State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

April 2, 2018
PR 18-08

Ms. Johanna Harris

Re: Harris v. City of Providence

Dear Ms. Harris:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the City of Providence ("City") is complete.

The instant complaint is a continuation of the matter already addressed by this Department in Harris v. City of Providence, PR 17-51, wherein we found that your request for fourteen (14) months of the Mayor's schedule was subject to an improper prepayment estimate. As such, we concluded that "the City must process your APRA request, as discussed herein, without charge." Id. However, we cautioned that "we leave to the City, in the first instance, to determine whether other entries (in whole or in part) should be redacted in a manner consistent with the APRA and this finding." Id.

On December 1, 2017, the City released the requested records in a manner consistent with our finding. In so doing, the City reviewed approximately 5,000 entries dating from January 1, 2015 to March 12, 2016, and made approximately 501 redactions. You filed the instant complaint on December 3, 2017. Specifically, you contend that the redactions – all 501 of them – were improper. You note, in pertinent part:

> "[T]he mere fact that an entry has been inserted in the Mayor's schedule creates the presumption that the entry is related to City business, and the City has the burden of proving otherwise.
> ***
> Very few of the redacted entries refer to a wake for a deceased individual or a telephone number. Some of the redacted telephone numbers appear to be publicly available extensions within the City's telephone directory.
> ***

> Accordingly, I request that the Attorney General conduct an in camera review of the City's 501 redactions and, where warranted, order the City to release those entries that were illegally redacted."

In response to your complaint, this Department received a substantive response in affidavit form from Assistant City Solicitor David Ellison, Esquire. In his response, Attorney Ellison states, in relevant part:

> "6. After engaging multiple City employees to review over 5,000 entries of the Mayor's schedule, the City fulfilled Harris' request.
> ***
> 8. The Mayor's personal schedule is co-mingled with his schedule as Mayor of the City of Providence and required exhaustive review by the City Solicitor's office.
> ***
> 10. In my review, I took the default position of assuming that each entry was public and only redacted those that were indicated to be private by a particular city official. By the requester's count, the City provided nearly 90% of the Mayor's schedule to the public, including all dates and times.
> ***
> 12. There are many entries on the schedule relating to time blocked out for the Mayor to spend time with his family. These were redacted in all circumstances.
> 13. There are meeting entries that occurred during the day noting that the Mayor met with his Year Up mentee. Those meetings were redacted to protect the mentee's personal privacy.
> 14. Personal appointments for the mayor, such as dental appointments, were all redacted.
> 15. The names of deceased individuals in entries relating to ceremonies of their deaths were redacted to protect the personal privacy of the deceased and their families.
> 16. Entries relating to interviews of candidates who did not receive the position for which they interviewed were redacted in their entirety to protect their personal privacy. ***
> 17. There are personal lunches and dinners that the Mayor had with friends and/or family which were redacted. Other lunches and dinners were released if they were not personal.
> ***
> 20. Some entries were redacted to protect the attorney-client relationship and reflect conversations protected by the attorney-client privilege. ***
> 21. *** [Commissioner of Public Safety Steven Pare] recommended certain entries should be redacted because they could compromise the Mayor's safety."

You filed a rebuttal stating, in pertinent part:

> "**The City cannot pretend that the Mayor is just an ordinary municipal employee.**
> In a proper evaluation of the balance between public interest and personal privacy, we cannot escape the simple fact that the Mayor is the chief executive officer of the City of Providence. Virtually every action he takes can significantly affect our lives, even when the Mayor chooses not to do something.
> ***
> In its evaluation of the public interest in disclosing the Mayor's calendar entries, the attorney general needs to understand that each entry may have substantially greater significance than may meet the untrained eye at first glance. ***
> Consider the calendar entry on February 11, 2016[.] *** Why has the Mayor been interviewing candidates for such lower-level positions as sewer construction worker[?] *** Is it conceivable that the Mayor wants to send a message to the individual who 'recommended' each candidate that he personally had a hand in hiring?
> ***
> **The City remains curiously silent on the question of fundraising events.**
> ***
> With the exception of a 'Los Andes Reception Dinner' on March 21, 2016, 7:00 – 9:00 p.m., there are no clear references to any fundraisers for [Mayor] Elorza himself. Yet there are strong indications that some of the redacted entries refer to specific fundraising events.
> ***
> If the City is in fact withholding evidence of the Mayor's fundraising, the redacted records need to be disclosed in the public interest. For each identified fundraiser, the public has a right to examine the evidence to determine whether the mayor raised funds on municipal property. If so, that would be a violation of the city's ethics ordinance.
> ***
> If a calendar entry was entitled 'Private Appointment' with nothing more, the public has a right to know that such an appointment took place so that it can inquire why it was supposedly 'private' and why it was inserted in the Mayor's schedule. Was the Mayor in fact soliciting campaign contributions in his office, thus violating the City's ethics code? Was he engaging in other illegal activity?
> ***
> **The assertion that the disclosure of certain calendar entries 'could compromise the Mayor's safety' is meaningless.**
> ***

> In this case, however, the requested calendar entries are all retrospective. It is hardly evident how they might disclose the Mayor's whereabouts at a future date.
> ***
> **The City improperly withheld the names of the interviewees who were not hired.**
> ***
> **The City improperly redacted the Mayor's meetings with his Year Up Mentee.**
> ***
> **The City improperly redacted the names of deceased persons.**
> ***
> **The City improperly redacted contacts with so-called friends and family.**
> ***
> **The City's redactions based upon the attorney-client relationship are improper.**" (Emphases in original).

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 City violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

Here, you take issue with virtually every stated reason that the City gave for redacting various entries. After receiving your rebuttal, and consistent with your original request, this Department conducted an in camera review of all 5,000 calendar entries, focusing on the approximately 501 redacted entries, which we reviewed in unredacted form. After reviewing the evidence before us, we find no violation. We explain below.

The City's chief explanation for its redactions is that the failure to do so would constitute a "clearly unwarranted invasion of personal privacy" in violation of R.I. Gen. Laws § 38-2-2(A)(I)(b). Accordingly, the central issue for us is to balance the public interest in disclosure of the calendar entries versus the privacy interest in the calendar entries.

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"), and by extension 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. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773, 109 S. Ct. 1468, 1481–82 (1989).

The Court further explained that:

> "the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, 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." Id. at 774–75, 109 S. Ct. at 1482.

As a general matter, we disagree with two central tenets of your rebuttal. First, taken to their logical termini, your rebuttal arguments would have this Department find that by virtue of his position as Mayor of the City, Mayor Elorza has no privacy interest in any of his calendar entries, including personal matters. While we acknowledge as a general matter that there is an increased public interest in Mayor Elorza's schedule as opposed to, say, a lower-ranked government official, "individuals do not waive all privacy interests in information relating to them simply by taking an oath of public office[.]" Lissner v. U.S. Customs Service, 241 F.3d 1220, 1223 (9th Cir. 2001). Reasoning, as you do, that the Mayor is incapable of having calendar entries related to family and friends not in the public interest belies the fact that Mayor Elorza still maintains at least some privacy interest. Additionally, your reasoning on this point ignores the privacy interests of others named in the calendar entries. Therefore, as a general matter, we reject your suggestion that the Mayor's calendar entries are per se devoid of privacy interests.

Second, we disagree with the speculative reasoning that permeates nearly every contention in your rebuttal. For example, you hypothesize that if Mayor Elorza held a fundraising event on municipal property, "that would be a violation of the city's ethics ordinance." However, you provide no evidence, let alone "clear evidence," that any such fundraiser or impropriety occurred. As our Supreme Court has instructed, "there is a presumption of legitimacy accorded to the Government's official conduct *** and where the presumption is applicable, clear evidence is usually required to displace it." See Providence Journal Co. v. Rhode Island Dept. of Public Safety ex. rel. Kilmartin, 136 A.3d 1168, 1176 (R.I. 2016)) (internal quotations omitted); see also Road and Highway Builders, LLC v. United States, 702 F.3d 1365, 1368 (Fed. Cir. 2012) ("We . . . have long upheld the principle that government officials are presumed to discharge their duties in good faith . . . . it is well-established that a high burden must be carried to overcome this presumption[.]") (internal quotations omitted).

Indeed, in Providence Journal, the Supreme Court reviewed nearly an identical argument as the one you make in this case. The Court explained with respect to a similar exemption as the one at issue in this case:

> "the Journal seeks the investigatory files related to the facts underlying the charge of a private individual in hopes of potentially uncovering some hint of impropriety. Like Favish, where the Court dealt with 'photographic images and other data pertaining to an individual who died under mysterious circumstances," the justification most likely to satisfy the APRA's public interest requirement "is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties.' Favish, 541 U.S. at 173, 124 S.Ct. 1570. Of course, this standard would be toothless if disclosure were required based upon mere speculation, without the need to provide some evidence of negligence or impropriety. See id. at 174, 124 S.Ct. 1570. Thus, we hold, in line with Favish, that:
>
> > '[W]here there is a privacy interest protected by [G.L.1956 § 38–2–2(4)(D)(c)] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.' Favish, 541 U.S. at 174, 124 S.Ct. 1570."

Providence Journal Co., 136 A.3d at 1175.

Applying this test to the similar balancing tests at issue in this case, you do not submit any evidence that Mayor Elorza (or any other City employee) has engaged in any improper conduct or any evidence that disclosure of any particular calendar entry would advance exposure of improper conduct. Having reviewed the redacted calendar entries in camera we also find no evidence that disclosure would reveal any improper conduct. Accordingly, we decline to, as you suggest, infer nefarious reasoning behind every redaction.

With respect to your particular grievances, we note that we have already opined on several of the categories of redacted entries. For example, you take issue with the redaction of the names of interviewees who were not ultimately hired. As you acknowledge, we addressed an identical situation in Jackson v. Town of Coventry, PR 14-35. There, we noted that "federal courts have found that names of unsuccessful applicants are exempt because the names, along with other identifying information, are 'unlikely to 'open public business to public view.' See Putnam v. U.S. Dept. of Justice, 873 F. Supp. 705, 712-13 (D.D.C. 1995); see also Voinche v. Federal Bureau of Investigation, 940 F. Supp. 323, 330 (D.D.C. 1996)." Id. After applying the balancing test, we found that "disclosure of the unsuccessful

applicants' resumes will constitute a 'clearly unwarranted invasion of personal privacy,' and that the Town did not violate the APRA by denying access to these unsuccessful applicant resumes." Id. Your attempt to distinguish this finding by asserting that the Jackson complainant's particular request affected the outcome is unavailing. Additionally, we note that you do not provide a cognizable public interest in disclosure of applicants' names other than your general speculative reasoning that it could uncover potential improper conduct. As discussed supra, this general averment is insufficient. Furthermore, you provide no reasoned argument to depart from our prior finding and we accordingly decline to do so. Accordingly, the entries containing the names of interviewees who were not hired constitute a "clearly unwarranted invasion of personal privacy" and the City did not violate the APRA by redacting them.

Additionally, we have previously weighed in on the implications on a public official's personal safety in conducting the balancing test. See Harris v. City of Providence, PR 17-53. You concede that "[t]here is precedent for the notion that the prospective disclosure of the Mayor's whereabouts might jeopardize his safety." You contend that this precedent is inapposite because it is cabined to prospective calendar entries. Respectfully, we disagree. We noted in Harris v. City of Providence, PR 17-53 that "'[e]ven disclosure of outdated schedules would pose a security risk, * * * because they would enable the reader to discern characteristic habits and activity patterns followed by the [public official], from which opportunities for access to the [public official's] person may be surmised.'" Id. (quoting Times Mirror Company v. The Superior Court of Sacramento County, 813 P.2d 240, 243 (Cal. 1991)).

Here, the City presented evidence in affidavit form that the Commissioner of Public Safety deemed certain calendar entries susceptible to redaction because they could compromise the Mayor's safety. You provide no evidence to the contrary. Instead, you make the circular argument that there is a public interest in knowing that the Mayor frequents certain locations on a predictable basis and that there is a public interest is knowing that such predictability could jeopardize his safety. Respectfully, it is truly ironic that the public interest you assert in disclosure is precisely the personal safety basis for withholding the redacted information. Consistent with our finding in Harris v. City of Providence, PR 17-53, we credit the uncontroverted assertion by the Commissioner of Public Safety that even these outdated schedules could disclose patterns of activity that could threaten the Mayor's safety. See Petrucelli v. Dept. of Justice, 51 F. Supp. 3d 142, 172 (D.D.C. 2014) ("Within limits, the court defers to the agency's assessment of danger."). Accordingly, we conclude that the redaction of certain calendar entries, the disclosure of which could jeopardize the Mayor's safety and/or which does not outweigh the public interest in disclosure, did not violate the APRA.

We turn next to your assertions regarding the redacted calendar entries for wakes and funerals as well as meetings with the Mayor's Year Up mentee. Your chief contention is that this information was available by other means and thus does not qualify for protection. This averment overlooks the Supreme Court's instruction that "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." Reporters Comm., 489 U.S. at 770 (quotations and citations omitted); see also Providence Journal Co., 136 A.3d at 1177 (quoting Reporters Comm.). There are privacy interests in a family's wake or funeral for a lost loved one and in a minor mentee's meeting with a mentor. It should also be noted that the City disclosed that the Mayor met with his mentee and/or attended a wake or funeral, but only redacted the name of the mentee or the identity of the decedent. Other than a generalized assertion that everything the Mayor does is in the public interest – which, as described supra, is insufficient – you provide no public interest in disclosure of calendar entries regarding the identity of the mentee or decendent. As such, your non-asserted public interest is outweighed by the privacy interests and, accordingly, the City did not violate the APRA by redacting these calendar entries. See Conley v. City of East Providence, PR 17-39 (finding that a non-asserted public interest is outweighed by privacy interests).

We next address your claims regarding fundraising events. You profess consternation that "there are no clear references to any fundraisers for [Mayor] Elorza himself." You surmise that this must mean that fundraiser events were redacted. Our discussion of this issue is hindered since any analysis would confirm or deny the nature of the redactions. However, even assuming that your contention is accurate and that the City did redact fundraising events, you do not sufficiently articulate how disclosure of those calendar entries, i.e., that the Mayor attended his own fundraising events, would further the public interest as described by the Supreme Court. See Reporters Committee, 489 U.S. at 773 ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose.").

On this point, it is hardly surprising that an elected official would attend fundraising events, particularly his or her own fundraising events. And while there is certainly a significant public interest in campaign financing in general and who donates to an elected official in particular, it is unclear how disclosure of a calendar entry furthers those public interests. Indeed, it is difficult to understand – and you provide no evidence or argument to illuminate – how knowing that the Mayor attended his own fundraising event on a specific date furthers the public interest in knowing who donated to the Mayor's campaign and in what amounts. We note that these public interests are already advanced in far greater detail through other public documents, namely those maintained by the Rhode Island Board of Elections. See http://www.ricampaignfinance.com/RIPublic/Filings.aspx.[1] Therefore, on this record, we find no violation.

Before concluding, we take a final turn to the last category of redacted calendar entries – those redacted based on the attorney client privilege. The APRA exempts from public disclosure "[a]ll records relating to a client/attorney relationship." R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). Our past cases have noted that this provision exempts documents related to the attorney/client relationship, and that this exemption is broader than documents relating

[1] This database contains quarterly reports that consist of detailed information as to each contribution given to a particular public official, including names, addresses, amounts given, and dates.

to the attorney/client privilege. See Graziano v. Rhode Island Auditor General, PR 98-01. "The general rule is that communications made by a client to his attorney for the purposes of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure." State v. Von Bulow, 475 A.2d 995, 1004 (R.I. 1984).

You acknowledge that this APRA exemption is "broader than the attorney-client privilege" but then, curiously, cite the Superior Court Rules of Civil Procedure to argue that the redactions were improper. Respectfully, in determining the scope of an APRA exemption, we are bound by the express statutory terms.

Based on our in camera review of the unredacted calendar entries, we find that they contained information "relating to a client/attorney relationship." R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). Although our in camera review prevents a full discussion of the calendar entries at issue, it suffices that these calendar entries are records relating to legal representation of the City. For example, one redacted entry contained the following: "September 3, 2015, 9:00–9:30 a.m. Meet with Legal re: [redacted]." The specific subject matter of a legal discussion between the Mayor and his attorneys is clearly "relat[ed] to a client/attorney relationship," and thus redaction was proper. R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). You provide no legal precedent to the contrary. Accordingly, we find that the City did not violate the APRA by exempting the calendar entries from disclosure.

In sum, based on the evidence and arguments presented, as well as our in camera review, we find no violation and conclude that the City provided a reasonably segregable document. See R.I. Gen. Laws § 38-2-3(b). While reasonable minds may differ on some redactions – such as telephone extensions – we are confident and conclude that the information redacted by the City does not advance the public interest in knowing "what their government is up to," Reporters Committee, 489 U.S. at 773, and/or was otherwise properly redacted. As such, we find no violations.

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,

Sean Lyness
Special Assistant Attorney General

Cc: Etie Schaub, Esq.