



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

May 8, 2020
PR 20-43

Ms. Katie Davis

Mr. Adam J. Sholes, Esquire
Legal Counsel, Rhode Island Department of Public Safety

Re: Davis v. Rhode Island State Police

Dear Ms. Davis and Attorney Sholes:

The investigation into the Access to Public Records Act (“APRA”) Complaint filed by Ms. Katie Davis (“Complainant”) against the Rhode Island State Police (“RISP”) is complete. For the reasons set forth herein, we find that the RISP did not violate the APRA.

Background

The Complainant submitted an APRA request to the RISP seeking “copies of any correspondence between Rhode Island State Police and the Diocese of Providence regarding allegations of sexual abuse from January 2005 through November 2018. I am also requesting corresponding police reports for each allegation, if any exist.”

The RISP initially responded to the Complainant by providing “316 pages of responsive reports from 2005 to 2018,” and then subsequently provided additional responsive documents, bringing the total number of records produced to 467 pages. The RISP asserted R.I. Gen. Laws § 38-2-2(4)(D)(c) to support its redaction of “personal information relating to an individual in any files and law enforcement records that could reasonably be expected to be an unwarranted invasion of personal privacy[.]”¹

¹ We note that RISP did not cite Exemption (D)(a) and assert that disclosure could reasonably be expected to interfere with investigations of criminal activity, and as such we do not consider whether withholding of any of the records may have been permissible on that basis.

The Complainant filed the instant complaint alleging that the RISP violated the APRA when it redacted the names of “credibly accused individuals,” including deceased individuals, and the “names and locations of churches, or other places where the abuse allegedly took place[.]” The Complainant did not specifically take issue with any other redactions. Moreover, the Complainant expressly stated that she was not seeking the identities of any alleged victims and did not object to the redaction of their names or other identifying information.

Arguments

The Complainant argues that, in light of the “List of Credibly Accused Clergy” published by the Roman Catholic Diocese of Providence (the “Diocese”) in July of 2019, the RISP should disclose any names from that list that appear in the responsive records. The Complainant also raises an additional argument that the RISP should be required to ascertain whether the accused individuals named in the responsive documents (regardless of whether they are named on the Diocese’s list of “credibly accused clergy”) “are dead or alive” because “dead persons have a diminished privacy interest.” Additionally, the Complainant claims that the RISP “has not considered the substantial public safety interest in identifying members of the clergy against whom credible allegations of abuse have been made.”

The RISP filed a substantive response arguing that it appropriately redacted the names of accused individuals and their associated parishes because “[t]here is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm.” (Quoting *SafeCard Services v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991)). Regarding the Diocese’s list of “credibly accused clergy,” RISP argues that “[a]n individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.” (Quoting *United States Dep’t of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994)). The RISP also argues that Rhode Island law does not require it to determine whether the accused individuals are living or deceased. Finally, the RISP contends that the Complainant has not asserted a significant relevant public interest that would outweigh the privacy interests implicated by disclosure. At this Office’s request, the RISP provided this Office with unredacted copies of the responsive documents for *in camera* review.²

The Complainant did not provide a 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.

² The RISP represented that it does not now, and did not at the time of the request, maintain unredacted copies of certain documents, and as such, provided this Office only copies of those documents where certain information, including certain accused individual’s names, had already been redacted.

The APRA states that, unless exempt, all records maintained by a 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). The APRA exempts from disclosure “[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency,” provided (among other potential exemptions) the disclosure of such records “[c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(D)(c). 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, “[c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(D)(c).

Law enforcement records pertaining to specific identifiable private citizens who were investigated and/or accused of wrongdoing implicate significant personal privacy interests, particularly when no arrest takes place. *See, e.g., Fund for Constitutional Government (“FCG”) v. National Archives and Records Service*, 656 F.2d 856, 864 (D.C. Cir. 1981)³ (“There can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an FBI investigation.”); *American Civil Liberties Union v. Department of Justice*, 655 F.3d 1, 7 n.8 (D.C. Cir. 2011) (“disclosure of records revealing that an individual was involved or mentioned in a law enforcement investigation implicates a significant privacy interest,” particularly where the individual was never charged or convicted); *Maynard v. C.I.A.*, 986 F.2d 547, 566 (1st Cir. 1993) (“FBI agents, support personnel, confidential sources, and investigatory targets all have significant privacy interests in not having their names revealed”); *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (“There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm.”).

The APRA provides that records “reflecting the initial arrest of an adult” are public, and as such, an individual who was arrested has a diminished privacy interest in records pertaining to the matter that resulted in the arrest. *See* R.I. Gen. Laws § 38-2-2(4)(D). In response to an inquiry from this Office, the RISP represented that to its knowledge, only one of the accused individuals named in the requested documents had been arrested in connection with the allegations as of the time when the RISP responded to the request. The RISP did not redact that individual’s name in the documents provided to the Complainant.⁴

³ We reference FOIA caselaw because the Rhode Island Supreme Court has made clear that “[b]ecause APRA generally mirrors the Freedom of Information Act * * * we find federal case law helpful in interpreting our open record law.” *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556, 558 n.3 (R.I. 1989).

⁴ It appears that one record pertaining to the arrested individual was redacted, but that record was among those that the RISP represents it does not maintain in unredacted form. As such, RISP was

Our *in camera* review of the requested records confirms that disclosure in unredacted form would implicate the privacy interests of private citizens who were accused but — based on the record before us — not arrested in connection with the accusations as of the time when the APRA request was denied. The lack of a probable cause determination by a law enforcement agency is a significant consideration in evaluating any privacy interest. See *In re Cumberland Police Department*, ADV 03-02 (“the General Assembly has concluded that when a law enforcement agency finds probable cause to make an arrest, the public has the right to access the record of that arrest”).

We also conclude that the list of “credibly accused clergy” released by the Diocese does not significantly diminish the privacy interests implicated by disclosure of the RISP documents, especially given that the RISP documents reveal additional details and information beyond the names provided on the Diocese’s list. See *Providence Journal Co. v. Rhode Island Dep’t of Pub. Safety ex rel. Kilmartin*, 136 A.3d 1168, 1177 (R.I. 2016) (“the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information”). Importantly, the “credibly accused clergy” list is a document generated by the Diocese. It is unclear how the Diocese determined what names to include on this list or the method of the Diocese’s evaluation of the evidence to arrive at its conclusion. The list does not contain the imprimatur of a law enforcement or governmental entity. And, to state the obvious, the Diocese’s decision to include a name on a list of “credibly accused clergy” does not curtail the ability of a law enforcement agency, such as RISP, to make an independent investigation of the underlying accusations and determine whether disclosing an accused individual’s name is appropriate. We also note that the Diocese’s list was released on July 1, 2019, approximately six (6) months after the RISP denied the instant APRA request. Even assuming the RISP were inclined to consider the Diocese’s list of “credibly accused clergy,” at the time of its denial, no such list existed. See *Newport Daily News v. Department of Public Safety*, PR 12-25 (citing *Bonner v. United States Department of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (“court review properly focuses on the time the determination to withhold is made *** [t]o require an agency to adjust or modify its FOIA responses based on post response occurrences could create an endless cycle of judicially mandated reprocessing”)).

The Complainant also argues that “many of the individuals named in the requested records are deceased, and dead persons have a diminished privacy interest.”⁵ To be sure, deceased individuals

not required by the APRA to produce unredacted documents that it does not maintain. See R.I. Gen. Laws §38-2-7(c).

⁵ The Complainant asserts that the RISP was required to ascertain whether an individual is deceased when balancing the public interest in disclosure against privacy interests. See *Davis v. Dep’t of Justice*, 460 F.3d 92, 98 (D.C. Cir. 2006) (determining that government was required to make a reasonable effort to ascertain life status “in light of the accessibility of the relevant information”). Although we question whether RISP was required to conduct affirmative research to determine the life status of the numerous individuals named in these records, our *in camera* review reveals that the requested records themselves identified a number of the accused individuals

do not have a privacy interest because “the right to privacy dies with the person.” *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 814 (R.I. 1996). Nevertheless, other individuals, such as the decedent’s family, may have a privacy interest implicated by disclosure of the documents. See *National Archives and Records Administration v. Favish*, 541 U.S. 157, 171 (2004); *Farinelli v. City of Pawtucket*, PR 20-07. Although the privacy interests applicable to deceased individuals may be diminished, as applied to this case, we also note that the interest asserted in favor of disclosing the redacted names — “disclosing identities of credibly accused individuals who may still be in active ministry and working with children” — is not applicable to the deceased individuals.

Having considered the relevant privacy interests, we now consider the Complainant’s contention that there is a “public interest in disclosing identities of credibly accused individuals who may still be in active ministry and working with children.”

In the context of FOIA, the United States Supreme Court has explained that the right to access public records:

“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.*” *Dept. of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989) (emphasis added).

“[W]hether disclosure of a private document . . . is warranted must turn on the nature of the requested document and its relationship to ‘the basic purpose . . . ‘to open agency action to the light of public scrutiny.’” *Id.* at 772 (holding that a “rap sheet” of a private citizen within the Government’s possession was not public).

Here, disclosure of the requested records in unredacted form would primarily provide information about specific private citizens. This does not demonstrate that disclosure would “shed light” on the government’s “performance of its statutory duties” or otherwise inform the public of “what the Government is up to.” See *Harper v. Portsmouth Police Department*, PR 19-15; *Murray v. Providence Police Department*, PR 19-13. Nonetheless, we do discern a public interest in the documents, as the public interest is defined in the APRA context, to the extent the documents might shed light on how law enforcement handled reports of allegations involving the Diocese. However, given that the documents have already been disclosed in redacted form, it is unclear how

as deceased. See *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 664 (D.C. Cir. 2003) (holding that “there are limits to the lengths to which an agency must go in responding to a FOIA request” and determining that it was unduly burdensome to require government to determine life status of 113 individuals). As explained in this finding, whether the accused individual is deceased is a relevant consideration when balancing privacy interests, but is not dispositive because others’ privacy interests may also be implicated.

much the disclosure of the names of the accused individuals would shed additional light on the operations of the government. We have not been provided with any argument regarding how disclosure of this additional (presently redacted) information would shed light on governmental actions.

Balancing these privacy and public interests, we conclude that any public interest in disclosure of the accused individuals' identities is outweighed by the privacy interests of the accused individuals. We observe that RISP has already disclosed hundreds of pages of documents that even in redacted form shed light on the relevant public interest.

To be clear, our finding is focused on whether the RISP violated the APRA, as well as the privacy and public interests as defined by the APRA. As we have often noted, the APRA provides a floor in identifying documents that must be disclosed, but a public body is generally not prohibited from providing additional disclosure above the APRA requirements. In doing so, a public body may, of course, consider interests outside those recognized by the APRA. There is no question combatting molestation and related crimes is of paramount importance to the public and to this Office. However, our determination in this current matter is based on the requirements of the APRA and the record currently before us. Under the applicable APRA analysis and caselaw, the public interest, as defined through APRA, must be balanced against the privacy interests of individuals who may have been subject to police investigation but were never charged or otherwise lacked probable cause to make an arrest. Under that APRA standard, we conclude that the RISP's redaction of accused individuals' names did not violate the APRA when the RISP responded to this request in January 2019.

Finally, the Complainant requests that "the names and locations of churches, or other places where abuse allegedly took place, be un-redacted in the letters, as that information alone cannot be used to identify victims." The above-described balancing test also applies to this information.

With respect to this information, we have not been provided (nor do we discern) how the disclosure of this information would shed light on government operations. As such, the APRA public interest in the disclosure of this limited information – particularly considering the RISP other disclosures in this case – is minimal at best. Regarding the privacy interest, the RISP asserted that disclosure of the locations where the alleged abuse occurred could be used to identify the individuals whose names were redacted in the documents. Based on our *in camera* review, we determine that revealing this information, in the context of the rest of the unredacted information, could be used to identify the individuals whose names are redacted in these records. In this respect, our analysis and findings set forth above applies equally to this redacted information. We determine that RISP did not violate the APRA by redacting this information in January 2019.

Conclusion

Although the Attorney General will not file suit in this matter, 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.

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