



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

July 3, 2013  
PR 13-14

Mr. Paul E. Pontarelli

**Re: Pontarelli v. Rhode Island Department of Elementary and Secondary Education**

Dear Mr. Pontarelli:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Department of Elementary and Secondary Education (“Education Department”) is complete. By correspondence dated November 9, 2012, you allege the Department violated the APRA when it improperly denied your APRA request dated October 25, 2012 for the following documents:

All records related to the ‘Compensation Review Committee.’ Records shall include those concerning the purpose, creation, and operation of the committee, as well as the records submitted by employees to the committee and the committee’s responses to employees.

In response to your complaint, we received an affidavit from Mr. Elliot Krieger, the Education Department’s public information officer. In his affidavit, Mr. Krieger states, in pertinent part:

I am the Public Information Officer at the R.I. Department of Education (RIDE), and as such I handle all requests...for Access to Public Records that RIDE receives.

On October 25, 2012, I received a request... under the Access to Public Records Act from Paul Pontarelli, for:

All records related to the ‘Compensation Review Committee.’ Records shall include those concerning the purpose, creation, and operation of the committee, as well as the records submitted by employees to the committee and the committee’s responses to employees.

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On November 2, 2012, I replied to Mr. Pontarelli...In my reply, I broke his request into two points, for clarity:

1. All records related to the 'Compensation Review Committee.' Records shall include those concerning the purpose, creation, and operation of the committee, as well as
2. The records submitted by employees to the committee and the committee's responses to employees.

Our response was to deny Mr. Pontarelli access to these records, thus:

Point 1:

The records that you have requested are not in the custody and control of the R.I. Department of Education. No such records exist.

Point 2:

The records that you have requested are exempt from disclosure pursuant to the provisions of RIGL Section 38-2-2-(3)(A)(1)(b) [sic] as they would be 'personnel and other personal individually identifiable records...the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'

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As to Point 1 of my response, the 'Compensation Review Committee' to which Mr. Pontarelli refers in his request is in fact an informal working group that the RIDE Leadership Team has recently convened to review new and pending requests for salary adjustments and to review salary offers to pending hires. The Leadership Team is advisory to the Commissioner, it is not a public body, and it does not keep minutes of its meetings.

The purpose of the Compensation Review Committee is to ensure consistency across the agency regarding salary decisions. The Committee is advisory to the Commissioner and has no unique statutory authority and is not a public body. As noted to Mr. Pontarelli, there are no records related to the 'purpose, creation, and operation of the committee' of this Committee, though our Human Resources Office has been asked to develop some guiding documents for the Committee, which would be public records once the Commissioner approves them and which RIDE would be glad to provide at that time to the Attorney General and to Mr. Pontarelli, supplementary to his request.

As to Point 2 of my response, members of the RIDE Leadership Team provide the Compensation Review Committee with records of employees for the Committee members to review regarding proposed salary adjustments. I can only reiterate that RIDE holds that these records are exempt from disclosure pursuant to the provisions of RIGL Section 38-2-2(3)(A)(1)(b) [sic] as they would be ‘personnel and other personal individually identifiable records...the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.’ These records contain no reasonably segregable information that is releasable; because these records provide details of job descriptions, responsibilities, and performance, it would be easy to identify the personnel whom these records reference, even with the redaction of names and other personal information such as addresses and job titles.

We acknowledge receipt of your reply to the Education Department’s response.

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

You requested the following records from the Education Department:

All records related to the Compensation Review Committee. Records shall include those concerning the purpose, creation, and operation of the committee, as well as the records submitted by employees to the committee and the committee’s responses to employees.

We will analyze your request in two parts, but before doing so, you take issue with what you claim is the inconsistent response by the Education Department. As Mr. Krieger’s response makes clear, however, the two points in his response references the two parts of your APRA request. Accordingly we do not find the response inconsistent and we examine this two-point response below.

I. Records concerning the purpose, creation, and operation of the Compensation Review Committee.

Under the APRA, a public body has no obligation to create a non-existent document. The APRA is clear with regard to documents or information not maintained by a public body:

Nothing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was

made except to the extent that such records are in an electronic format and the public body would not be unduly burdened in providing such data. See R.I. Gen. Laws § 38-2-3(h).

This Department has previously held that failure of a public body to produce records that do not exist does not violate the APRA. See e.g., Hazelwood v. Town of West Greenwich, PR 13-09; Tetreault v. Lincoln School Committee and Superintendent of Schools, PR 99-14; Schmidt v. Ashaway Volunteer Fire Association and Ashaway Fire District, PR 97-23.

Here, there is no evidence, as of the date of your request, that the Review Committee or the Education Department maintained records relating to the “purpose, creation, and operation” of the Committee, and therefore, the Education Department did not violate the APRA.<sup>1</sup>

II. Records submitted by employees to the Committee and the Committee’s responses to employees.

The main purpose of the APRA is to “shed light on how Government operates.” See United States Department of Justice, et al. v. Reporters Committee for Freedom of the Press, et al., 489 U.S. 749, 780 (1989). Absent a strong public interest that outweighs the privacy of an individual, personally identifying information that is “unlikely to ‘open public business to public view’” is not public. See Putnam v. U.S. Dept. of Justice, 873 F.Supp. 705, 712-13 (D.C. 1995); Voinche v. Federal Bureau of Investigation, 940 F.Supp. 323, 330 (D.C. 1996); see also In re Rhode Island Airport Corporation, ADV PR 12-02.

A record is public unless it falls within one of several enumerated exceptions. See R.I. Gen. Laws § 38-2-2(4)(A)-(Y). One exception is Rhode Island General Laws § 38-2-2(4)(A)(I)(b), which 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...[.]” The APRA does, however, require “[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4)” to be released. See R.I. Gen. Laws § 38-2-3(b).<sup>2</sup>

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<sup>1</sup> This Department notes Mr. Krieger’s statement in his response that the Human Resources Office was in the process of “develop[ing] guiding documents for the Committee, which would be public records once the Commissioner approves them\*\*\*.” It is not entirely clear if the draft guidelines existed before or after your request. If the draft guidelines existed before the date of your request, they would be exempt pursuant to Rhode Island General Laws § 38-2-2(K). If the draft guidelines existed after the date of your request, they would not be responsive to your request as discussed above.

<sup>2</sup> If a public body exempts an entire document, the APRA also requires a public body to “state in writing that no portion of the document or record contains reasonable segregable information that is releasable.” See R.I. Gen. Laws § 38-2-3(b).

As stated above, Rhode Island General Laws § 38-2-2(4)(A)(I)(b) 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*\*\*\*.” Because this provision was effective September 1, 2012, the Rhode Island Supreme Court has not had an opportunity to interpret this newly amended provision. In addition, this Department has had limited opportunity to interpret this provision. In In re Rhode Island Airport Corporation, ADV PR 12-02, we considered whether resumes of unsuccessful applicants are public records based upon the rulings of the United States Supreme Court and other federal courts on similar provisions of the Freedom of Information Act (“FOIA”), upon which the APRA was modeled. We opined that unsuccessful applicants have a privacy interest in the non-disclosure of certain information, such as their names and resumes. See In re Rhode Island Airport Corporation, ADV 12-02.

According to Mr. Krieger’s affidavit, the purpose of the Committee is to “review new and pending requests for salary adjustments and to review salary offers to pending hires.” Here, you have offered no evidence as to how disclosure of the requested documents advances the public interest, as defined by the APRA and the FOIA. Contrarily, Mr. Kreiger argues that all the documents are exempt per Rhode Island General Laws § 38-2-2(4)(A)(I)(b). The Education Department provided us with six (6) documents it considers responsive to your request. After an *in-camera* review of those documents, we conclude the following.

One (1) document is an undated request for reclassification and three (3) documents are letters either to or from the Committee itself, and to or from the Education Department regarding the Committee. These letters are dated September 25, 2012; October 18, 2012; and October 22, 2012. All of these documents, except the September 25, 2012 letter, were correspondence either to you or from you. Since you were in possession of all these documents, except the September 25, 2012 letter, we limit our analysis to that letter.<sup>3</sup> After careful review of the September 25, 2012 letter, we agree with Mr. Kreiger that this document does not contain reasonably segregable information and disclosure of this document is exempt pursuant to Rhode Island General Laws § 38-2-2(4)(A)(I)(b). In this respect, since you contend that “gross salary” and “job descriptions” are public records, we note that the September 25, 2012 document does not contain this information. Thus, the Education Department did not violate the APRA when it failed to disclose this letter to you in response to your APRA request.

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<sup>3</sup> It is important to note that since your request was made under the APRA, our analysis must focus on which documents any person is entitled to, and not which documents you, as an individual, may be entitled to. See Bernard v. Vose, 730 A.2d 30 (R.I. 1999)(under the APRA, a requesting party “has no individualized right to review his board files.”); see also Radtke v. Rhode Island Department of Public Safety, PR 13-10; McQuade v. Rhode Island State Police, PR 13-03. Even if we were to consider those three (3) documents sent either by you or to you by the Education Department, our analysis would not change because once a document is made public to one person under the APRA, it is public to all persons.

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The final two (2) documents were generated by the Committee itself. Since you requested documents that were “submitted by employees to the committee” and not “created” by the Committee, these documents are not responsive to your request.

While the Attorney General has found no violation, nothing within the APRA prohibits an individual 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 your 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  
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MRC/pl

Cc: David V. Abbott, Esquire