



State of Rhode Island and Providence Plantations

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*Attorney General*

**VIA EMAIL ONLY**

December 09, 2019

PR 19-23

Mr. Steven Levitt

Joseph J. Rodio, Jr., Esquire  
Legal Counsel, Office of the Lieutenant Governor

**RE: Levitt v. Office of the Lieutenant Governor**

Dear Mr. Levitt and Attorney Rodio:

The investigation into the Access to Public Records Act (“APRA”) complaint filed by Mr. Steven Levitt (“Complainant”) against the Office of the Lieutenant Governor (“Office”) is complete. For the reasons set forth herein, we find that the Office violated the APRA.

**Background**

The Complainant made an APRA request to the Office, seeking “timesheet/schedule of Anthony Silva, chief of staff, for the week ending 12/31/2018.” The Office timely responded that the requested record was exempt from public disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). In response, the Complainant filed this complaint.

Legal counsel for the Office, Attorney Joseph Rodio, Jr., provided a substantive response to the complaint, as well as a one page document for *in camera* review evidencing the hours worked/accounting of time for Mr. Silva over a two week period, which the Office identifies as a “possibly responsive document.” The Office indicates that this document is exempt because disclosure would constitute a clearly unwarranted invasion of personal privacy, and that even though R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) identifies various categories of information deemed public for employees, “time sheets are notably absent from the explicit list of items related to public employees that are deemed public.” The Office also cites federal case law, which shall be discussed, *infra*. We received no rebuttal.

Relevant Law and Findings

When we examine an APRA complaint, our authority is to determine whether a violation of the APRA has occurred. *See* R.I. Gen. Laws § 38-2-8. In doing so, we must begin with the plain language of the APRA and relevant caselaw interpreting this statute.

As an initial matter, we conclude based on our review that the “possibly responsive” document provided for our *in camera* review is responsive to the request to the extent that it pertains to “the week ending 12/31/2018.” We next consider whether the Office properly withheld the document.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. *See* R.I. Gen. Laws § 38-2-3(a). Pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), the APRA exempts from disclosure:

[p]ersonnel 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.*; provided, however, with respect to employees \* \* \* the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and any other remuneration in addition to salary, job title, job description, dates of employment and positions held with the state, municipality, or public works contractor or subcontractor on public works projects, employment contract, work location, and/or project, business telephone number, the city or town of residence, and date of termination shall be public. (Emphasis added).

The Office largely relies upon *Berger v. Internal Revenue Service*, 487 F. Supp. 2d 482 (D.N.J. 2007), *aff'd* 288 Fed. Appx. 829 (3<sup>rd</sup> Cir. 2008) (unpublished). In that case, the Office submits, “the United States Third Circuit Court of Appeals agreed that the privacy interest outweighed any public interest in the contents of the time sheets.” Response at 3 (citing *Berger*, 288 Fed. Appx. At 833). But our review of *Berger* leads us to conclude that the “time sheets” at issue in that case differ greatly from the “time sheets” at issue in this case. For instance, in *Berger*, Officer Williams’ time sheets were described as containing “extensive amount[s] of personal information” and memorializing the “time spent on the investigation of Plaintiffs.” *Berger*, 487 F. Supp. 2d at 505-06. In this case, however, we have reviewed *in camera* the responsive document and can find nothing that approaches what can fairly be described as “extensive amount[s] of personal information.”

To be sure, R.I. Gen. Laws § 38-2-2(4)(I)(A)(b) requires the Office to balance the public interest in disclosure versus the privacy interest, and in this case, Complainant identifies no specific public interest. But where at least some public interest is apparent, the failure of the Complainant to assert a public interest is not fatal. Here, at least one public interest is apparent, *i.e.*, how public employees account for their time while paid by the public. *See Dobronski v. Federal Communications Commission*, 17 F.3d 275, 278 (9<sup>th</sup> Cir. 1994) (“As for the plaintiff’s interest in

disclosure, Dobronski, or any other citizen, has a right to investigate whether government officials abuse their offices and the public fisc by improperly using sick leave to take unauthorized paid vacations.”). Balanced against this public interest in disclosure, the Office has not identified any privacy interests other than a general argument that disclosure of an employee’s time sheet (time card) is an unwarranted invasion of personal privacy. Whatever privacy interests may be implicated through the disclosure of this time sheet (time card), we are confident that disclosure, at least in this context, is not “a clearly unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

*Dobronski*, where a request was made for the “work attendance and sick leave records for an assistant bureau chief,” supports our conclusion. See *Dobronski*, 17 F.3d at 277. In holding the work attendance and sick leave records of a particular employee were public records, the District Court concluded that the documents did not fall within Exemption 6 – an exemption that in relevant part parallels R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). The Court explained that “[t]he documents consist mainly of leave slips and, with the exception of the assistant’s social security number, contain no personal information. The leave slips do not describe the reasons why leave was being taken. Thus, the privacy interests in these leave slips is minimal at best.” *Id.* (quoting *Dobronski v. FCC*, Civ. 91–1295, at 3 (D. Ariz. June 16, 1992)). On appeal, the Ninth Circuit Court of Appeals affirmed, observing that “[t]he records do not state the reasons why the assistant took sick leave, merely the dates on which she took sick leave.” *Id.* at 279 (emphasis added). As such, the Court held, “although the assistant in question may have some privacy interest \* \* \*, we find that disclosure does not constitute a ‘clearly unwarranted invasion of personal privacy,’ given the public interest in knowing whether sick leave was being abused to allow for inappropriate paid vacations.” *Id.* at 280.

Lastly, the Office suggests that because time sheets or time cards are not listed within R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) as information that must be made public, this omission supports its position. Respectfully, we disagree. As detailed, *supra*, R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) lists various categories of information that “shall be public.” The absence of time sheets or time cards does not support the Office’s position that such records are exempt from public disclosure, but rather advances this Office’s conclusion that such records are subject to a balancing test. Our conclusion is also supported by amendments made to the APRA in 2012. Specifically, prior to the 2012 amendment, the APRA exempted from disclosure all records identifiable to an individual employee, with the exception of a delineated list of information that did not include time sheets. On that basis, this Office held that the APRA did not require disclosure of specific individuals’ time sheets. See *WPRI v. Department of Labor and Training*, PR 09-33. After the 2012 amendments, the language exempting records identifiable to an individual employee was replaced with the balancing test language discussed in this finding. This change in the APRA’s language – aimed at increasing transparency – further supports our conclusion in this matter. For its part, the Office acknowledges that the time sheet or time card is subject to the balancing test analysis discussed herein, but for the reasons already discussed, concluded that disclosure constituted an unwarranted invasion of personal privacy. This is a conclusion with which we disagree.

Conclusion

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). Additionally, 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).

Based on the evidence presented, we do not conclude that the Office’s conduct evinces a willful and knowing, or alternatively, reckless violation of the APRA. Our conclusion is guided, in part, by the lack of binding legal authority on this issue. Moreover, until 2012 (when the APRA was amended), it was undisputed that under the APRA, time cards were exempt from public disclosure. *See WPRI v. Department of Labor and Training*, PR 09-33, abrogated through legislation. Although injunctive relief may be appropriate in this case, we will allow the Office ten (10) business days within issuance of this finding to disclose the document to the Complainant in a manner consistent with the APRA and our findings, *supra*. No charges may be assessed by the Office. *See* R.I. Gen. Laws 38-2-7(b). Although we do not find a willful and knowing, or reckless, violation, the Office is advised that its actions in this matter violated the APRA and that this finding may be used as evidence of a willful and knowing, or reckless, violation in a future, similar case.

Although the Attorney General will not file suit in this matter at this time, 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 this file as of the date of this letter, but reserve the right to reopen this matter should the circumstances warrant.

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

Sincerely,

PETER F. NERONHA  
ATTORNEY GENERAL

By: /s/ Michael W. Field  
Michael W. Field  
Assistant Attorney General