



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

May 14, 2015

PR 15-17

Mr. and Mrs. Michael E. & Lynn Farinelli

Re: Farinelli v. City of Pawtucket

Dear Mr. & Mrs. Farinelli:

Your Access to Public Records Act (“APRA”) complaint filed against the City of Pawtucket (“City”) is complete. On September 16, 2014, you sought a police report under the APRA involving an incident that involved your family, but which we decline to discuss. In response to your APRA request, the City provided you with the requested police report and did not redact any individually-identifiable information, including but not limited to, the names of the police officers involved. Subsequently, you filed a complaint against one or more of the involved officers, which resulted in an internal affairs report and it is this internal affairs report that you sought through a subsequent APRA request dated October 14, 2014. The City, by letter dated October 28, 2014, denied your request for the internal affairs report and you filed the instant APRA complaint on November 23, 2014, alleging that the City violated the APRA when it denied you access to the internal affairs report.

Pawtucket Solicitor Frank Milos, Esq., provided a substantive response to your complaint. In relevant part, the City states:

“1. On September 16, 2014, Michael Farinelli submitted an APRA request with the Pawtucket Police Department and requested ‘Any and all [reports] with regards to [John Doe’s]¹ death’...The APRA request was forwarded to the City Solicitor’s office on the same day.

2. On September 30, 2014, I prepared and mailed a written response to Mr. Farinelli, which included a complete and unredacted copy of Police Report numbered 14-34700.

¹ For privacy reasons, we refer to this particular individual as John Doe.

3. On October 14, 2014, Michael Farinelli submitted a second APRA request with the Pawtucket Police Department and requested 'The completed investigation conducted by Lt. Gonsalves of the IAD in the matter of the death of John Doe...' The APRA request was forwarded to the City Solicitor's Office on the same day.

4. On October 28, 2014, I prepared and mailed a written response to Mr. Farinelli, denying his request and setting forth the specific substantive basis for the denial. I hereby incorporate my October 28, 2014 letter and request that it be taken and considered as a part of this Answer to Complaint as if it were completely set out herein.

...

7. In light of the foregoing, and based on the statutes and opinions cited in my October 28, 2014 letter, the City contends that it did not violate the APRA when it denied Mr. Farinelli's request for a copy of the Internal Affairs Report... Mr. and Mrs. Farinelli were provided a complete and unredacted copy of Police Report numbered 14-34700, which specifically names the Officers involved in the investigation... Therefore, even providing a redacted copy of the Internal Affairs Report would have resulted in the unwarranted invasion of personal privacy of the Officers who were the subject of the Internal Affairs investigation."

The City's October 28, 2014 denial letter, which is incorporated into the City's substantive response, in relevant part, states:

"...As you know, on September 16, 2014, you previously requested the police report regarding [John Doe's] death. On September 30, 2014, in response to your request, this office provided you with a copy of the specific incident report compiled by the Pawtucket Police Department.

It is my understanding that your current APRA request seeks internal affairs records identifiable to specific police officers who are named in the incident report previously provided to you on September 30, 2014. Please be advised that the City must respectfully deny your request for any Internal Affairs reports which exist regarding this matter. The basis for this denial is that it is the City's belief that the disclosure of the Internal Affairs records could constitute an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(6) (See R.I. Gen. Laws § 38-2-2[4](A)(I)(b), which states in relevant part that the following records shall not be deemed public: 'Personnel and other personal individually-identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 et seq.')

We acknowledge your rebuttal.

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

The APRA's stated purpose is both "to facilitate public access to public records" and "to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-1. Similarly, the United States Supreme Court has made clear that the federal Freedom of Information Act ("FOIA"):

"focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct." U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481-82 (1989) (emphasis supplied).²

The Court further explained that:

"the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." Id. at 774-75, 109 S.Ct. at 1482 (emphases in original).

In the instant case, the City's October 28, 2014 denial letter cites R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts from public disclosure, in pertinent part:

"Personnel and other personal individually-identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would

² The Rhode Island Supreme Court has stated that "[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law." Teacher's Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et. seq...[.]” (Emphasis added).³

The plain language of this provision contemplates a “balancing test” whereby the “public interest” in disclosure is weighed against any “privacy interest.” Consequently, we must consider the “public interest” versus the “privacy interest” to determine whether the disclosure of the requested records, in whole or in part, “would constitute a clearly unwarranted invasion of personal privacy[.]” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

The United States Supreme Court relied on House and Senate Reports to interpret this phrase. See Dep’t of Air Force v. Rose, 425 U.S. 352, 355-57 (1976). The House report stated that “[t]he limitation of a ‘clearly unwarranted invasion of privacy’ provides a proper balance between the protection of an individual’s right of privacy and the preservation of the public’s right to Government information by excluding those kinds of files the disclosure of which might harm the individual.” See id. at 373. Similarly, with respect to a “clearly unwarranted invasion of privacy,” the Senate report weighed the “interests between the protection of an individual’s private affairs from unnecessary public scrutiny, and the preservation of the public’s right to governmental information.” See id. The Supreme Court thus determined that the legislative intent promulgated a balancing test between the individual’s privacy interests and the public’s right to disclosure.

Although decided prior to the 2012 APRA amendments, the Rhode Island Supreme Court’s discussion in The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982) still has some applicability to this matter. In The Rake, Brown University students sought seven (7) years worth of Providence Police Department records regarding civilian complaints of police misconduct. There, the City claimed the requested documents were exempt from disclosure in the entirety pursuant to what was enumerated as R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) because the requested reports contained the names and identities of police officers.⁴ The Superior Court ordered that the records be disclosed after redacting the names of the individual officers and the complainants and Defendant’s appealed. On appeal, the Rhode Island Supreme Court concluded that the requested civilian complaints must be publicly disclosed, but in redacted form. The Supreme Court explained:

“[t]he statute requires that the records must be identifiable to an individual applicant in order for the exemption to take effect. In the present case, the reports do not identify the citizen complainants or the police officers because the names of both have been deleted as ordered by the Superior Court justice. Consequently,

³ This amendment became effective September 1, 2012.

⁴ This provision exempted “[a]ll records which are identifiable to an individual applicant for benefits, clients, patient, student, or employee; including, but not limited to, personnel, medical treatment, welfare, employment security, and pupil records and all records relating to a client/attorney relationship and to a doctor/patient relationship.”

an important prerequisite for application of the exception has not been met.” The Rake, 452 A.2d at 1148 (emphasis added).

Accordingly, The Rake stands for the authority that even prior to the 2012 APRA amendment certain police records, *i.e.*, seven (7) years worth of civilian complaints, were public records after information identifying named police officers was redacted.

The Court revisited this issue in Direct Action for Rights and Equality v. Gannon, 713 A.2d. 218 (R.I. 1998), overturning a decision by the trial court to release records regarding civilian complaints in unredacted form. In DARE, a community-action group, Direct Action for Rights and Equality, made an APRA request to the Providence Police Department seeking records pertaining to civilian complaints of police misconduct, which included the name of the person filing the complaint and the name of the officer who was the subject of the complaint. See id. at 218. The records sought were in some ways similar to the document you seek in this case:

- a.) “Every ‘Providence Police Civilian Complaint report’...filed within the Providence Police Dept. from 1986 to present.
- b.) A listing of all findings from investigations that was [*sic*] conducted by the Bureau of Internal Affairs, in reference to all ‘Providence Police Civilian Complaint reports’ on record from 1986 to present.
- c.) All reports made by the ‘Providence Police Department Hearing officers [] on their [*sic*] decesions [*sic*] from the findings of investigations conducted in Re: Providence Police Civilian Complaints’...from 1986 to present.
- d.) Reports on all disciplinary action that’s [*sic*] been taken as a result of recommendations made by the Hearing Officers [’] Division since 1986 to present.”

See id. at 220.

The trial justice concluded that documents relating to the above categories were public records and that the requested documents must be disclosed in unredacted form, *i.e.*, with the names of the complainants and officers included. See id. at 221. The Supreme Court disagreed and concluded that documents relating to category (b) were exempt from public disclosure (based upon the determination that the requested documents did not exist) and, similar to its reasoning in The Rake, documents relating to categories (a), (c), and (d) were public records, but the names of the complainants and the officers should be redacted. See id. at 225.

In this case, after reviewing the internal affairs report *in camera*, using the above case law for guidance, and based on the evidence presented, we conclude that disclosure of the internal affairs report in a redacted manner would not constitute a “clearly unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). In other words, we find that the internal affairs report does shed at least some light on the City’s operations. See Reporters Committee, 489 U.S. at 1481-82. Specifically, disclosure of the redacted internal affairs report will further the public’s interest in knowing “the manner in which a law enforcement agency addresses the concerns of its citizens regarding civilian complaints.” See DARE 713 A.2d at 224. In regards

to any privacy interests in the internal affairs report, we find that, on balance, the scale tips in favor of disclosure. Indeed the crux of the City's argument centers on the prior release of the police report and does not identify the nature or the quantity of the privacy interests in disclosure. If simply asserting a privacy interest was determinative of whether records are exempt under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), without more, there would be no need for a balancing test and, as indicated supra, the plain language of this provision contemplates a balancing between the public interest in disclosure and the privacy interest in non-disclosure. Respectfully, it is difficult to recognize a privacy interest in the entire internal affairs report where it was the City's decision to release the unredacted police report under the APRA.

Here, the City contends that disclosure of the internal affairs report would "result in the unwarranted invasion of personal privacy of the Officers who were the subject of the Internal Affairs investigation" because you were provided "a complete and unredacted copy of [the police report], which specifically names the Officers involved in the investigation." The City suggests, since it previously released an unredacted copy of the police report, that disclosing even a redacted copy of the internal affairs report could lead to the identity of the officers who were the subject of the internal investigation and that identification would "constitute a clearly unwarranted invasion of personal privacy." See R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). A similar argument was made in The Rake where defendants argued that since "the facts set forth in each report could be matched with newspaper accounts of the incident that gave rise to the complaint," the public would be able to identify the parties involved even if the reports were redacted. Id. at 1149. The Supreme Court rejected this argument and held that "while recognizing that the scenario defendant presents us with could occur, we feel that on balance the public's right to know outweighs such a possibility." Id. We reach the same conclusion here. Although the prior disclosure of the unredacted police report was one factor we considered, ultimately, our conclusion must be consistent with the legal precedent established in The Rake and DARE.⁵ Therefore, we conclude that redacting any personal individually-identifiable information would strike a "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information." See Dep't of Air Force v. Rose, 425 U.S at 373. The City, as well as those seeking guidance from this finding, should be advised that our finding is limited to the unique facts presented herein. Accordingly, we find that the City violated the APRA when it denied you access to the internal affairs report in its entirety.

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). 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).

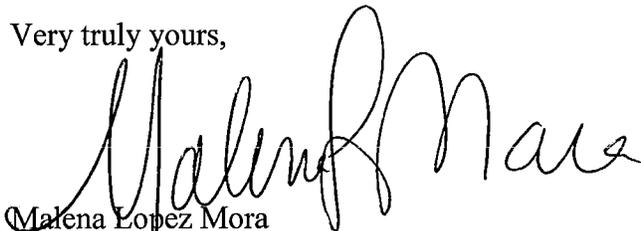
⁵ While there are similarities between the police report and the internal affairs report, the differences between the two are notable and, based on our review of the police report, we question whether the public's interest in that document outweighed the privacy interests implicated by unredacted disclosure.

While we find that a civil fine is not appropriate, we conclude that the City must respond to your APRA request in a manner consistent with the APRA, The Rake, and this finding by providing you with a copy of the internal affairs report. In doing so, the City may redact information contained within the documents that would constitute a “clearly unwarranted invasion of personal privacy,” such as information that would directly lead to the identity of persons whose privacy interests outweighs the public interest in disclosure. We would envision this category to include family members and other individual(s) involved in the underlying incident, as well as the officers who were the subject of the internal investigation. See Direct Action for Rights and Equality v. Gannon, 819 A.2d 651, 1663 (R.I. 2003) (“redactable information should include any information that directly could identify a complainant or officer against whom a complaint was made.”) (badge numbers redacted). While we do not exclude the possibility that the identities of other individuals may be redacted, on the present record we are unable to reach this conclusion and leave this determination to the City in a manner consistent with the APRA.

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). If you do not receive a response from the City consistent with this finding within ten (10) business days, kindly advise this Department so that we may further review this situation. 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,



Malena Lopez Mora
Special Assistant Attorney General
Ext. 2307

Cc: Frank J. Milos, Jr., Esquire