



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

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PR 20-45

Natalia Friedlander, Esquire
Rhode Island Center for Justice

Kathleen M. Kelly, Esquire
Rhode Island Department of Corrections

RE: Rhode Island Center for Justice v. Rhode Island Department of Corrections

Dear Attorney Friedlander and Attorney Kelly:

We have completed an investigation into the Access to Public Records Act (“APRA”) complaint filed by Attorney Natalia Friedlander on behalf of the Rhode Island Center for Justice (“Complainant”) against the Rhode Island Department of Corrections (“DOC”). For the reasons set forth herein, we find that the DOC violated the APRA by failing to consider whether any reasonably segregable portions of the requested documents could be released.

Background and Arguments

The Complainant alleges that the DOC violated the APRA when it denied an APRA request pursuant to R.I. Gen. Laws § 38-2-2(4)(E) and § 38-2-2(4)(F). The APRA request sought two specific DOC policies, one related to chemical agents and the other related to use of force. The Complainant contends that Exemption (E) is inapplicable because no litigation privilege applies and that Exemption (F) is inapplicable because other states release similar policies and there are at least portions of the DOC policies that can be released without endangering the public welfare.

DOC submitted a substantive response through its Executive Legal Counsel, Kathleen M. Kelly, Esquire. DOC maintains that Exemption (E) applies because the Complainant is involved in litigation against the DOC and because the instant APRA request circumvents the litigation process. DOC also maintains that Exemption (F) applies because the chemical agents and use of force policies contain sensitive security information – such as security protocols and information on the locations and storage of chemical agents – that implicate safety risks if disclosed. DOC also provided copies of both withheld DOC policies for our *in camera* review.

We acknowledge the Complainant's rebuttal.¹

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 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). Exemption (E) permits nondisclosure of documents that “would not be available by law or rule of court to an opposing party in litigation.” R.I. Gen. Laws § 38-2-2(4)(E). We have previously noted that this provision is a vehicle that incorporates judicially-recognized litigation privileges and court orders into the APRA’s exemptions. *See Hydron Labs., Inc. v. Dep’t of Atty. Gen. for State*, 492 A.2d 135, 139 (R.I. 1985) (“It was never the Legislature’s intent to give litigants a greater right of access to documents through APRA than those very same litigants would have under the rules of civil procedure. Therefore, exemption [E] of APRA was enacted to limit production under APRA to the scope of production allowed in pending litigation.”); *Providence Journal v. Executive Office of Health and Human Services*, PR 20-01.

Exemption (F) permits nondisclosure of “[s]cientific and technological secrets and the security plans of military and law enforcement agencies, the disclosure of which would endanger the public welfare and security.” R.I. Gen. Laws § 38-2-2(4)(F). Courts grant prison administrators great deference in decisions regarding institutional security. *See, e.g., Laurie v. Senecal*, 666 A.2d 806, 809 (R.I. 1995) (“Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”) (quotations omitted); *Bell v. Wolfish*, 441 U.S. 520 (1979).

Having reviewed the withheld chemical agent and use of force policies *in camera*, we conclude that much of these policies do appear to be “security plans *** the disclosure of which would endanger the public welfare and security.” R.I. Gen. Laws § 38-2-2(4)(F). We particularly credit DOC’s assertion (supported by our *in camera* review) that certain information, such as the location of chemical agents or protocols for responding to certain security situations, implicates extremely important safety and security concerns.

However, based on the record before us, we are hard pressed to conclude at this juncture that the *entire* chemical agent and use of force policies fall under Exemption (E) or (F). With respect to Exemption (E), the DOC does not articulate or reference any specific litigation privilege or court

¹ DOC argued that Complainant lacked standing. Because the instant Complaint was submitted by Attorney Friedlander on behalf of the Rhode Island Center for Justice, and because the operative APRA request was made by a Rhode Island Center for Justice intern, we find that the Complainant has standing to bring the Complaint. *See* R.I. Gen. Laws § 38-2-8(b).

order that permits nondisclosure of either policy in its entirety. Moreover, the APRA requires that all reasonably segregable portions of documents be made available. *See* R.I. Gen. Laws § 38-2-3(b). We are mindful of our Supreme Court’s instruction that “every effort should be made to segregate those portions of the requested documents that contain information exempted from disclosure.” *Providence Journal Co. v. Convention Center Auth.*, 774 A.2d 40, 50 (R.I. 2001). Additionally, “[i]f an entire document or record is deemed non-public, the public body shall state in writing that no portion of the document or record contains reasonable segregable information that is releasable.” R.I. Gen. Laws § 38-2-3(b).

Here, DOC failed to state in writing that no portion of the requested documents is reasonably segregable. This failure not only violated the APRA, it leads us to question whether the DOC considered whether any reasonably segregable portions of the documents could be made publicly available. *See* R.I. Gen. Laws § 38-2-3(b). While our *in camera* review raises the possibility that some reasonably segregable portion(s) of the requested documents could be disclosed – a possibility that we raise but do not answer – our finding in this matter is limited. We find only that the DOC violated the APRA by denying access to these two policies in whole without stating “in writing that no portion of the document or record contains reasonable segregable information that is releasable.” *Id.*

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).

Based on the evidence presented, we find no evidence of a willful and knowing, or reckless, violation. In this respect, we note that the Complainant does not allege a willful and knowing, or reckless, violation, nor were we presented with evidence from which such a conclusion may be gleaned. We also observe that the policies at issue concern the use of force and chemical agents at the Adult Correctional Institutions and we have no qualms that these policies, at least in part, implicate the safety and security of inmates and staff. Nonetheless, this finding serves as notice to DOC 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.

However, DOC should review the policies at issue in this finding and determine whether there are reasonably segregable portions that must be disclosed under the APRA. If there are, the DOC must provide those portions to the Complainant and may not assess any charge for the production of portions of these policies. *See* R.I. Gen. Laws § 38-2-7(b) (“All copying and search and retrieval fees shall be waived if a public body fails to produce requested records in a timely manner; provided, however, that the production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under section 38-2-4.”). If there are no reasonably segregable portions that may be disclosed, DOC should likewise communicate its

conclusion to the Complainant. The DOC should respond to Complainant within twenty (20) business days of the issuance of this finding and may invoke the extension provided in Executive Order 20-25 if necessary.

We reiterate that this finding does *not* require DOC to disclose any information that it has reason to believe falls within Exemption (E) or (F), and we do not rule out the possibility that no reasonably segregable portion exists that may be disclosed. After DOC's review and its response to Complainant, if the Complainant is dissatisfied with DOC's response, the Complainant may notify this Office within ten (10) business days of receiving DOC's response.

Although this Office will not file suit in this matter at this time, nothing within the APRA prohibits an individual from instituting an action for 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 DOC's response and any response from Complainant.

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