clear, presumably Plaintiff means that it is pointless for him to pursue relief pursuant to the Rhode Island Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-2-15 (1997 Reenactment)(2002 Supplement), because the form which was produced by Defendants, see Plaintiff's Objection to Summary Judgment, Ex. A (Complaint Phone Form), does not contain the name of the complainant whose complaint prompted the notice of violation. Thus, according to Plaintiff, this omission could not be cured by filing a complaint with the Rhode Island Attorney General pursuant to R.I. Gen. Laws § 38-2-8.[17] The problem with this argument is that Plaintiff's Amended Complaint alleges constitutional violations based on an alleged failure to allow Plaintiff to inspect and copy records, see Amended Complaint

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[17] At the hearing on April 28, 2003, Plaintiff appeared to argue that there was no complainant and that the complaint form had been completed by Mr. Evans. The reason for this action, according to Plaintiff, was to retaliate against him for filing a complaint/lawsuit against the Town as a result of smoke/gas being pumped into Plaintiff's basement. Plaintiff cites no evidence in support of this theory, and conclusory allegations, improbable inferences, or unsupported speculation will not defeat summary judgment, Hershey v. Donaldson, Lufkin & Jenrette Sec. Corp., 317 F.3d 16, 19 (1st Cir. 2003). Moreover, regardless of any merit to this theory, Plaintiff cannot avoid summary judgment based on a claim that is not pled in his Amended Complaint. See Bauchman v. West High School, 132 F.3d 542, 550 (10th Cir. 1997).

(Document #11) ¶ 2, and Plaintiff's argument admits that the record in question was produced to Plaintiff by Defendants. Thus, as to this particular record, Plaintiff's constitutional claims are moot.

Plaintiff also argues that Defendants violated his rights by failing to reply within ten business days to his request to inspect and copy the records. See Plaintiff's Objection to Summary Judgment (Document #34) at 3. He asserts that he need not pursue his state remedies before initiating a § 1983 action, see id., and cites Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961),[18] as support for this proposition. Monroe was overruled in part by Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and in any case Monroe is inapposite. In Monroe, police officers, acting without either a search warrant or an arrest warrant, broke into the plaintiffs' home in the early morning hours. See Monroe, 365 U.S. at 169, 81 S.Ct. at 474. The plaintiffs were routed from bed and made to stand naked in the living room while the police ransacked their home. See id. One of the plaintiffs was then taken to the police station on "'open' charges" and interrogated for ten hours about a two-day old murder. Id. He was not taken before a magistrate although one was available, and he was not allowed to call his family or an attorney. See id. In finding that the plaintiffs had a cause of action under 42 U.S.C. § 1983, the Supreme Court rejected the argument that the plaintiffs must first seek relief through an available state remedy before invoking the federal remedy. See Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473,

[18] Pinpoint citation by the court.

482, 5 L.Ed.2d 492 (1961).

The difference between Monroe and the instant case is that Monroe involved claims of substantive due process violations while Plaintiff's Amended Complaint, construed liberally, can only be viewed as alleging procedural and not substantive due process violations.[19] See Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 1001 n.8 (1st Cir. 1992)("A complaint pleads a substantive due process violation by a local administrative agency only if the facts alleged are 'shocking or violative of universal standards of decency.'")(citing Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990)(quoting Furtado v. Bishop, 604 F.2d 80, 95 (1st Cir. 1979))).

Consequently, resolution of the question of whether Plaintiff has suffered a constitutional deprivation turns upon

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[19] "Unlike a procedural due process claim, in which the Court's focus is on 'how' and by what procedure the state has acted, substantive due process requires a consideration of 'what' the government has done." Aubuchon v. Mass. State Bldg. Code Appeals Bd., 933 F.Supp. 90, 93 (D. Mass. 1996)(citing Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990)).

> The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'"

PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991) (quoting Comm. of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988))(alteration in original). It "protects individuals from state actions which appear shocking or violative of universal standards of decency, or those which are arbitrary and capricious." Aubuchon, 933 F.Supp. at 93 (citations and internal quotation marks omitted).

whether an adequate post-deprivation remedy exists. While it is true that overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983, Zinermon v. Burch, 494 U.S. 113, 124, 110 S.Ct. 975, 982, 108 L.Ed.2d 100 (1990), this is not the case where the claim is for a violation of procedural due process, see id. at 125-26, 110 S.Ct. at 983. The egregious acts alleged in Monroe, if true, violated plaintiffs' substantive due process rights regardless of whether the state provided an available remedy. Here, in contrast, a violation of Plaintiff's right to procedural due process exists only if there is no adequate remedy under state law. See id. This court rejects Plaintiff's argument that the availability of an adequate state remedy does not bar his claim of an actionable procedural due process violation under 42 U.S.C. § 1983. See Reid v. New Hampshire, 56 F.3d 332, 336 n.8 (1st Cir. 1995) ("Given an adequate state-law remedy for a procedural due process violation, no § 1983 claim lies.").

Plaintiff's assertion that Defendants failed to respond to his request for copies of the records, which for purposes of the present motion for summary judgment the court assumes to be true, does not affect the availability of an adequate state remedy. Indeed, such denial or refusal is the triggering circumstance for the prescribed review process. See R.I. Gen. Laws § 38-2-8.

The Court of Appeals for the First Circuit has "cautioned that even the outright violation of state law by local officials is a matter primarily of concern to the state and does not implicate the Constitution--absent fundamental procedural irregularity, racial animus, or the like." Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 1001

n.8 (1st Cir.
1992)(internal quotation marks omitted).

> If the federal courts were to entertain civil rights complaints based on procedural deprivations for which adequate state remedies exist, "every disgruntled applicant could move [its procedural grievances] into the federal courts ...[,] any meaningful separation between federal and state jurisdiction would cease to hold and forum shopping would become the order of the day."

Id. at 999 (alterations in original)(citation omitted).

Plaintiff cites a 1933 New York state appellate court case, Brescia Construction Co. v. Walart Construction Co., 264 N.Y.S. 862 (N.Y. App. Div. 1933), for the proposition that a court should not make findings of fact and conclusions of law when granting a motion for summary judgment. See id. at 871. Summary judgment necessarily involves applying a legal standard to facts which must by definition be undisputed. See Amsden v. Moran, 904 F.2d 748, 752 (1st Cir. 1990). If by "conclusions of law" the Brescia court meant that a court should not apply a legal standard to undisputed facts, this court rejects Brescia as contrary to applicable federal case law.

"[T]he existence and adequacy of the remedies provided by state statutes is a question of law, not of fact." Gudema v. Nassau County, 163 F.3d 717, 724 (2nd Cir. 1998). This court finds as a matter of law that Rhode Island's Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-3-7, provides an adequate state remedy where local officials deny or fail to respond to requests for records. Because Plaintiff has an adequate state remedy, his claim for an alleged violation of procedural due process also fails. See Zinermon v. Burch, 494

U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).[20]

III. Defendants' Tardy Response

Plaintiff's last argument is that Defendants failed to respond to his Amended Complaint within twenty days as this court had directed in its Memorandum and Order dated 10/1/02. See Plaintiff's Motion for Summary Judgment (Document #37); Memorandum and Order dated 10/1/02 (Document #10) at 5. He asserts that as a consequence "Defendants' objection and motions are moot," Plaintiff's Motion for Summary Judgment (Document #37) at 2, and that the "[c]ourt is bound to dismiss in favor of Plaintiff and award all cost to Plaintiff," id.

It appears from the docket that Plaintiff is correct in his contention that Defendants failed to file a response within the twenty days specified by the Memorandum and Order dated 10/1/02. The first filing by Defendants after the issuance of that October 1st Order was the instant motion for summary judgment which was filed on December 16, 2002. Thus, Defendants' response was late. However, default had not entered at the time the response was filed, nor had Plaintiff moved for entry of default. See Fed. R. Civ. P. 55(a) (providing that the clerk shall enter default "when [the fact

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[20] At the April 28, 2003, hearing, Plaintiff submitted to the court a copy of a recent decision by the Rhode Island Supreme Court, Direct Action for Rights & Equality v. Gannon, 819 A.2d 651 (R.I. Apr. 10, 2003). The decision interprets and applies portions of the Rhode Island Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-2-15 (1997 Reenactment)(2002 Supplement). Plaintiff did not direct the court's attention to any specific part of the opinion, and the court finds nothing therein that would detract from the conclusion that the Act provides Plaintiff will an adequate state law remedy. The case recounts the largely successful efforts of a non-profit community action group to compel the Providence Police Department to produce documents relating to civilian complaints of police misconduct. See Direct Action for Rights & Equal. v. Gannon, 819 A.2d at 654.

that a party has failed to plead or otherwise defend] is made to appear by affidavit or otherwise"). Indeed, it appears that until the filing of Plaintiff's Motion for Summary Judgment on April 25, 2003, the fact that Defendants did not file a response within the time prescribed by the Memorandum and Order dated 10/1/02 had escaped everyone's notice, including Plaintiff's. Plaintiff has not pointed to any prejudice resulting from the delay in the filing of Defendants' response to the Amended Complaint, and this court finds none.

Rule 56(b) permits a defending party to move for summary judgment in its favor "at any time ...." Fed. R. Civ. P. 56(b). The filing of an answer is not a prerequisite to the consideration of a motion for summary judgment. See HR Res., Inc. v. Wingate, No. 02-40165, 2003 WL 1813294, at *5 (5th Cir. Apr. 8, 2003)(footnote omitted); see also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968)(affirming grant of summary judgment to defendant who had never answered in more than eleven years of litigation); Jordan v. Kelly, 728 F.2d 1, 3 (1st Cir. 1984) (upholding grant of summary judgment to defendant who had not filed an answer to plaintiff's complaint); Chan Wing Cheung v. Hamilton, 298 F.2d 459, 460 & n.1 (1st Cir. 1962)(affirming grant of summary judgment and finding absence of formal answer immaterial).

The court has discretion to grant additional time for a party to plead or otherwise respond. See Isby v. Clark, 100 F.3d 502, 504 (7th Cir. 1996)(finding district court did not abuse its discretion in allowing amended answer to be filed late where defendants had filed a timely answer to plaintiff's original complaint); Suarez Cestero v. Pagan Rosa, 167

F.Supp.2d 173, 181 (D.P.R. 2001)(denying motion for entry of default because of general disfavor in which default judgments are held in the law and the discretion afforded to the court to grant additional time for a party to plead or otherwise respond). Given that the court has discretion to grant additional time for a party to respond, see id., that Defendants did not ignore the original Complaint but filed an Answer (Document #3), that default had not entered at the time Defendants' Motion for Summary Judgment was filed, that Plaintiff has not shown any prejudice resulting from Defendants' late response, that Plaintiff's filings at times have been incoherent[21] and confusing[22] which may have contributed to Defendants' error, and that Plaintiff's claims lack merit, this court declines to find that the Defendants' Motion for Summary Judgment should be ruled moot or denied because Defendants failed to file a response to the Amended Complaint within twenty days. Accordingly, Plaintiff's argument on this point is rejected.

Conclusion

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[21] See, e.g., Order Denying Without Prejudice Plaintiff's Motion to Amend Complaint (Document #6) at 1-2 (finding both Complaint and Motion to Amend deficient for failure to set forth facts which provide a basis for the action and for Plaintiff's entitlement to relief); Memorandum and Order dated 10/1/02 (Document #10) at 3 (finding ¶ 4 of Proposed Amended Complaint incomprehensible and treating it as surplusage).

[22] See Memorandum and Order dated 10/1/02 (Document #10) at 5 n.3 (noting Plaintiff's filing of an almost identical copy of the Proposed Amended Complaint). Similarly, Plaintiff's predilection for verbose titles for his filings is not conducive to either recognition or comprehension. See, e.g., Plaintiff John Oliveira's Re-Entering His Amended Complaint Now Signed and Notarized to Comply with Rule 7(b)1 and Rule 8 and Rebuts Defendants' Objection Dated 9/20/2002 to Plaintiff's Amended Complaint (Document #11). Additionally, Plaintiff's use of sentence fragments hinders understanding.

For the foregoing reasons, I recommend that Defendants' Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 be granted. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

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David L. Martin
United States Magistrate Judge
May 9, 2003