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OFFICE OF THE ATTORNEY GENERAL

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Peter F. Neronha
Attorney General

VIA EMAIL ONLY

October 21, 2020
PR 20-64

Mr. Adam Teper

Etie-Lee Schaub, Esquire
Associate City Solicitor, City of Providence

Re: Teper v. Providence Police Department

Dear Mr. Teper and Attorney Schaub:

The investigation into the Access to Public Records Act ("APRA") complaint filed by Mr. Adam Teper ("Complainant") against the Providence Police Department ("Department") is complete. For the reasons set forth herein, we find that the Department did not violate the APRA.

Background and Arguments

The Complainant submitted an APRA request to the Department seeking "reports or investigations" filed "on/against" himself by two specific private citizens. The Department responded to the request by indicating that it could neither confirm nor deny the existence of responsive records for personal privacy reasons. The Department stated that if responsive records did exist, such records would be exempt from public disclosure in full pursuant to R.I. Gen. Laws §§ 38-2-2(4)(D)(c) and that no reasonably segregable portion could be produced. The Complainant appealed the Department's response to Commissioner Steven M. Paré, who upheld the Department's response. The Complainant subsequently filed a Complaint with this Office alleging that the Department violated the APRA "for refusing to acknowledge or disclose public records and complaints made about" himself.

Associate Solicitor, Etie-Lee Schaub, Esquire, provided a substantive response and affidavit on behalf of the Department. The Department states that the Complainant "has not articulated any public interest that would outweigh the release of responsive records, if they exist. The basis of his request and appeals, in fact, appears to be finding information on claims or complaints filed by two individuals against Complainant personally." The Department also notes that the Complainant did not seek arrest reports. Finally, the Department maintains that if any responsive documents did

exist, they "could not have been reasonably redacted" because Complainant "requested information about complaints made by one of two specific individuals against another person."

We acknowledge Complainant's rebuttal wherein he argues that the APRA requires the Department to disclose whether the requested records exist or do not exist. The Complainant also states that the information he seeks is necessary because he is involved in civil lawsuits involving the individuals mentioned in his original APRA request.

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). The APRA exempts from public disclosure "[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime" where disclosure, among other reasons, "could 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 R.I. Gen. Laws § 38-2-2(4)(D)(c) 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." *See Judicial Watch, Inc. v. U.S. Dept. of Justice*, 898 F.Supp.2d 93, 100 (D.C. Cir. 2012) ("The Freedom of Information Act's (FOIA) strong interest in transparency must be tempered by the legitimate governmental and private interests that could be harmed by release of certain types of information.").[1]

In this case, the Complainant sought "reports and investigations" about himself maintained by the police and initiated by two private individuals. Although the APRA provides that records "reflecting the initial arrest of an adult" are public, *see* R.I. Gen. Laws § 38-2-2(4)(D), the Complainant does not contend that the requested "reports and investigations" culminated in an arrest. Law enforcement records related to the investigation of identifiable private citizens implicate 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) ("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

[1] The Rhode Island Supreme Court has stated that "[b]ecause [the] APRA generally mirrors the Freedom of Information Act [("FOIA")], 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law." *See Pawtucket Teacher's Alliance Local No. 920 v. Brady*, 556 A.2d 556, 558 n.3 (R.I. 1989).

enforcement investigation implicates a significant privacy interest," particularly where the individual was never charged or convicted). Additionally, disclosure of the requested records, if any such records exist, could also implicate the privacy interests of the private citizen(s) identified in the request as the ones who "filed" the report or investigation.

We next consider whether there is any public interest in the records, assuming such records exist. The public has an interest in a document that "sheds light" on how government operates. *See Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-773 (1989). The Complainant requested "reports and investigations" filed against himself by two private individuals. The Complainant has not identified any public interest in the requested records and has not asserted that disclosure would shed light on the government's operations. Instead, the Complainant contends that he has a compelling personal interest in obtaining records separate and apart from any public interest, i.e., knowing whether particular private citizens initiated a report or investigation about himself. Under the APRA, however, our sole function is to determine whether the requested document should be made available to the public at-large, not specific persons who assert a heightened personal interest in a document. *See* R.I. Gen. Laws § 38-2-3(a); *Bernard v. Vose*, 730 A.2d 30 (R.I. 1999) (holding that petitioner did not have a right, under the APRA, to review his own parole board files, which contained personal and sensitive information about him, because once the files were made public to him under the APRA, the files would then be available for inspection by the general public). For this reason, Complainant's asserted personal interest in obtaining the records cannot factor into our analysis. *See, e.g., Mercurio v. Cranston Police Department*, PR 20-32; *Harper v. Portsmouth Police Department*, PR 19-15; *Gardiner v. Rhode Island Department of Public Safety*, PR 19-08. Additionally, we do not discern any apparent public interest in disclosure of these records (if they exist) as recognized or defined by the APRA, except perhaps revealing some limited information about how law enforcement officers potentially responded to certain particular civilian complaints. But even this interest, without more, is at best minimal. *See Hunt v. Federal Bureau of Investigation,* 972 F.2d 286, 288–89 (9th Cir. 1992) (contrasting a FOIA request for a single investigatory file with requests for numerous disciplinary files and concluding that "[t]he single file * * * will not shed any light on whether all such FBI investigations are comprehensive").

For the reasons discussed above, we conclude that the privacy interests implicated by disclosing the requested records, assuming such records exist, outweighs any public interest, and therefore the Department did not violate the APRA by denying the request.[2] We likewise do not find that the Department violated the APRA by concluding that no reasonably segregable portion of the records, if any exist, could be disclosed. *See* R.I. Gen. Laws § 38-2-3(b). Given that the request specifically sought documents related to particular citizens, we find that the Department's conclusion that the privacy interests could not be addressed by redaction was reasonable. *See*

[2] The Department's response to the Complaint invited this Office to conduct an *in camera* review of the withheld records, *if any*. Through an *in camera* process, this Office confirmed whether any responsive records exist and conducted a review of those records, *if any*. Given the *in camera* nature of this portion of our investigation, it would be inappropriate to comment further except to state that our decision in this matter is consistent with the findings of our investigation, including any portion of the investigation conducted *in camera*.

Harper v. Portsmouth Police Department, PR 19-15 ("Furthermore, the implicated privacy interests cannot be effectively quelled by redaction since the requested records relate to a specific and identifiable private residence where Complainant alleges a specific individual lives."); *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556, 559 (R.I. 1989) ("the 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 principal's identity would still be abundantly clear from the entire context of the report.").

Finally, the Complainant argues that the Department was required under the APRA to disclose whether it maintained any responsive documents. To be sure, the APRA does provide that "[a] public body that receives a request to inspect or copy records that do not exist or are not within its custody or control shall *** state that it does not have or maintain the requested records." R.I. Gen. Laws § 38-2-7(c). However, we have previously acknowledged that "there may very well be circumstances when a public body need not cite R.I. Gen. Laws § 38-2-7(c), but instead provides a substantive denial, *see* R.I. Gen. Laws § 38-2-2(4)." *Sherman v. Joint Committee on Legislative Services*, PR 20-38. Similarly, federal FOIA caselaw recognizes that there exists "an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information." *Judicial Watch, Inc.* 898 F.Supp.2d at 102. Such a response in the FOIA context is referred to as a *Glomar* response. *Id.* "[A] *Glomar* response allows an agency to respond to a FOIA request by neither confirming nor denying the existence of any records responsive to the request, on the grounds that confirming or denying the existence of records would itself cause harm cognizable under a FOIA exception." *Id.* (internal quotations omitted).

In this case the Department explained that confirming or denying the existence of responsive records would itself implicate the relevant privacy interests, i.e., whether a particular private citizen was the subject of a report or investigation initiated by other particular private citizens . Under these circumstances, we agree that such a disclosure falls within the *Glomar*-type exception this Office and the federal courts have previously recognized. If the Department were to confirm that it maintains responsive records, that statement in and of itself would reveal that a specific private citizen was the subject of a police investigation or report initiated by other specific private citizens. Revealing such information would implicate the privacy interests of those citizens for the reason discussed above. As such, we find that it was permissible for the Department to neither confirm nor deny the existence of any responsive records in these circumstances.

This finding pertains only to the APRA and we make no determination whether the Complainant, who claims a heightened personal interest above and beyond the general public, may be able to obtain the requested report through other non-APRA means. Indeed, if Complainant is involved in civil litigation, the Rules of Civil Procedure would likely provide Complainant access to documents otherwise not available pursuant to the APRA.

Conclusion

Although this Office has found no violations, nothing within the APRA prohibits an individual from instituting an action for injunctive or declaratory relief in Superior Court as provided in the

APRA. *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