



State of Rhode Island and Providence Plantations

**OFFICE OF THE ATTORNEY GENERAL**

150 South Main Street • Providence, RI 02903

(401) 274-4400

*Peter F. Neronha*  
*Attorney General*

**VIA EMAIL ONLY**

May 7, 2020  
PR 20-40

Mr. Walter Moore

Ron Cavallaro, Esquire  
General Counsel, Office of the Postsecondary Commissioner

**RE: Moore v. Office of the Postsecondary Commissioner**

Dear Mr. Moore and Attorney Cavallaro:

We have completed an investigation into the Access to Public Records Act (“APRA”) complaint filed by Mr. Walter Moore (“Complainant”) against the Office of the Postsecondary Commissioner (“OPC”). For the reasons set forth herein, we find that the OPC violated the APRA by withholding a responsive resume in its entirety.

**Background and Arguments**

The Complainant sent three APRA requests to the OPC requesting various documents related to a senior business analyst position that the OPC filled. Although the OPC provided documents in response to some of these requests, the Complainant asserts that the OPC violated the APRA in two ways: (1) when it asserted that it did not maintain certain documents responsive to some of his requests; and (2) when it withheld a public employee’s resume under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

The OPC demurs. It maintains that one of the Complainant’s requests was actually a question that sought legal conclusions and thus was not a cognizable APRA request. Regarding the other requests for which no documents were produced, the OPC asserts that it does not maintain responsive records. Finally, the OPC contends that nondisclosure of the resume was proper under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

We acknowledge the Complainant's rebuttal.<sup>1</sup>

At this Office's request, the OPC submitted a copy of the withheld resume for our *in camera* review.

Relevant Law and Finding

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.

1. Whether OPC Maintained Responsive Records

The Complainant alleges that the OPC failed to identify and provide documents responsive to two of his requests. For both requests, we find no violation.

a. *The August 1, 2019 Request*

On August 1, 2019, the Complainant requested the following documents regarding the senior business analyst position:

- “Minutes from the Council meeting when this promotion was approved
- Agenda for the Council meeting
- Commissioner or OPC recommendation to the Council regarding the reclassification
- Old job description
- Change in Position Request Form
- Resume [of the successful applicant hired]”

The OPC provided the old job description but asserted that it does not maintain the remaining documents (with the exception of the resume, discussed below). The OPC explained that the senior business analyst position was reclassified such that it did not require Council approval. As such, the OPC asserts it does not maintain any responsive minutes, agenda, recommendation, or change in position request form.

The Complainant insists that the Council's policy did not permit the position to be reclassified in this manner and that the OPC should maintain responsive records.

The APRA mandates that “all records maintained or kept on file by any public body \*\*\* shall be public records and every person or entity shall have the right to inspect and/or copy those records.” R.I. Gen. Laws § 38-2-3(a).

---

<sup>1</sup> To the extent that the Complainant's rebuttal asserts that the OPC violated the policies of the Council of Postsecondary Education (“Council”), those contentions do not pertain to the APRA and will not be addressed. *See* R.I. Gen. Laws § 38-2-8.

The OPC's counsel submitted a signed statement to this Office representing that the OPC does not maintain the requested minutes, agenda, recommendation, or change in position request form. The Complainant did not present any evidence that the OPC does maintain these requested records. While the Complainant insists that the OPC *should* have filled the position in a different manner, and thus *should* maintain these documents, the APRA only applies to documents that *are* maintained or kept on file. *See* R.I. Gen. Laws § 38-2-3(a). Here, the undisputed evidence indicates that the OPC does not maintain the requested minutes, agenda, recommendation, or change in position request form. Based on the undisputed record before us, we conclude that the OPC did not violate the APRA by not providing documents it did not maintain. *See Lopez v. City of Providence*, PR 20-03 (“Because the APRA does not require a public body to disclose records that do not exist or that are not within its custody or control, we find no violation[.]”); *see also* R.I. Gen. Laws § 38-2-7(c). Whether the OPC *should* maintain these documents or otherwise complied with applicable practices or regulations, is beyond the scope of this finding.

b. *The August 14, 2019 Request*

On August 14, 2019, the Complainant requested the following:

“please provide me with the RI General Law or Council policy and procedures given [sic] OPC the authority to make a career ladder promotion reclassification without Council approval and without retaining any personnel records to substantiate the promotion of an individual from business analyst to senior business analyst.”

The OPC responded that the request was not a cognizable APRA request because it required the OPC to answer questions and provide legal conclusions. Without waiving the foregoing, the OPC referred Complainant to a copy of the Council's Personnel Policy Manual (“Policy Manual”), which it had already provided to the Complainant in response to his prior August 1, 2019 request.

The Complainant maintains that he was not asking the OPC to answer questions or provide legal conclusions and that the OPC should maintain responsive records.

We have questions regarding whether Complainant's August 14, 2019 correspondence was a cognizable request under the APRA. We are mindful that the APRA governs the public's right to access public *documents* but does not mandate that public bodies answer questions or conduct research and reach legal conclusions. *See* R.I. Gen. Laws § 38-2-1 (“The purpose of this chapter is to facilitate public access to public records”); *see also Blais v. Revens*, No. C.A. PC-01-1912, 2002 WL 31546103, at \*9 (R.I. Super. Nov. 7, 2002) (“Public bodies are repositories of records, not libraries; and their administrators are not research assistants who should cull, compile or consolidate the data sought based upon their own idea of what is appropriately extrapolated from the existing records given the discernable objectives behind the request”).

Nonetheless, we find it unnecessary to resolve this question because it is uncontested that the OPC responded to the request by referring Complainant to a copy of the Policy Manual that it had

provided to him. The Complainant contends that the Policy Manual does not provide the OPC with the authority to make the type of career ladder promotion described in the request. However, the Complainant did not ask for a particular document or documents, but rather asked the OPC to provide him with documents that responded to the substance of his inquiry. The OPC complied by referring him to a policy that it had provided him and that the OPC believed was responsive. Whether the Policy Manual actually gives the OPC the relevant authority is a legal question and legal conclusion that is beyond the scope of the APRA. *See id.* In these circumstances, we do not find that the OPC violated the APRA when it provided the Policy Manual.

## 2. Whether the Public Employee's Resume Was Properly Withheld

We turn next to the Complainant's July 4, 2019 request for "Education and Experience records (resume) for the successful applicant hired, transferred, or promoted to the position[.]" a request that he renewed in the August 1, 2019 request. Because both complaints concern the same issue and the same document, we consolidate both aspects of the complaints.

The OPC did not deny that it maintains a resume for this individual, but rather explained that any resume for this individual would have been submitted in connection with applying for a different position several years earlier, and thus is not responsive. We disagree that the request can be read so narrowly. The Complainant's request specifically sought the resume of the person "promoted to the position." A reasonable interpretation of the Complainant's request encompasses the latest resume of the promoted individual that is maintained by the OPC, regardless of whether the resume was submitted as part of an application process for the senior business analyst position. The OPC submitted a copy of the individual's latest resume for our *in camera* review. There is no evidence or argument that the OPC maintains any additional responsive documents.

In responding to the Complainant's requests for a resume, the OPC also argued that any resume it maintained was not a public document, citing the employee's privacy interests.

The Complainant alleges that the OPC violated that APRA when it withheld the resume, citing *Jackson v. Town of Coventry*, PR 14-35 and *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir. 1984). The OPC disagrees, asserting that both cited cases are distinguishable because here there was no posting of a vacant position, no applicants for the position, and no resumes or applications submitted in connection with this particular position. The OPC maintains that nondisclosure was proper under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) because the requested records implicate the employee's privacy interests and "experience" records for a public employee are not specifically listed in the enumerated list of personally-identifiable information that *shall* be public under the APRA. *See* R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

The APRA provides that all records maintained by public bodies are subject to public disclosure unless the document falls within one of the twenty-seven (27) enumerated exemptions. *See* R.I. Gen. Laws § 38-2-2(4)(A)-(AA). Among other exemptions, the APRA permits nondisclosure of "[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[.]" R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). Although the

APRA mandates disclosure of certain enumerated information regarding public employees (that does not include resumes), for other personnel or individually identifiable information not specifically enumerated in the statute, the plain language of R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) contemplates a “balancing test” whereby the public interest in disclosure is weighed against any privacy interest.

This Office has previously addressed the balancing test’s application to public employees’ resumes. In *Jackson v. Town of Coventry*, PR 14-35, this Office conducted the balancing test to determine whether resumes submitted to the Town of Coventry by individuals seeking employment as Town Finance Director and Director of Public Works were public records subject to disclosure. We concluded that disclosure of the resumes of individuals employed with the Town would not constitute a “clearly unwarranted invasion of personal privacy.” See R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). Specifically, we found that “the public has at least some interest in knowing that the successful applicants for a public position are qualified and capable to hold that position and that viewing the resumes of the successful applicants will further the public interest.” *Jackson*, PR 14-35. We also found that this public interest outweighed any privacy interest and thus directed the Town to disclose the resumes of the successful applicants and to redact information that would constitute a “clearly unwarranted invasion of personal privacy.” *Id.* Conversely, after balancing the privacy interests of the unsuccessful applicants against the public’s interest in the resumes, we found that the scale tipped in favor of nondisclosure. Specifically, we found that viewing the resumes of individuals who were not selected for employment by the Town would provide little to no insight “on how government operates.” See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (explaining that the right to access public records “focuses on the citizens’ right to be informed about ‘what their government is up to’”).

Consistent with this precedent, we find that the OPC violated the APRA when it withheld the public employee’s resume in its entirety. Like *Jackson*, we find here that disclosure of the resume (and thus the qualifications) of a public employee furthers the public interest in knowing that those in public positions are qualified and capable to hold that position. *Jackson*, PR 14-35. Although there may be some privacy interests implicated by disclosure of a resume, we find that those privacy interests are outweighed by the public interest in instances where the employee was hired by the public body. We do not find that this analysis is significantly altered simply because the public employee’s resume was submitted in connection with a previous position the employee obtained with the public body. Indeed, under *Jackson*, the employee’s resume related to this prior position would be a public record.

However, we do find that the OPC may redact certain limited information contained in the resume where disclosure would constitute a “clearly unwarranted invasion of personal privacy,” such as a home telephone number, home address (street name and number), and/or personal e-mail address. See *Jackson*, PR 14-35. There is no apparent public interest but significant privacy interests in such information. Based on the record before us, we also find that redaction of the names, addresses, and contact information of the references listed at the end of the resume is also appropriate as such information implicates those individuals’ privacy interests and we have not been presented with any overriding public interest, nor is any apparent to us. Our decision regarding the references is based on the particular circumstances of the record before us where the request sought the resume

of the hired individual. We question whether the references appended to the resume are responsive to this request and, in any event, the public interest asserted by the Complainant was in the employee's qualifications as reflected on a resume.

For these reasons, we find that the OPC's nondisclosure of the resume in its entirety violated the APRA. *See* R.I. Gen. Laws § 38-2-3 (requiring public body to provide any reasonably segregable portion of a public record that is not exempt).

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). 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).

Here, based on the evidence presented, we find no evidence of a willful and knowing, or reckless, violation. We recognize the OPC's assertions that it withheld the resume based on a belief that it was nonresponsive or exempt. However, this finding serves as notice to the OPC that its conduct violated the APRA and may serve as evidence in a future similar situation of a willful and knowing, or alternatively reckless, violation.

Although injunctive relief may be appropriate, we will allow the OPC twenty (20) business days to respond to the Complainant's APRA request by providing the resume in a manner consistent with our finding and the APRA. If the Complainant does not receive a response as described in this finding, this Office should be notified. The OPC should copy this Office in its response to the Complainant.

Although the Attorney General will not file suit in this matter at this time, nothing within the APRA prohibits an individual from instituting injunctive or declaratory relief in Superior Court. *See* R.I. Gen. Laws § 38-2-8(b). Please be advised that this file will remain open pending the OPC's response.

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

Sincerely,

PETER F. NERONHA  
ATTORNEY GENERAL

By: /s/ Sean Lyness  
Sean Lyness  
Special Assistant Attorney General