



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

May 8, 2020
PR 20-42

Mr. Harry August

Steven A. Colantuono, Esquire
Chief Legal Counsel, Rhode Island Public Transit Authority

Re: August v. Rhode Island Public Transit Authority

Dear Mr. August and Attorney Colantuono:

The investigation into the Access to Public Records Act (“APRA”) Complaint filed by Mr. Harry August (“Complainant”) against the Rhode Island Public Transit Authority (“RIPTA”) is complete. For the reasons set forth herein, we find that RIPTA violated the APRA.

Background

The Complainant submitted a three-part APRA request to RIPTA on February 28, 2019 seeking various documents related to RIPTA’s contracts with Brown University (“Brown”) and Rhode Island School of Design (“RISD”). Part (3) of the request sought “[a]ll ridership reports or similar documents that reference [Brown] or [RISD].” RIPTA responded on March 7, 2019. In response to part (3) of the request, RIPTA provided a single “Ridership Data” document. On March 14, 2019, after having reviewed the provided documents that apparently referenced monthly ridership reports prepared by RIPTA for each of the respective schools, the Complainant questioned RIPTA why these monthly ridership reports had not been produced in response to part (3) of his request. RIPTA responded on March 19, 2019 by providing a “sample” of one month of ridership report¹ records for one school consisting of approximately 550 pages with student and faculty ID numbers redacted. RIPTA also requested prepayment from the Complainant to complete search, retrieval, and review of the remaining monthly ridership reports. When Complainant questioned the

¹ A ridership report lists a series of individual bus trips and the corresponding rider’s individual card ID number (but not name), along with the number, direction (inbound/outbound), and run number of the bus, as well as the date and boarding time.

redactions, RIPTA responded on March 26, 2019 by stating that “the privacy interests of the individuals indetified [sic] outweigh the public interest in disclosure.”

The Complainant appealed the redactions to RIPTA’s Chief Executive Officer, Scott Avedisian. On April 25, 2019, Mr. Avedisian upheld the nondisclosure of the ID numbers on the grounds that disclosure would be “an unwarranted invasion of privacy” because student ID numbers constitute “personally identifiable information” protected under the Family Education Rights and Privacy Act (“FERPA”).

Dissatisfied with this response, the Complainant filed a complaint with this Office.

Arguments

The Complainant raises two allegations. First, he alleges that RIPTA violated the APRA when it failed to provide monthly ridership reports in response to his APRA request. The Complainant argues that monthly ridership reports “clearly fall under item (3) of my request that asks for ‘all ridership reports’” and “RIPTA was in possession of documents that I specifically asked for and they did not include in their response, nor provide a reason for their absence.”

Second, Complainant alleges that RIPTA violated the APRA by redacting the individual ID numbers in the sample ridership report it provided him. The Complainant argues that he is entitled to unredacted ridership reports, including student and/or faculty ID numbers, because “riding the bus in not a private act, and carries no expectation of privacy.” Complainant also maintains that “there is a significant public interest in disclosure. These reports will allow for a careful analysis of how Providence’s private university students use public transportation, the average and median quantity of rides taken by students and staff, the number of students who have never taken the bus, and an evaluation of whether the contract between RIPTA and Brown is in the best interests of both parties.”

RIPTA provided a substantive response through its Chief Legal Counsel, Steven Colantuano, Esquire, wherein it argued that “the student ID numbers in question, which would be prominent in the ‘ridership data’ [Complainant] requested, is protected from disclosure by [FERPA] 20 USC Section 1232g[.]” RIPTA asserts that “[t]he duty to protect these student records flows from the educational institutions to RIPTA by contractual agreements.” RIPTA asserts that such information is exempt pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts “personal individually identifiable records otherwise deemed confidential by federal law or state law or regulation, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]”

Brown and RISD submitted a combined letter, through their respective legal counsel, in support of RIPTA’s position that student ID numbers are protected from disclosure as “personally identifiable information” as defined by FERPA, 34 C.F.R. § 99.3(d). Both institutions acknowledge that “educational institutions may, under certain limited circumstances, designate student identifiers as disclosable ‘directory information’...[but contend that] neither of our institutions has designated the relevant student ID numbers as directory information.”

We acknowledge the Complainant's 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.

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 exceptions. *See* R.I. Gen. Laws § 38-2-2(4)(A)-(AA). Pursuant to the APRA, a public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the period necessary to comply as provided in the APRA. *See* R.I. Gen. Laws §§ 38-2-3(e), 38-2-7. Additionally, “[a]ny denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial. Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” R.I. Gen. Laws § 38-2-7(a).

The Complainant argues that RIPTA violated the APRA by failing to provide, or otherwise exempt, the monthly ridership reports in response to the initial request for “[a]ll ridership reports or similar documents that reference Brown University or Rhode Island School of Design ridership.” On March 7, RIPTA responded to this part of Complainant’s request by providing only a one-page document entitled “Ridership Data” listing yearly ridership information for each institution from 2010-2018. RIPTA did not indicate that it was withholding any documents. Upon inquiry from Complainant, RIPTA did not dispute that the monthly ridership reports were responsive to part (3) of Complainant’s APRA request. Additionally, in responding to this complaint, RIPTA again did not dispute that the monthly ridership reports were responsive to Part (3) of the request. RIPTA also did not present argument or otherwise explain why it did not identify these responsive documents when initially responding to Complainant’s APRA request.

Based on the record before us, we conclude that Complainant’s request for all ridership reports related to Brown and RISD reasonably encompassed the monthly ridership reports prepared by RIPTA for Brown and RISD for the requested timeframe.² There is also no evidence that RIPTA, within ten (10) business days of the request, sought an extension of time or requested prepayment to search, retrieve, and review these monthly reports. *See* R.I. Gen. Laws §§ 38-2-3(e), 38-2-4. Accordingly, we find that RIPTA violated the APRA when it failed within ten (10) business days

² Part (3) of Complainant’s APRA request did not specify a timeframe but the other two parts of the request asked for documents “since 2010.” Based on subsequent correspondence between the parties, it appears both parties understood the requested timeframe for monthly reports to be the last ten years. We note that RIPTA’s initial response to the APRA request did not seek to clarify the timeframe requested and did not even identify the existence of any monthly reports.

of the request to identify and provide, or otherwise exempt, the monthly ridership reports responsive to Complainant's request.

Next, the Complainant alleges that RIPTA improperly redacted faculty and student ID numbers in the single monthly ridership report it eventually provided to him. The Complainant also noted that it was unclear "what legal test, of privacy versus public interest" was being referenced in RIPTA's March 26, 2019 correspondence responding to the Complainant's inquiry seeking the basis for the redactions.

The record reveals that on March 19, 2019, RIPTA provided the Complainant a sample redacted ridership report and requested prepayment for searching, retrieving, and reviewing the remaining requested monthly ridership reports. RIPTA did not provide a basis for the redactions until its March 26, 2019 letter. RIPTA's March 26, 2019 response asserted that "the privacy interests in the individuals indentitified [sic] outweigh the public interest in disclosure."³

Rhode Island General Laws § 38-2-2(4)(A)(I)(b) exempts from disclosure "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." The plain language of this provision contemplates a "balancing test" whereby the public interest in disclosure is weighed against any privacy interest.

In arguing that there is a privacy interest in the ID numbers, RIPTA invokes FERPA. The record indicates that the treatment of student ID numbers under FERPA can vary between educational institutions, and in some cases can vary by individual based on whether a student has opted out of having such numbers disclosed.⁴ The parties in this matter raised competing arguments about the level of privacy protection afforded student ID numbers at Brown and RISD.

We do not deem it necessary to resolve the parties' dispute regarding how Brown and RISD each treat ID numbers under FERPA. The undisputed evidence indicates that ID numbers are identifiable to specific individually identifiable students and faculty. In unredacted form, the requested ridership reports would allow the movements of identifiable individuals (through their ID numbers) to be tracked, including the specific busses and bus routes that were taken and the exact dates and times of those bus trips. To the extent the Complainant argues that student ID numbers are not treated as private information, that only reinforces the concern that anyone who gains access to an individual's ID number could then match the ID number to a specific person

³ The Complainant primarily argues that the redactions were substantively improper. To the extent Complainant also contends that RIPTA's assertion of an exemption was not timely or not sufficiently specific, we agree with the former argument but reject the latter argument. As detailed herein, RIPTA did not timely provide or otherwise exempt the responsive ridership reports. However, RIPTA's March 26 response did cite privacy and the balancing test as the reason to redact.

⁴ Although the record indicates that some of the redacted ID numbers may belong to faculty, the parties generally seem to agree that most of the implicated ID numbers belong to students. In any event, we think that the same general analysis applies to both student and faculty ID numbers.

and then use the ridership report to track that person's precise movements and bus use. Although Complainant suggests that riding the bus is a public act, the ridership reports would allow the precise tracking of an individual's day-to-day movements in a manner that raises privacy concerns that are not implicated by simply observing someone riding a bus. As such, we conclude that there is at least some personal privacy interest in the ID numbers listed on the ridership report sought by Complainant.

Because we find that individual privacy interests are implicated in the requested records, we must next consider whether the public interest in disclosure outweighs the privacy interests implicated. Under the APRA, the public has an interest in a document that "sheds light" on how government operates. *See Direct Action for Rights and Equality v. Gannon*, 713 A.2d 218 (R.I. 1998); *Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-773 (1989) ("Whether disclosure of a private document is "warranted" within the meaning of the Exemption turns upon the nature of the requested document and its relationship to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties[.]").⁵

Complainant contends that there is a public interest in disclosure of the student ID numbers because the disclosure "will allow for a careful analysis of how Providence's private university students use public transportation, the average and median quantity of rides taken by students and staff, the number of students who have never taken the bus, and an evaluation of whether the contract between RIPTA and Brown is in the best interests of both parties." We have not been presented with any specific evidence or argument regarding how disclosure of ID numbers would shed light on RIPTA's performance of its statutory duties beyond the general assertion that such information may somehow help reveal whether RIPTA and Brown entered a contract that "is in the best interests of both parties." Although there may be some public interest in determining whether RIPTA entered a contract that was in its best interest, disclosing the ID numbers would primarily shed light on the behavior of private citizens and the operations of two private, higher education institutions rather than the government. Indeed, the majority of the asserted public interest, *see supra, i.e.*, "a careful analysis of how Providence's private university students use public transportation, the average and median quantity of rides taken by students and staff, [and] the number of students who have never taken the bus," would not shed light on government operations. Therefore, based on the record before us, we conclude that the privacy interests implicated outweigh any public interest that would be served by disclosing the requested ID numbers. Accordingly, we find that it was permissible for RIPTA to redact the identification numbers from the reports.

⁵ 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." *Pawtucket Teacher's Alliance Local No. 920 v. Brady*, 556 A.2d 556, 558 (R.I. 1989).

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).

The APRA provides that “[a]ll copying and search and retrieval fees shall be waived if a public body fails to produce requested records in a timely manner.” R.I. Gen. Laws § 38-2-7(b). Since we have found that RIPTA violated the APRA by failing to timely identify all responsive records when initially responding to the request, RIPTA is required to provide Complainant with the remainder of the monthly ridership reports responsive to part (3) of the request at no cost. Consistent with this finding, the ID numbers may be redacted.⁶ Because it is unclear to us whether the Complainant continues to seek these document in a redacted manner, within ten (10) business days of the issuance of this finding, Complainant should inform RIPTA whether he still seeks these documents in a redacted manner. If he does, then within twenty (20) business days of that notification, RIPTA should provide Complainant the requested documents, which may be in redacted form, at no cost. This time period may be extended in accordance with Executive Order 20-25. Although injunctive relief may be appropriate, we will first allow RIPTA the opportunity to comply with this finding. If Complainant alleges RIPTA has not complied, the Complainant may advise this Office.

We do not find evidence of a willful and knowing, or reckless violation. We also observe that there are no recent similar violations found against RIPTA. This finding serves as notice that the conduct discussed herein violates the APRA and may serve as evidence of a willful and knowing, or reckless, violation in any similar future situation.

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 this

⁶Rhode Island General Laws § 38-2-7(a) provides that “[e]xcept for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” As noted herein, RIPTA’s initial response did not specifically set forth the reason for denying the ridership reports, or even acknowledge the existence of these records. To be sure, RIPTA later provided this information in its March 26, 2019 response. Because the ridership reports at issue contain information about third party individuals, and which could be used to track third party private citizens, we do not think RIPTA’s failure to identify and exempt these responsive records when first responding to the request should result in these individuals’ privacy interests not being considered. *See Scripps News v. Rhode Island Dept. of Bus. Regs.*, PR 14-07 (“We have great difficulty accepting the argument that documents maintained by DBR relating to third parties should be disclosed because of an untimely response.”). For this reason, we find “good cause.” *See* R.I. Gen. Laws § 38-2-7(a).

file shall remain open pending the Complainant's notification to RIPTA and RIPTA's response, if any. This Office requests to be included on these communications.

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla E. O'Rourke
Kayla E. O'Rourke
Special Assistant Attorney General