



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

January 17, 2014
PR 14-01 A

Mr. Walt Buteau

RE: WPRI v. Community College of Rhode Island

Dear Mr. Buteau:

The investigation into WPRI's Access to Public Records Act ("APRA") complaint filed against the Community College of Rhode Island ("CCRI") is complete. By email correspondence dated April 29, 2013, you allege CCRI violated the APRA when it improperly denied your request for records responsive to the reason Ms. Jane Doe,¹ a CCRI employee, was terminated.

In response to your complaint, we received a substantive response from CCRI's legal counsel, Ronald A. Cavallaro, Esquire. Attorney Cavallaro states, in pertinent part:

"[A]s the College indicated in its initial response and the President reiterated in his response to the Complainant's appeal, pursuant to the APRA, documents that reflect the reason for termination of this specifically identified college employee, are '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.,' and are therefore not deemed public under the APRA * * * Documents that contain a reason for the termination of a College employee are maintain[ed] in that employee's personnel file which clearly brings them within the purview of RIGL §38-2-2(4)(A)(I)(b)'s exemption. * * *

In fact, when describing the types of employee information that would constitute and/or be contained in a personnel file, the US Supreme Court in Department of the Air [F]orce, et. al. v. Michael T. Rose [] indicated that the type of information typically in a personnel file includes 'vast amounts of personal data' . . . showing, for example, where [one], was born, the names of [ones] parents, where [one] had

¹ We decline to name this person for privacy reasons.

lived from time to time, [ones] high school or other school records, results of examinations, and evaluations of work performance.’ Clearly, documents that reflect the reason for one’s termination of employment and/or the fact that one has received discipline from his/her employer come within the purview of what is typically included in one’s personnel file as described by the Supreme Court.

It also follows that the disclosure of the specific reasons that one’s employment has been terminated also constitutes a clearly unwarranted invasion of privacy, under both the APRA and the Federal FOIA. This fact was noted by the United States District Court for the District of Columbia in Metropolitan Life Insurance Company v. W.J. Usery, et al.[], where it stated that ‘the disclosure of information concerning an employee’s promotion prospects, lack of promotion prospects, job performance evaluations, and personal preferences and goals, *and the reason for an employee’s termination . . .* would constitute a substantial invasion of the company’s employees’ person privacy.’ * * * ‘The disclosure of negative comments or information about an employee on these subjects,’ the District Court noted, ‘could be quite embarrassing and painful to the employee.’ Similarly, the Rhode Island Supreme Court in Pawtucket Teachers’ Alliance Local 920, AFT, AFL-CIO, et al v. James [V.] Brady[] indicated that ‘investigations into administrative and morale problems at work places necessarily [implicate] personal and intimate topics of discussion that are inherently related to personnel matters . . .’ and that ‘*the potential for harm resulting from the disclosure of this type of information clearly outweighs any perceived benefit that would accrue to the Plaintiffs.*’ []

This is especially true in the instant matter where this employee’s termination of employment has been appealed through the grievance process set forth in the Collective Bargaining Agreement that her union has entered into with the College and the Board of Governors for Higher Education. * * * Indeed, the release of the reason(s) for this employee’s termination prior to the issuance of a final determination in this personnel matter would cause this employee’s termination to be adjudicated in public rather than through the grievance process that is available to her under this Collective Bargaining Agreement. Moreover, there is nothing in the present APRA that would indicate that the legislature intended that public employees’ discipline and personnel matters be public, and that the R.I. Supreme Court’s balancing analysis illustrated in Brady is no longer applicable. Indeed, the Court in Brady was applying the balancing and exemption language of the FOIA, which has now been specifically inserted into the APRA through its recent amendments, and an application of that balancing analysis here clearly tilts in favor of nondisclosure and this individual’s right to privacy that is expressly acknowledged and granted in the APRA.

It should also be noted, that some of the documents in this employee’s personnel file that include the reason(s) for this employee’s termination of employment include those forms that the College, as an employer, is required to file with the

RI Department of Employment and Training pursuant to the provisions of the R.I. Employment Security Act. [] These forms and the information contained on them are specifically deemed confidential pursuant to RIGL §28-42-38(c), which indicates that ‘information obtained or information contained in other records of the Department [of Labor and Training] obtained from any individual pursuant to the administration of those chapters, *shall be held confidential by the director and shall not be published or be opened to public inspection in any manner revealing the individuals or employing unit’s identity. . .*’ [] This employee, like all others in Rhode Island, is therefore granted a specific right of confidentiality to any documents and information regarding unemployment benefits that are provided to the Department of Employment and Training by the College. It follows, therefore, that the disclosure of any such documents regarding this specifically identified employee [] would clearly be an unwarranted invasion of personal privacy, and the College’s nondisclosure of these documents was clearly warranted under the APRA.”

We acknowledge your reply, filed by WPRI’s legal counsel, dated June 6, 2013. On or about August 7, 2013, legal counsel for CCRI informed this Department that the grievance process was completed, the case had been arbitrated and the parties were awaiting the Arbitrator’s Award. On or about October 16, 2013, this Department received, for its in camera review, documents from legal counsel for CCRI, including an Arbitrator’s Award directing CCRI, inter alia, to reinstate Ms. Doe to her former position. In other words, the termination had been reversed.

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 CCRI 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). In this case, you “requested the reason CCRI employee, [Ms. Jane Doe], was terminated on December 18, 2012.” You contend that “sources tell us she was fired for [wrongdoing]”² and “[w]e believe since this was an expenditure of tax money, the taxpayer has a right to know about it.” You further contend that the reason for this individual’s termination is not an “unwarranted” invasion of privacy. Rather, this individual was “a public employee whose salary was paid for by taxpayers.”

Rhode Island General Laws § 38-2-2(4)(A)(I)(b) exempts in relevant part “[p]ersonnel and other personal individually-identifiable records * * * the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et. seq.” The plain language

² We decline to provide more information regarding this individual’s alleged wrongdoing.

of this provision 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[.]” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).³

The undisputed facts are that this CCRI employee was terminated after an internal investigation, although after your APRA complaint was filed, an arbitrator overturned this termination. The issue in this case is whether CCRI violated the APRA when it failed to disclose records that specifically relate to the reasons for the termination as requested through an APRA request by WPRI. We find it helpful to our analysis to review what courts have held in similar situations.

In Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989), the Rhode Island Supreme Court determined that the requested document “was exempted from public access” in its entirety. Id. at 559. As described by the Supreme Court in Brady, the Pawtucket School Committee:

“appointed a new principal to head the Varieur Elementary School in Pawtucket. Shortly thereafter, the committee received a series of complaints regarding the operation of the school and the relationship between the principal and the teaching staff. In response to growing parental concerns, the [School Committee] authorized a management study of school operations.” Id. at 557.

Subsequently, the School Committee hired an outside consultant who conducted numerous interviews with the principal and staff, and summarized his findings into a report, which was presented to the School Committee in executive session and sealed. After the plaintiffs requested the report (and were denied access), they filed an APRA lawsuit. The trial justice determined that the report was exempt from public disclosure pursuant to what was codified as R.I. Gen. Laws § 38-2-2(5)(i)(A)(I), and on appeal, the Supreme Court affirmed.

While the Court began its analysis by recognizing “the basic policy of the [APRA] is in favor of disclosure,” the Court simultaneously observed that “the dual purpose of APRA makes clear that the Legislature did not intend to bestow upon the public carte blanche access to all publicly held documents.” Id. at 558. The Brady plaintiffs advanced their position by arguing that the “report pertains to school operations and educational concerns * * * rather than to the personnel records of any individual.” Id. The Court was “unpersuaded” by this argument. Id.

Accordingly, the entire report in Brady was deemed exempt from public disclosure. The Court further held that if it ordered the release of the report, it “would effectively license the public to review the performance of any principal or teacher under the guise of an investigation into

³ The APRA underwent significant changes effective September 1, 2012. Previously, the language of the specific section at issue, R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), formally at R.I. Gen. Laws § 38-2-2(5)(i)(A)(I), exempted “[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee, including, but not limited to, personnel.”

school operation and administration. Such a result would clearly be in derogation of public policy and directly contravene the express language of APRA.” Id. at 559-60.

In Mueller v. United States Department of the Air Force, 63 F.Supp.2d 738 (E.D. Virginia 1999), an F-15 aircraft crashed on the runway during take-off at an Air Force base in Germany, killing the pilot. An Air Force investigation revealed that the accident was caused by a crossed steering rod. Id. at 740. Technical Sergeant Thomas Mueller, plaintiff’s deceased husband, was the supervisor of the two mechanics who serviced the aircraft prior to the accident. As a result of the crash investigation, the Air Force charged plaintiff’s husband and one of the mechanics with negligent homicide and dereliction of duty. Id. On October 19, 1995, the day the general Courts-Martial of one of the mechanics was to commence, plaintiff’s husband committed suicide. The Air Force’s handling of the investigation of the crash, including the prosecution of Mueller and his suicide, received some attention in the press, including an article in Time magazine, and a segment on “60 Minutes.” Id.

Thereafter, a complaint was filed against the prosecutor in the Mueller case, Major Martha Buxton, alleging that during the investigation, she tampered with mail belonging to Sgt. Mueller and made a false official statement. Id. An investigation of the charges followed, culminating in a report of more than 900 pages. The investigator recommended that disciplinary action be taken against Major Buxton under Article 15 of the Uniform Code of Military Justice. The first level commander accepted this recommendation. Id. Major Buxton then appealed this decision to the second level commander, who granted the appeal, terminated the Article 15 proceedings, dismissed all charges and exonerated Major Buxton. Plaintiff filed a Freedom of Information Act (“FOIA”)⁴ request with the Air Force seeking disclosure of the documents concerning the investigation of Major Buxton and the Air Force’s decision to dismiss all charges against her. Id. The Air Force denied the request citing, inter alia, 5 U.S.C. § 552(b)(6), which provides an exemption from disclosure for “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Id. at 741. The Court held that under § 552(b)(6), it is proper to begin the analysis by examining the privacy interests implicated by disclosure of the requested documents:

“Courts have held that a government employee has at least a minimal interest in his or her employment history and record of job performance, not only because of the embarrassment from possible negative disclosures, but also because of the compilation of personal information found in such records. * * * Id. at 745. In the present case, the privacy interest at stake is significantly greater because the requested file is the result of an investigation that led initially to a recommendation for imposition of nonjudicial punishment. * * * Even though Major Buxton was ultimately exonerated, she has a heightened privacy interest in

⁴ Although this case involved the Federal Freedom of Information Act, we make reference to FOIA cases because the Rhode Island Supreme Court has made clear that “[b]ecause APRA generally mirrors the Freedom of Information Act * * * we find federal case law helpful in interpreting our open record law.” Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

this type of file because the disclosure of the results of the investigation of wrongdoing could still damage her reputation.” (Emphases added). Id.

The Court continued that “[t]hese invasions of Major Buxton’s privacy must be weighed against the interest of the public in disclosure of the requested documents.” Id. “[G]iven Major Buxton’s strong privacy interests in her personnel files, it is clear that even under the more exacting standard of § 552(b)(6), disclosure of the requested documents would constitute a clearly unwarranted invasion of privacy.” Id. The Court held that the requested documents were properly exempt from disclosure under FOIA. See also Hunt v. Federal Bureau of Investigation, 972 F.2d 286 (9th Cir. 1992) (holding that a government employee has a privacy interest in any file that reports on an investigation that could lead to the employee’s discipline or censure).

The Court in Barnard v. Department of Homeland Security, 598 F.Supp.2d 1 (D.D.C. 2009) recognized the long line of cases that find individuals maintain an interest in their privacy even where some information is known about them publicly. Id. at 12. See also United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S.Ct. 1468, 1476 (“Because events summarized in a rap sheet have been previously disclosed to the public, respondents contend that Medico’s privacy interest in avoiding disclosure of a federal compilation of these events approaches zero. We reject respondents’ cramped notion of personal privacy.”); Kimberlin v. Dep’t of Justice, 139 F.3d 944, 949 (D.C.Cir 1998) (“although government officials, as we have stated before, may have a ‘somewhat diminished’ privacy interest, they ‘do not surrender all rights to personal privacy when they accept a public appointment’”); Consumers’ Checkbook v. U.S. Dep’t of Health & Human Servs., 554 F.3d 1046, 1055 (D.C.Cir. 2009) (holding that privacy interests outweighed public interest even though “the public is already familiar” with certain aspects of the requested data); Taylor v. Dep’t of Justice, 268 F.Supp.2d 34, 38 (D.D.C. 2003) (“the fact that the requestor might be able to figure out some or all of the individuals’ identities through other means, or the fact that their identities have already been disclosed, does not diminish their privacy interests in not having the documents disclosed”). Id.

In Kassel v. United States Veterans’ Administration, 709 F.Supp. 1194 (D.N.H. 1989), the plaintiff had been employed as a clinical psychologist by the defendant since 1971. Dr. Kassel asserted that he had been continually harassed by his employer since 1979, when he successfully pursued a grievance against the hospital’s chief of psychiatry. Id. at 1197. According to the plaintiff, the harassment came in many forms, including negative performance evaluations, threats of discharge, transfers, numerous letters detailing alleged deficiencies in his work, reassignments and an unlawful termination in August 1982. Id. In response to the negative attention the VA was receiving in response to comments made by Dr. Kassel during an interview regarding his views on the Vietnam War, it appointed a fact finding Board of Inquiry to determine “whether our ability to offer services has been impaired by [Dr. Kassel’s] statement.” Id. On May 24, 1985, the Board of Inquiry issued its report citing the “enormous attention” that was attracted from Dr. Kassel’s interview. In response to the report, the VA discharged Dr. Kassel and made public the reasons for the disclosure. Id. at 1198. A proposed letter of removal

and the Board of Inquiry report were both released. Dr. Kassel was reinstated with back pay following arbitration. Id. at 1197.

Thereafter, Dr. Kassel brought suit for violation of the Privacy Act and invasion of privacy. The Court held that an agency does not violate the Act when it discloses information that it is required to disclose by the Freedom of Information Act (“FOIA”). Id. at 1199. The FOIA requires governmental agencies to make available to the public most of the information maintained in their files, with nine specific “exemptions.” Id. Pertinent here is exemption 6, which exempts from mandatory disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Id. Regarding the release of the proposed letter of removal, the defendants argue that the public’s powerful interest in learning the details of the Kassel case and the VA’s response to the quoted statements outweighs Dr. Kassel’s privacy interest in the disclosed documents. Id. at 1200.

The Court did not agree and held that although the public may have had an interest in knowing that Dr. Kassel was to be discharged, the public had no interest in his letter of termination, which contained detailed allegations of specific shortfalls in his job performance. “Information contained in the removal letter was significantly more ‘embarrassing’ * * * than the information contained in the Board’s report.” Id. The Court concluded that the disclosure of the proposed letter of removal was not required by the FOIA and thus violated the Privacy Act.⁵

The United States Supreme Court has explained that the 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 an agency’s own conduct.” United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S.Ct. 1468, 1481-82 (1989).

Determining whether disclosure of the requested records “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” necessarily requires a balancing test, namely weighing the public interest in disclosure versus any privacy interests.

WPRI asserts the public interest is, among other things, taxpayer money and, in the words of WPRI, to “confirm [CCRI’s] good work for the people of Rhode Island.” Although subsequent events by the arbitrator have reversed the termination, WPRI indicated (prior to the reversal) that

⁵ See also Horowitz v. Peace Corps., 428 F.3d 271 (D.C.Cir. 2005) *quoting* Dep’t of the Air Force v. Rose, 425 U.S. 352, 372-73 (1976). (“To determine whether release of a file would result in a clearly unwarranted invasion of personal privacy, we must balance the private interest involved (namely, ‘the individual’s right to privacy’) against the public interest (namely, ‘the basic purpose of the Freedom of Information act,’ which is ‘to open agency action to the light of public scrutiny’”).

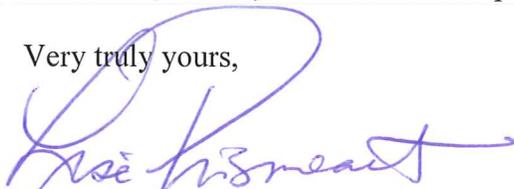
disclosure would also further the public interest by revealing whether CCRI's investigation was proper, disclosing the allegations supporting CCRI's decision and revealing how CCRI operates and whether its employees follow the rules.

In light of the above, even if we assume that WPRI has established some "public interest," we cannot conclude that the "public interest" outweighs Ms. Doe's privacy interest. In this respect it is important that WPRI's original APRA request was for documents responsive to Ms. Doe's termination, and that this termination has been reversed. While we decline to mention the specific contents of the Arbitrator's Award because we understand its contents have not been fully disclosed, we note that in a Target 12 article published September 19, 2013, you indicate that the arbitrator directed CCRI to "reinstate [Ms. Doe] to her former position" and to "permanently expunge the termination records from [Ms. Doe's] personnel file." See <http://www.wpri.com/target-12/walt-buteau/target-12-arbitrator-rules-for-fired-ccri-worker>. The Arbitrator's Award further bolsters the fact that this employee has a substantial privacy interest in the non-disclosure of the termination papers, including the reasons she was originally terminated. Applying the foregoing standard and based upon the evidence presented, which includes our review of the termination papers and the Arbitrator's Award, we determine that the privacy interest outweighs the public interest in disclosure. See Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998); Mueller v. United States Department of the Air Force, 63 F.Supp.2d 738 (E.D. Virginia 1999). This finding should not be interpreted as precedent that records concerning a governmental employee's alleged impropriety or discipline could never be disclosed since the 2012 amendment requires a case-by-case balancing. In this case, the arbitrator reversed the Rhode Island Board of Governors for Higher Education's decision and reinstated Ms. Doe. We can reach no other conclusion in this case other than the privacy interest outweighs any public interest in disclosure.

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,



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