



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 11, 2014
PR 14-04

Mr. Greg DeAscentis

Re: DeAscentis v. Town of Jamestown

Dear Mr. DeAscentis:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Town of Jamestown (“Town”) is complete. By correspondence dated September 30, 2013, you allege the Town violated the APRA when it improperly withheld the complete addresses of mooring permit holders in Jamestown as requested per your APRA request dated September 25, 2013.¹ Specifically, you argue that the Town violated the APRA when it failed to disclose the street address and state for each of the Town’s mooring permit holders in response to your APRA request, wherein you requested, “Current list of mooring owners, mooring # and address.”²

In response to your complaint, we received a substantive response from the Town solicitor, Peter D. Ruggiero, Esquire. Attorney Ruggiero states, in pertinent part:

¹ A public body has ten (10) business days to respond to an APRA request. See R.I. Gen. Laws § 38-2-7. You made your APRA request to the Town on September 25, 2013. You filed a complaint with this Department on September 30, 2013, only three (3) business days after the date of your request. Normally, such a complaint to this Department is not ripe, but since the Town responded on September 27, 2013, prior to you filing your complaint with this Department, and because the Town does not raise this issue, we proceed with the merits of your allegation.

² In response to your APRA request, the Town did provide the mooring number, mooring holder name, and town of residence.

The Harbor Commission provided the requested documents to Mr. DeAscentis by e-mail on September 27, 2103 [sic] as evidenced by the enclosed e-mail message and attachments (the 'Response'). The Response contained the names of each current mooring permit holder, the municipality of residence and the mooring permit number. In discussing this matter with the Harbor Commission Clerk, I was informed that the street address and state of residence for each mooring permit holder was omitted from the Response as the release of such information would constitute an unwarranted invasion of personal privacy and be of no relevance to the conduct of government action.

The APRA establishes that all public records must be disclosed unless they specifically qualify as exempt from public disclosure. The General Laws at § 38-2-2(4)(A)(I)(b) specifically exempt from public disclosure '[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. section 552 et seq....'. This exemption has been interpreted by the United States Supreme Court to mean '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.' United States Department of Justice, et al. v. Reporters Committee for Freedom of the Press, et al., 489 U.S. 749, 774 (1989). The reasoning applied in the Freedom of the Press case has been incorporated in the R.I. Superior Court in Fuka v. R.I. Dept. of Environmental Management, C.A. 07-1050 (Apr. 17, 2007). The touchstone concerning whether public disclosure of a record maintained by the government outweighs an individual's privacy is whether the records concern 'official information' about the government agency. In Fuka, the Superior Court held that 'the list of addresses of the licensees on file with the DEM will provide little or no insight into the performance of the DEM.' Accordingly, the list of licensees' addresses in the Fuka matters were determined exempt from public disclosure.

This instance whereby the Harbor Commission Clerk withheld the street addresses and state of residence of mooring permit holders is analogous with Freedom of the Press and the Fuka cases, wherein public disclosure of the street addresses and state of residence of the mooring permit holders does not contain any 'official information' about the government agency and release of such information would clearly constitute an unwarranted invasion of personal privacy. As such, it is my conclusion that no violation of the APRA occurred in this instance.

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

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. 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).³

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 (emphases in original).

The instant case implicates the amended R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts from public disclosure, in pertinent part:

Personnel 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).⁴

³ 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).

⁴ This amendment became effective September 1, 2012.

This Section is modeled after 5 U.S.C. § 552 (b)(6), which exempts from disclosure all “personnel and medical files and similar files...which would constitute a clearly unwarranted invasion of personal privacy.” We must apply a two-fold analysis to interpret R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). First, we must determine what constitutes “personnel and other personal individually-identifiable records.” The United States Supreme Court has interpreted the similar language of 5 U.S.C. § 552 (b)(6), “personnel and medical files and similar files,” to mean “all information which ‘applies to a particular individual[.]’” See Voinche v. Federal Bureau of Investigation, 940 F.Supp. 323, 329 (D.C. 1996)(quoting Department of State v. Washington Post Co., 456 U.S. 595 (1982)). Although the precise language of R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) has not yet been interpreted by the courts, this Department looks to the United States Supreme Court’s interpretation of the language contained within Exemption (b)(6) as guidance and considers “personnel and other personal individually-identifiable records” to include all information applying to a particular individual.

Second, we must determine what constitutes a “clearly unwarranted invasion of personal privacy.” The United States Supreme Court relied on House and Senate Reports to interpret this phrase. See Dep’t of Air Force v. Rose, 425 U.S. 352, 355-57 (1976). The House report stated that “[t]he limitation of a ‘clearly unwarranted invasion of privacy’ provides a proper balance between the protection of an individual’s right of privacy and the preservation of the public’s right to Government information by excluding those kinds of files the disclosure of which might harm the individual.” See id. at 373. Similarly, with respect to a “clearly unwarranted invasion of privacy,” the Senate report weighed the “interests between the protection of an individual’s private affairs from unnecessary public scrutiny, and the preservation of the public’s right to governmental information.” See id. The Supreme Court thus determined that the legislative intent promulgated a balancing test between the individual’s privacy interests and the public’s right to disclosure.

In United States Department of Justice, et al. v. Reporters Committee for Freedom of the Press, et al., 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), which excludes records or information compiled for law enforcement purposes from disclosure only if production of such documents “could reasonably be expected to constitute *an unwarranted invasion of personal privacy*.” See 489 U.S. 749, 756 (1989) (emphasis added). Unlike the language contained in Exemption (b)(6) and R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), the word “clearly” is omitted in Exemption (b)(7). See id. at 756. The Supreme Court’s analysis, however, 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." In Holland v. CIA, the United States District Court for the District of Columbia found that the CIA properly withheld the name, signature, initials, address and entire resume of an applicant. See Holland, 1992 WL 233820 at *4. The Court found that the applicant had "a substantial privacy interest" that trumped the "insubstantial" public interest purported by the requester and rejected the argument that the public has a right to know how the CIA chooses its employees through its selection process or "network":

[w]hile the Court recognizes that revelation of this individual's identity, or information that would lead to it, might in some fashion further illuminate this "network," the Court finds on balance that disclosure of this identity under the circumstances of this case would work a clearly unwarranted invasion of personal privacy. See id. at *15 citing Core v. U.S. Postal Serv., 730 F.2d 946 (4th Cir. 1984).

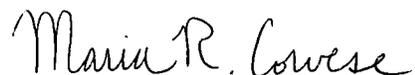
In 2007, the Rhode Island Superior Court determined that the addresses of licensed fishermen were exempt under the APRA. See Fuka v. RI Dept. of Environmental Mgmt, 2007 WL 1234484 (Indeglia, J.). Although the Court decided this case pursuant to the balancing test set forth in DARE v. Gannon, 713 A.2d 218 (R.I. 1998), we find the Court's conclusion and balancing analysis applicable to the instant matter. Again, the main purpose of the APRA is to "shed light on how Government operates." See Reporters Committee, 489 U.S. at 780 (1989). Respectfully, using the standards set forth above, you have demonstrated no "public interest" in disclosure of the street address and state of residence for each mooring permit holder, nor is a "public interest" identifiable to us. While we certainly do not adopt a per se rule, disclosure of street addresses and states of residence for a Town's mooring permit holders will not shed any light on government operations. See Chappell v. Department of Public Safety, PR 14-03 ("***disclosure of the city or town of residence will not shed any light on the operations of government."). Balanced against this non-existent "public interest," we perceive at least some privacy interest. See also United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994)(home addresses of agency employees represented by unions are exempt under the Freedom of Information Act). Accordingly, similar to Fuka, Chappell, and the balancing test as set forth in federal case law and in DARE, we conclude that the street addresses and states of residence for the Town's mooring permit holders are exempt under R.I. Gen. Laws § 38-2-2(4)(A)I(b) and the balancing test, and therefore find no violation.⁵

⁵ In an email dated October 3, 2013 to the Harbor Commission Clerk Ms. Kimberly Devlin and Special Assistant Attorney General Lisa Pinsonneault, you attached a page from an article dated

Although the Attorney General has found no violation, 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,



Maria R. Corvese
Special Assistant Attorney General
Extension 2297

MRC/pl

Cc: Peter D. Ruggiero, Esquire
peter@rubroc.com (by email only)

September 26, 2013 from the Jamestown Press. You state that the Press printed “the public information of all the building permits, Mechanical permits, electrical permits and Demolition permits. The name and address of each permit holder is listed and the specific details of the permit. It is all public information.” You then inquired why such information regarding mooring permits was withheld from you while the addresses of holders for various other permits are, as you state, “public information.” Our focus in this finding is not to determine whether the information you reference should have been disclosed. Indeed, our focus is to determine whether the street addresses and states of mooring permit holders must be disclosed, and our finding answers this question. The fact that similar information was disclosed and published in a newspaper is of no merit to our analysis. As the Rhode Island Supreme Court has noted, “the APRA exemptions ***allow agencies to withhold documents, but do not require withholding.” In re New England Gas, 842 A.2d 551, 545 (R.I. 2004). Accordingly, the fact that similar information may have been disclosed in another situation does not influence our APRA analysis and is hardly binding on this Department.

It is also worth noting that in Fuka, the DEM had disclosed similar address information, but then later denied Fuka’s APRA request for address information claiming the addresses were exempt from disclosure. The Superior Court found the prior disclosure was of no moment to its analysis and we follow this guidance for the reasons previously stated.