



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

July 28, 2016

PR 16-30

Parker Gavigan

Re: NBC 10 v. Rhode Island Department of Public Safety

Dear Mr. Gavigan:

This Department's investigation into your Access to Public Records Act ("APRA") complaint filed against the Rhode Island Department of Public Safety ("DPS") is complete. By email correspondence dated November 30, 2015, you allege the DPS violated the APRA when it improperly redacted the background report of a particular candidate for judicial office.

In response to your complaint, we received an affidavit and a substantive response from legal counsel for DPS, Paul Andrews, Esquire. Attorney Andrews' substantive response states, in pertinent part:

On August 26, 2015, the Department responded to Mr. Gavigan's request by letter. It indicated that the request was governed by the Access to Public Records Act contained in R.I.G.L. Chapter 38-2. After careful consideration of the privacy interest versus the public's right to disclosure, we [enclosed] the eighteen (18) page background check * * * with redactions. The letter noted that Rhode Island General Law 38-2-2(4)(D)(c) excludes the release of personal information or 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. In accordance with this expectation of privacy, portions of the enclosed reports were redacted.

...

In order to comply with the APRA, the Department examined the privacy interest of any individuals identified in the background investigation and the public interest sought to be advanced by the release of the documents. After careful analysis, the Department decided to release the requested document with redactions.

...

The public interest is defined as 'Official information that sheds light on an agency's performance of its statutory duties.' In the instance [sic] case, the Department released the judicial background with redactions, which sheds light on the performance of state government when selecting judicial candidates...

In the instant matter, the redacted records sought are directly identifiable to an individual. There has been no showing by Mr. Gavigan that the information he is seeking is significant or that the information is likely to advance that significant interest."

You provided no rebuttal.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DPS violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

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). Under the APRA, a record is public unless it falls within one of several enumerated exemptions or the balancing test. See R.I. Gen. Laws § 38-2-2(4)(A)-(AA); see also Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998). The APRA further provides that "[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after the deletion of the information which is the basis of the exclusion." See R.I. Gen. Laws § 38-2-3(b).

In its response to your APRA request, DPS cited R.I. Gen. Laws § 38-2-2(4)(D)(c), which exempts, in pertinent part, the disclosure of law enforcement records for criminal investigative purposes if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." A similar APRA provision exempts "[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." R.I. Gen. Laws § 38-2-2(4)(i)(A)(b). The analysis for determining whether disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" requires a balancing of the public's interest in disclosure with the privacy interest affected. 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 n.3 (R.I. 1989). Accordingly, we also review federal case law to resolve this complaint.

The United States Supreme Court has explained that the Freedom of Information Act (FOIA), or in this case the APRA:

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. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481-82 (1989) (emphasis supplied).

Therefore, when conducting the balancing test, the proper inquiry is whether the public interest – “official information that sheds light on an agency's performance of its statutory duties” – outweighs individual privacy interests. Id.

In Reporters Committee, the United States Supreme Court held that a “rap sheet” of a private citizen within the Government's possession was not public. The Supreme Court examined 5 U.S.C. § 552 (b)(7)(C), which excludes from public disclosure records or information compiled for law enforcement purposes if production of such documents “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Id. at 756 (emphasis added). The Supreme Court's analysis sheds light on what factors constitute an “unwarranted” invasion of personal privacy. See id. at 772. “[W]hether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to ‘the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’” See id. The Supreme Court explained:

[w]hen the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of ‘what the Government is up to,’ the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir...Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is ‘unwarranted.’ See id. at 780.

Thus, because the “rap sheet” did not shed light on how the Government operates, the privacy interests of the individual outweighed the public's interest in the citizen's “rap sheet.”

Here, we recognize that your complaint expresses the intent “to appeal the redaction of this document,” but respectfully, in no way do you direct this Department to any particular redaction at issue nor can we identify the precise rationale for your objection. Stated differently, in no way

do you express the “public interest” that you contend outweighs the “privacy interest.” Having reviewed, in camera, the unredacted document, the nature of the redactions generally fall within two categories: (1) information identifiable to a third party (not the subject of the background report) and (2) information regarding the subject of the report. With respect to the second category, the redacted material pertains to one incident or situation.

While in this case you do not expressly articulate the “public interest,” it appears that the “public interest” argument that you did articulate in a prior related case would also apply to the present complaint. In that prior related complaint, which you later withdrew, you related, in relevant part, that:

[o]ur argument is based on the public’s right to know and transparency in our government. We believe the subject interviewed by the State Police in the latter portion of these reports, is now on a list of candidates for a lifetime judicial appointment.

In other words, it appears you contend that the “public interest” in the unredacted background report outweighs any privacy interest because the subject of the report is (or was) seeking judicial office. Against this background, we examine the redactions.

With respect to the first category of redactions – information identifiable to a third person, e.g., name, date of birth, and home address – we perceive no public interest in disclosure. In this vein, while you contend that disclosure of redacted information advances the public interest, you make no argument concerning how information and contact information relating to these third parties advances the public interest. This is particularly the case where the DPS left the substantive information pertaining to the third parties unredacted. On the privacy side, case law is overflowing with examples that these third parties have significant privacy interests in avoiding the disclosure of their names and contact information under the circumstances presented in this case. 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 enforcement investigation implicates a significant privacy interest”). Because you were provided the substantive information pertaining to these third parties, we have little trouble concluding that the privacy interests related to the disclosure of information identifiable to a third party does not outweigh the public interest in disclosure. Again, your correspondence, even read broadly, contains no such argument and the DPS’s approach comports with United States Supreme Court precedent. See e.g., Reporters Committee, 109 S.Ct. at 1482 (“it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen”).

Turning to the second category of redaction – information uncovered by the DPS as a result of the background report – we also find no violation. Here, as referenced above, in a related

(withdrawn) complaint, you contended that the subject of the background report was a “public figure” who is now seeking judicial office.

While federal courts have recognized that a person’s status as a “public figure” might “somewhat diminish an individual’s interest in privacy, the degree of intrusion occasioned by disclosure is necessarily dependent upon the character of the information in question.” FCG, 656 F.2d at 865. Indeed, in FCG, the plaintiff made a similar argument that because certain investigatory records were related to high level government officials and concerned serious allegations of government misconduct – Watergate – the requested documents should have been disclosed. The Court of Appeals concluded otherwise, stating that the “release of this type of information represents a severe intrusion on the privacy interests of the individuals in question and should yield only where exceptional interests militate in favor of disclosure.” Id. at 866. Other courts have expressed similar opinions. See Perlman v. United States Department of Justice, 312 F.3d 100, 106 (2nd Cir. 2002)(“[t]hese parties possess strong privacy interests, because being identified as part of a law enforcement investigation could subject them to ‘embarrassment and harassment,’ especially if ‘the material in question demonstrates or suggests they had at one time been subject to criminal investigation’”); American Civil Liberties Union v. United States Department of Justice, 655 F.3d 1, 7 n.8 (D.C. Cir. 2011)(“The Justice Department correctly notes this court has held that disclosure of records revealing that an individual was involved or mentioned in a law enforcement investigation implicates a significant privacy interest.”). See also Collette v. Town of Hopkinton, PR 16-02 (“although you suggest that disclosure is required because the person you seek records concerning is a public official and the public has the right to know if public officials ‘have abused their public office,’ our review of case law finds that persons associated with (or appearing in) law enforcement records maintain a significant privacy interest”).

While we agree that a person’s status as a “public figure” might somewhat diminish an individual’s interest in privacy,” FCG, 656 F.2d at 865, and that a person’s application to serve as a judicial officer may further diminish this privacy interest, we know of no legal authority that mandates the disclosure of all information concerning a person seeking public office. Indeed, the legal authority is to the contrary.

For instance, in Archibald v. United States Department of Justice, 950 F.Supp.2d 80, 84 (D.D.C. 2013), the court reviewed a FOIA request seeking “the FBI’s 2008 background check of then-presidential candidate Barack Obama.” The FBI refused to provide the requested documents, citing Exemption 7(C).¹ After the FOIA request was denied, a lawsuit ensued seeking injunctive relief to require disclosure.

The District Court began its analysis by determining that the background check fell within the ambit of Exemption 7(C) since “[a] background check on a presidential candidate is an obvious national security function, and there is no indication the FBI was acting outside the scope of its law enforcement duties when it performed the background check on now-President Obama.” Id. at 87. See also id. (“background checks by nature implicate law enforcement interests”).

¹ FOIA Exemption (C) is identical to R.I. Gen. Laws § 38-2-2(4)(D)(c), the exemption cited by the DPS in this case.

Having determined that Exemption 7(C) – or in this case R.I. Gen. Laws § 38-2-2(4)(D)(c) – was the applicable exemption, the District Court continued its analysis to determine whether disclosure “could reasonably be expected to interfere with privacy interests.” Id. at 87. The court explained that “[i]nformation gleaned from a background check is typically considered private information, even if particular subsets of the information have already been disclosed to the public.” Id. at 88. Thereafter, the court concluded that “disclosure of information from the FBI’s background check related to President Obama’s early life could reasonably be expected to constitute an unwarranted invasion of personal privacy” and that the “information requested by the plaintiff concerns the President’s prior status as a private citizen.” Id.

Archibald makes clear that all background information related to a public official is not per se a public record, but instead a public body must review the particular information or document withheld, weigh the privacy and public interests, and determine whether the document(s) must be disclosed in whole or part. See FCG, 656 F.2d at 865 (“the degree of intrusion occasioned by disclosure is necessarily dependent upon the character of the information in question”).

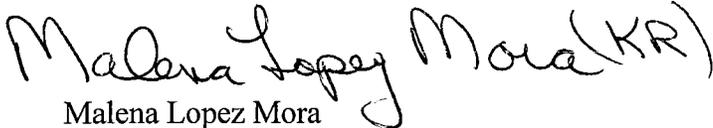
Here, we find the privacy interest of the redacted material (relating to the second category) outweighs the public interest in disclosure. Notably, your correspondence to this Department asserting a public interest makes no reference or application whatsoever to the particular nature of the documents or information at issue and is more akin to a per se argument that because a particular individual was seeking public office, the entire background report should be disclosed. This per se argument is inconsistent with Archibald, Collette, and other case law. See also FCG, 656 F.2d at 865 (“the degree of intrusion occasioned by disclosure is necessarily dependent upon the character of the information in question”). Moreover, while you may not know the precise verbiage of the redacted material, the evidence and background in this case make clear that you are generally aware of the nature of the redacted material. Under these circumstances, the failure to present this Department with a “public interest” argument aimed at “the character of the information in question” is particularly relevant. Id.

It is also not lost upon this Department that in this situation the nature of the information you seek may be akin to information that may be found in a law enforcement incident report. While the in camera nature of our review makes extended discussion of this matter difficult, it suffices that our prior observation would apply: “[w]hen a law enforcement agency investigates a complaint and determines that an arrest is not warranted, there exists a strong presumption that records arising out of that investigation fail to meet the threshold requirement established by R.I. Gen. Laws § 38-2-2(4)(i)(D)(c).” See In re Cumberland Police Department, ADV PR 03-02. See also Collette, PR 16-02. We have been provided no reason why our prior observations should not govern in this case, and considering the federal case law discussed above, we conclude that the privacy interest of the redacted material outweighs the public interest in disclosure. Again, you provide no argument concerning how disclosure of the redacted material would advance the public interest and this is particularly the case because the DPS provided you a reasonably segregable portion of the public record. See R.I. Gen. Laws § 38-2-3(b).

Although the Attorney General has found no violation and will not file suit in this matter, nothing within the APRA prohibits an individual or entity 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.

Very truly yours,

A handwritten signature in black ink that reads "Malena Lopez Mora (KR)". The signature is written in a cursive style with a large, stylized initial "M".

Malena Lopez Mora
Special Assistant Attorney General

MLM/kr

Cc: Paul Andrews, Esquire