



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

May 27, 2020
PR 20-48

Ms. Lynn Farinelli

Frank J. Milos, Jr., Esquire
City Solicitor, City of Pawtucket

RE: Farinelli v. City of Pawtucket

Dear Ms. Farinelli and Solicitor Milos:

The investigation into Ms. Lynn Farinelli's ("Complainant") Access to Public Records Act ("APRA") complaint filed against the City of Pawtucket ("City") is complete. For the reasons set forth herein, we find that the City violated the APRA by withholding a certain internal affairs report in its entirety.

Background

The Complainant made an APRA request to the City seeking "the last 5 Internal Affairs completed Investigations." The City responded to her request by providing one internal affairs report identified as #17-48-IA, but withholding the remaining four internal affairs reports, identified as #17-49-IA, #17-50-IA, #17-52-IA, and #17-53-IA.¹

Subsequently, the Complainant filed the instant Complaint, alleging that the withheld internal affairs reports should have been disclosed. In a subsequent correspondence, the Complainant noted that she was no longer pressing her complaint with respect to two internal affairs reports (#17-52-IA and #17-53-IA), which she represented were the subject of a separate ongoing lawsuit filed by the American Civil Liberties Union of Rhode Island ("ACLU") in Superior Court. Thus, our

¹ The City avers in its substantive response to this Complaint that #17-51-IA was not completed at the time of Complainant's request for completed reports, and thus was not responsive. The Complainant acknowledged this possibility in her initial Complaint and does not dispute the City's contention.

inquiry is limited to whether the City violated the APRA by withholding the two remaining internal affairs reports, #17-49-IA and #17-50-IA.

The City, through its City Solicitor Frank Milos, Esquire, maintains that nondisclosure of #17-49-IA and #17-50-IA was proper. With respect to #17-49-IA, the City avers that this internal affairs report regards a complaint brought by the Complainant. With respect to #17-50-IA, the City maintains that the individual who initiated the internal affairs report stated that she was not interested in pursuing a formal complaint. With respect to both reports, the City argues that disclosure does not advance the public interest because these two reports pertain to isolated incidents. The City provided the withheld internal affairs reports for our *in camera* review.

We acknowledge Complainant's rebuttal wherein she asserts that disclosure of these documents is in the public interest because "citizens should be able to read [the internal affairs reports] to have a watchful eye on how the Government is handling misconduct no matter who is complaining."²

Relevant Law

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). We begin our consideration of the two withheld internal affairs reports by observing that the APRA's stated purpose is both "to facilitate public access to public records" and "to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-1. Similarly, the United States Supreme Court has made clear that the federal Freedom of Information Act ("FOIA"):

"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."

² This Office invited the parties to discuss this Office's prior finding in *Piskunov v. Town of Narragansett*, PR 17-05, which we believed was potentially relevant to the issues presented by the Complaint. In her rebuttal, the Complainant contended that it was improper for this Office to do so. We reject this contention. Inherent in this Office's authority to investigate and decide APRA complaints is the authority to direct parties to supplement their submissions and address potentially relevant legal precedent. *See* R.I. Gen. Laws § 38-2-8(b). As long as both parties are provided the opportunity to do so, as was the case here, there is nothing unfair or improper about it.

United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989).³

In support of its denial, the City references caselaw and findings related to the balancing test contained in the APRA, R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts from public disclosure, in pertinent part:

“[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.*[.]” (Emphasis added).

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, “would constitute a clearly unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

The Rhode Island Supreme Court has previously considered situations similar to the instant matter. In *Direct Action for Rights and Equality v. Gannon*, 713 A.2d 218 (R.I. 1998) (“*DARE*”), a community-action group made an APRA request to the Providence Police Department seeking records pertaining to civilian complaints of police misconduct over a seven (7) year period. Our Supreme Court held that “the manner in which a law enforcement agency addresses the concerns of its citizens regarding civilian complaints ‘relat[es] to management and direction of a law enforcement agency.’” *Id.* at 224.⁴ On this basis, the Court determined that the requested reports over a seven (7) year period were public records, albeit in a redacted manner to obscure the identity

³ We make reference to a FOIA case 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 This language in *DARE* references APRA Exemption (D), which exempts from public disclosure certain law enforcement records but provides that “[r]ecords relating to management and direction of a law enforcement agency . . . shall be public.” R.I. Gen. Laws § 38-2-2(4)(D). The Court determined that the internal affairs reports did not fall into any of the particular exemptions set forth in (D) because only records related to criminal law enforcement or the detection and investigation of crime are exempt under (D). *See DARE*, 713 A.2d at 224. We note that the parties’ submissions to this Office did not reference Exemption (D), but rather focused on applying the balancing test and evaluating the degree of public interest in the requested reports. Based on the Supreme Court’s analysis in *DARE* and *DARE II*, we find that Exemption (D)’s provision that records relating to the management and direction of law enforcement are public must be read in conjunction with the balancing test set forth in R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) when those records concern personnel matters.

of the citizen complainant and officer. *Id.*; see also *The Rake v. Gorodetsky*, 452 A.2d 1144 (R.I. 1982) (requiring disclosure of years of civilian complaints filed against police officers concerning excessive force but permitting redaction of the parties' names); *Direct Action for Rights & Equality v. Gannon*, 819 A.2d 651, 663 (R.I. 2003) (“*DARE II*”) (“[R]edactable information should include any information that directly could identify a complainant or officer against whom a complaint was made.”).⁵

Most recently, the Rhode Island Superior Court considered this issue in the context of the lawsuit filed by the ACLU pertaining to the two internal affairs reports that Complainant removed from this complaint, as well as other internal affairs reports. See *Lyssikatos v. City of Pawtucket*, PC 2017-3678. Although that matter remains pending, the Superior Court, the Honorable Associate Justice Melissa Long, issued a bench decision in March 2019 denying the plaintiff’s motion for summary judgment. In seeking summary judgment, the plaintiff had argued that the Court need not review the withheld records or conduct the balancing test because the plaintiff was seeking the records in redacted form and was entitled to these redacted records as a matter of law. The Superior Court rejected that argument and determined that even though the plaintiff was seeking redacted internal affairs reports, it was necessary for the Court to review the withheld documents *in camera*. See *Lyssikatos*, PC 2017-3678 (Long, J.) (March 18, 2019) (pending petition for certiorari).

Findings

The Rhode Island Supreme Court has recognized a public interest in years of internal affairs reports because the reports shed light on government conduct but has also recognized a need to protect the privacy interests of the involved individuals. See *DARE*, 713 A.2d 218; *The Rake*, 452 A.2d 1144; *DARE II*, 819 A.2d at 663. As noted above, more recently, the Superior Court determined that access to a smaller timeframe of internal affairs reports was not required as a matter of law, but rather an *in camera* review was necessary to determine the precise nature of the documents at issue. See *Lyssikatos v. City of Pawtucket*, PC 2017-3678 (Long, J.) (March 18, 2019).

⁵ *The Rake* and *DARE* were issued under a prior version of the APRA where instead of a balancing test, all individually identifiable information was exempt. The relevant privacy interest was thus already encompassed in the text of the APRA itself and the decisions in those cases were not based on applying the statutorily required balancing test analysis. See R.I. Gen. Laws § 38-2-2(A)(I)(b). In any event, the Supreme Court in *DARE* and *DARE II* concluded that although the internal affairs reports pertained to the management and direction of a law enforcement agency and were public under Exemption (D), the exemption related to individually identifiable information, then contained in R.I. Gen. Laws § 38-2-2(d)(1), was also applicable and permitted the internal affairs reports to be redacted. See *DARE II*, 819 A.2d at 663 (“[R]edactable information should include any information that directly could identify a complainant or officer against whom a complaint was made.”). That provision is presently codified, in the form of a balancing test, as R.I. Gen. Laws § 38-2-2(A)(I)(b), and is the basis of the City’s argument to withhold the documents at issue.

This precedent makes clear that any request for disclosure of internal affairs reports must be considered on a case by case basis, applying the balancing test where any public interest in disclosure is weighed against the privacy interests of the involved officers and citizens. In the context of internal affairs reports, we note the following non-exhaustive list of considerations that may be relevant to considering the privacy and public interests implicated by a particular report and determining whether the report should be disclosed in whole or in part:⁶

- Whether the report(s) requested are likely to shed light on overall government functions rather than only reveal information about a particular isolated incident;
- Whether the allegations of misconduct were determined to be founded;
- The nature and severity of the alleged misconduct that is the subject of the report, including the rank and position of the official(s) investigated;
- Whether there is any evidence of governmental impropriety in investigating the allegations;
- Any particular public interest in disclosure that is apparent or identified by the requestor;
- The extent to which the report reveals personal or private information about officers and/or private citizens or would unfairly harm the reputation of the officers or private citizens, *see SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); and
- Whether redaction of names or other identifying information can effectively ameliorate any privacy concerns.

In contrast to *The Rake* and *DARE* where the requests sought a large volume of reports from an extended time period (years), in this case, only two internal affairs reports are at issue. The Complainant generally contends that there is a public interest in the disclosure of these documents, including the report based on the complaint she herself filed, because “citizens should be able to read that narrative to have a watchful eye on how the Government is handling misconduct no matter who is complaining.”

Having described the relevant analytical framework, we now apply the above-described balancing test to the particulars of each specific report that is the subject of this Complaint.

#17-49-IA

Our *in camera* review of #17-49-IA confirms both parties’ contentions that it pertains to an internal investigation of two Pawtucket detectives whom the Complainant⁷ alleged improperly disclosed information about an investigation to a private citizen. Although the *in camera* nature of our review limits our ability to discuss specifics, the report generally reflects that the police department

⁶ Some of these factors are derived from the caselaw that is discussed in the context of our analysis. These factors are intended only as an example of some considerations that may be relevant when applying the balancing test. In sum, when balancing the public interest and the privacy interest, the totality of the circumstances must be considered. *See Melo v. Department of Public Safety*, PR 15-49.

⁷ We identify the Complainant as the individual who filed the complaint because the Complainant incorporated that fact into her Complaint and arguments to this Office.

investigated the complaint thoroughly, including by interviewing multiple people, and determined that the allegations were unfounded.

Disclosure of the report would implicate the privacy interests of the two law enforcement officials who are the subject of the report. Revealing information about how these two officials were accused of misconduct and subjected to an investigation could negatively impact their personal and professional reputations. See *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026-27 (9th Cir. 2008) (recognizing government employees' privacy interest in avoiding harassment and "embarrassment and stigma" that could be associated with being named in a report); *Housley v. U.S. Dep't of Treasury, I.R.S.*, 697 F. Supp. 3, 5 (D.D.C. 1988) (determining "substantial" privacy interests were implicated by disclosure of information that "could subject that person to embarrassment or possibly more severe harm to his reputation"). Notwithstanding that the allegations were determined to be unfounded, these individuals have an interest in it not being publicized that they were accused of wrongdoing and investigated. See *American Civil Liberties Union v. Department of Justice*, 655 F.3d 1, 7 n.8 (D.C. Cir. 2011) ("[D]isclosure 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); see also *SafeCard Servs.*, 926 F.2d at 1205 ("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.").

Our *in camera* review also reveals that the report contains personal information regarding a third party individual who is a private citizen. The report includes various references about this private citizen's actual or perceived disability that may be difficult to redact and that could make this individual easily identifiable to someone reading the report. Disclosure of the report could thus also subject this individual and his or her family to potential embarrassment.

Moreover, where the request seeks only a small number of reports, as this one does, the privacy interests of individuals who may be readily identified may not be satisfactorily addressed through redaction. In *The Rake*, the Supreme Court determined that "on balance the public's right to know outweighs" the theoretical possibility that the identities of the redacted individuals could be determined by comparing years' worth of internal affairs reports to newspaper accounts of the incidents. *The Rake*, 452 A.2d at 1149. However, unlike *The Rake* and *DARE* where the requests sought a large volume of reports without regard to the individuals who were the subjects of the reports, here the Complainant is seeking a particular report involving particular individuals and the concern that the individuals' identities will be discernible despite redactions is not merely a remote or theoretical possibility. See *Pawtucket Teachers Alliance Local v. Brady*, 556 A.2d 556, 559 (R.I. 1989) ("[T]he report at issue in the present case specifically relates to the job performance of a single readily identifiable individual. Even if all references to proper names were deleted, the [individual's] identity would still be abundantly clear from the entire context of the report."); see also *Dep't of Air Force v. Rose*, 425 U.S. 352, 381 (1976) (analyzing a request for cadet discipline proceeding summaries and holding that the District Court should conduct an *in camera* review and, if in its opinion deletion of personal references and other identifying information "is not sufficient to safeguard privacy, then the summaries should not be disclosed").

Weighed against these privacy considerations, we consider the public interest in disclosure of this report. We were not presented with any evidence suggesting government misconduct related to the internal investigation that resulted in this report. Neither is any misconduct apparent to us on the face of the report. As noted above, the report indicates that the police department investigated the allegations, including by interviewing multiple people. Importantly, the findings in the report also do not suggest any misconduct by the law enforcement officers who were being investigated, which further diminishes any public interest in the report. We also note that although the nature of the alleged misconduct — sharing information about an investigation with a member of the public — is serious, it is not especially severe on the spectrum of potential misconduct allegations. Additionally, the officers who were the subject of the report were detectives, not high-ranking officials who were in significant leadership roles in the police department. Although the report sheds some light on how the police department investigates allegations of misconduct, unlike *The Rake* and *DARE*, the report primarily provides information related to a specific isolated incident involving specific people, rather than the overall conduct of the government or management of a law enforcement agency. *See Providence Journal Co. v. Dept. of Public Safety*, 136 A.3d 1168, 1176, n.6 (R.I. 2016) (quoting *Hunt v. Federal Bureau of Investigation*, 972 F.2d 286, 288–89 (9th Cir.1992) (“The single file *** will not shed any light on whether all such FBI investigations are comprehensive.”)).

Although we recognize that the public has an important interest in being informed about the conduct of its government, on these facts, we conclude that disclosure would do little to shed light on the conduct of government but would implicate multiple individuals’ privacy interests. Additionally, there is no indication that the contents of this report have already been made public by the City. *Compare with Farinelli v. City of Pawtucket*, PR 15-17 (disclosure of a specific single internal affairs report required where Pawtucket Police Department had previously publicly released a related un-redacted police report); *Lyssikatos v. City of Pawtucket*, PR 16-18 (finding that City did not violate the APRA by denying request for a particular internal affairs report related to a complaint made by the individual who filed the APRA request where City had not previously released an un-redacted related report). Accordingly, we conclude that the City did not violate the APRA by withholding this report.

Nonetheless, public bodies may choose to disclose internal affairs reports in the interests of promoting transparency and public confidence even if disclosure may not be strictly required under the balancing test. We note that the report in this case indicates that the Complainant was provided with a letter explaining the findings of the internal investigation.

#17-50-IA

Report #17-50-IA pertains to the police department’s actions in response to a citizen complaint about an incident involving a certain officer’s on-duty conduct, including how the internal affairs process proceeded. Although the *in camera* nature of our review limits our ability to discuss details, the complaint generally pertained to an allegation that a relatively junior officer mishandled responding to a domestic call. Although the City contends that the citizen ultimately declined to pursue the complaint, our review indicates that the citizen pressed his/her concerns. The report indicates that the investigation resulted in the officer being counseled regarding the

conduct. The report therefore contains information that illustrates an incident where an officer was counseled for on-duty conduct involving private citizens and also sheds some light on the police department's disciplinary process and investigatory actions. We also note that the alleged misconduct in this case is more serious than in the other report discussed above, because here the citizen complainant alleged that she experienced some minor physical injury as a result of the officer's conduct. Although this report only pertains to a single incident involving a junior officer, it does at least to some degree further the public's understanding of what the City is "up to." *Reporters Committee*, 489 U.S. at 773. On balance, disclosure of this report implicates greater public interests than Report #17-49-IA.

However, disclosure of this report also implicates privacy interests. The report contains the names of multiple identifiable individuals, including an officer and multiple private citizens. As discussed above, revealing information about someone being investigated for wrongdoing implicates privacy interests. However, the fact that the report indicates that the officer was counseled regarding the handling of the situation somewhat diminishes the privacy interests of the officer. *See Forest Serv. Employees*, 524 F.3d at 1025 ("[A] government employee's privacy interests may be diminished in cases where information sought under FOIA would likely disclose 'official misconduct.'"). Additionally, we have not been presented with any evidence or argument indicating that redaction of the individuals' names or other identifying information would not adequately protect their privacy interests in this particular case. We also were not presented with any argument or evidence that there is a public interest in disclosing the identities of the specific officer and individuals involved in this report. We therefore conclude that the balancing scale tips in favor of disclosing the report in redacted form. Therefore, by withholding #17-50-IA in its entirety, the City violated the APRA.

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).

We find no evidence of a willful and knowing, or reckless, violation. We are mindful that applying the balancing test to requests for internal affairs reports under the APRA is a fact-specific task. The undisputed evidence supports the conclusion that the City undertook the inquiry in good faith based on its interpretation of applicable precedent.

Although injunctive relief may be appropriate in this case, we will allow the City twenty (20) business days from the issuance of this finding to disclose internal affairs report #17-50-IA to Complainant in a redacted manner consistent with the APRA and our findings, *supra*. To be clear, "redactable information should include any information that directly could identify a complainant or officer against whom a complaint was made." *DARE II*, 819 A.2d at 663. The City should also redact identifiable information pertaining to third parties. The City must produce this record

without cost. *See* R.I. Gen. Laws § 38-2-7(b). If the City wishes, it may contact this Office with specific questions regarding the redaction of the document at issue.

Although the Attorney General 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). The City should copy this Office on its response to the Complainant. If the Complainant believes that the City has failed to comply with this finding, Complainant should advise this Office. This file remains open pending the City's response and any response from the Complainant.

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