



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 2, 2016

PR 16-02

Mr. Will Collette

Re: Collette v. Town of Hopkinton

Dear Mr. Collette:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Town of Hopkinton (“Town”) is complete. On November 17, 2014, you submitted an APRA request to the Town seeking:

electronic copies of any complaints or correspondence filed with the town manager, town police department or zoning officer against [Jane Doe]¹ * * * also * * * copies of any responses or follow-up taken as a result of such complaint or correspondence.

The Town timely denied your APRA request and cited four (4) APRA exemptions as reasons for its denial. In accordance with R.I. Gen. Laws § 38-2-8, you appealed the Town’s decision to the Town Manager who confirmed the Town’s response. Thereafter, you filed the instant APRA complaint alleging that the Town violated the APRA when it improperly denied your APRA request dated November 17, 2014.

In response to your complaint, the Town’s legal counsel, Patricia Buckley, Esquire, provided copies of the responsive records to this Department for an in camera review. In addition, Attorney Buckley submitted a substantive response to your complaint, which states, in pertinent part:

I would like to make clear that the documents are not records or reports reflecting an initial arrest of an adult or any charges ever brought against anyone. Nor do they describe a criminal investigation undertaken by the

¹ We decline to name this individual for privacy reasons.

police in response to a complaint. Rather, the records contain at best a basic description of two isolated situations reported by private citizens and their corresponding statements. No criminal charges were ever filed and no further investigation was made by the Hopkinton Police Department. I also find relevant, and in weighing against the public interest in disclosure, the fact that the situations described in the documents occurred, in one instance, five and ½ years ago and in the other, almost one year ago with no further action taken. Given the amount of time that has passed since these circumstances took place, and the strong presumption that personal privacy is unreasonably invaded by disclosure of records describing instances that do not lead to an arrest, it is my opinion that the documents requested by Mr. Collette are not public records under the Act.

* * *

First and foremost, § 38-2-2(4)(A)(I)(b), explicitly exempts from disclosure both personnel and other personal individually-identifiable records, which would constitute a clearly unwarranted invasion of personal privacy. The section is not limited to only ‘personnel’ or ‘employees’ as Mr. Collette asserts. The Town has not asserted that the individual targeted by Mr. Collette is an ‘employee’ but that she falls within the ‘other personal individually identifiable records’ portion of the exemption. Further, one of the issues raised by the documents * * * is that the records requested relate not only to a single, readily identifiable individual against whom no official action has been taken regarding his/her conduct, but to the conduct of various other private citizens. Even if all references to proper names were deleted, I believe the individuals’ identities could still be ascertained from the context of the documents and a clear invasion of privacy would occur.

* * *

Similarly, § 38-2-2(4)(D) exempts from disclosure records maintained by law enforcement agencies where the disclosure of such would constitute an unwarranted invasion of personal privacy. * * * The Legislature made a clear, substantive distinction between arrest records and records like those at issue here, which describe incidents lacking sufficient cause to prompt further action. * * * The Legislature has clearly concluded that when a law enforcement agency finds probable cause to make an arrest, the public has the right to access the record of that arrest. * * * However, when 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 under R.I.G.L. § 38-2-2(4)(D).

* * *

Furthermore, under § 38-2-2(4)(K), ‘preliminary drafts, notes, impressions, memoranda, working papers, and work products * * *’ are not public records under the Act, and therefore, access to any documents that fall within this exemption, including notes and working papers maintained by the Town Manager, has been denied. Any initial complaints received or preliminary investigations made by the Hopkinton Police Department or the Town Manager’s Office addressing concerns raised by citizens constitute only ‘preliminary drafts, notes, impressions, memoranda, working papers, or work product; and do not under any circumstance represent or reflect any final action taken on any such matter. * * *

Finally, the same rationale articulated previously in this letter, applies to exemption § 38-2-2(4)(P): ‘all investigatory records of public bodies * * * pertaining to possible violations of statute, rule, or regulation other than records of final actions taken * * *.’ No formal notification of any type of ‘violation’ or ‘noncompliance’ ever occurred here. The public’s right to know about such very preliminary matters that do not result in any official action simply cannot outweigh the privacy interests implicated, here.

We will address your rebuttal arguments below.

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 determine whether this Department believes that 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 provides that “all records maintained or kept on file by any public body, whether or not those records are required by any law or by any rule or regulation, shall be public records and every person or entity shall have the right to inspect and/or copy those records” unless the record falls within one of the APRA’s exemptions. See R.I. Gen. Laws § 38-2-3. The Town denied your APRA request for “electronic copies of any complaints or correspondence filed with the town manager, town police department or zoning officer against [Jane Doe] * * * also * * * copies of any responses or follow-up taken as a result of such complaint or correspondence,” and cited four (4) APRA exceptions in support of its denial, i.e., R.I. Gen. Laws §§ 38-2-2(4)(A)(I)(b),² (D), (K), and (P).

In sum, APRA exception (A)(I)(b) exempts documents identifiable to an individual, “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant

² The Town’s denial actually cited R.I. Gen. Laws § 38-2-2(4)(A)(I)(a), but the verbiage referenced in the denial concerned R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). Your appeal to the Town Manager notes the proper exemption was R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

to 5 U.S.C. 552 et. seq.” Exception (D) exempts law enforcement records, apart from adult arrest reports, which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” See R.I. Gen. Laws § 38-2-2(4)(D)(c). Exception (K) provides that “[p]reliminary drafts, notes, impressions, memoranda, working papers, and work product” that have not been “submitted at a public meeting of a public body” may be withheld. Finally, Exception (P) excludes “all investigatory records of public bodies, with the exception of law enforcement agencies, except “records of final actions.”

In your appeal letter to the Town Manager, which you incorporate into your complaint, you indicate that your request was “limited to what [you] would describe as the beginning and the conclusion of any complaint process, not the material generated during the town’s investigation.” You further provide that your request “was for material not exempted under the Act,” and that you “understand [your APRA request] does not include investigatory material, but it does include complaints, the initial police reports and whatever records were generated to wrap up the town’s response to complaints against [Jane Doe].” While it is difficult to segregate the documents according to the categories you describe, in the end this distinction makes little difference. Accordingly, this finding will address whether the Town violated the APRA when it denied your request for “complaints, the initial police reports, and whatever records were generated to wrap up the town’s response to complaints against [Jane Doe].”

The Town provided this Department with documents responsive to your request for an in camera review, but indicated that the Town was withholding other potentially responsive documents from this Department. After inquiry, the Town provided this Department with the outstanding documents for an in camera review. After viewing all the evidence presented, and all the documents submitted, we conclude that the Town did not violate the APRA when it denied your APRA request. While our in camera review makes extended discussion difficult without disclosing the contents of the documents reviewed, we note that the documents responsive to your APRA request fall within APRA exemptions (A)(I)(b) and (K).³

Rhode Island General Laws § 38-2-2(4)(A)(I)(b) 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

³ Exemption (D) applies to “[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime...or compiled in the course of such a criminal investigation by any law enforcement agency.” See R.I. Gen. Laws § 38-2-2(4)(D). While the Town contends that the documents are exempt under (D), the Town further contends that the documents were not compiled in the course of a criminal investigation. Specifically, the Town asserts that the records “are not records or reports reflecting an initial arrest of an adult or any charges ever brought against anyone. Nor do they describe a criminal investigation undertaken by the police in response to a complaint.” (Emphasis in original). Accordingly – although we have our doubts – based on the Town’s substantive response, we must conclude that the documents do not fall within (D).

constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et. seq...[.] (Emphasis added).

Here, we must determine whether the disclosure of the requested documents constitutes a “clearly unwarranted invasion of personal privacy.” This Section is modeled after 5 U.S.C. § 552(b)(6), which similarly exempts from disclosure all “personnel and medical files and similar files...which would constitute a clearly unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). The United States Supreme Court relied on House and Senate Reports to interpret the foregoing phrase. See Dept 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 represented 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)(C), 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)(C). See id. at 756. Nonetheless, 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. (Emphasis added).

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, 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).⁴

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).

Therefore, we must balance the public’s right to “[o]fficial information that sheds light on an agency’s performance of its statutory duties,” against the privacy interests implicated by disclosure. Based on all the evidence presented, we find that the privacy interests implicated by disclosure clearly outweigh the public interest articulated by you. Among the public interest arguments you make is that R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) does not apply because the particular subject of the documents is not a “public employee[]” and is instead a “public official,” but this argument must be rejected because the foregoing exemption applies to any document that is “individually-identifiable,” which, if disclosed, “would constitute a clearly unwarranted invasion of personal privacy.” See R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). Thus, the plain language of this exemption forecloses your argument.

⁴ 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).

You also contend that the public interest outweighs the privacy interest because of what you perceive to be a diminished privacy interest due to the so-called public status of the named individual. For instance, you state that the “distinction” between elected officials and non-elected officials “is central to [your] appeal” and that “this is just the kind of information for which the APRA was created.” Furthermore, you assert that the public has an interest in knowing whether public officials have “abused their public office,” and knowing how officials handle the alleged “abuse[.]” Specifically, you contend in your complaint that:

[t]he APRA was created to serve the public’s right to know about the conduct of elected officials and certainly if they have abused their public office. The public interest is served in seeing that charges against public officials are properly and fairly addressed without political favoritism.

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.” Fund for Constitutional Government (“FCG”) v. National Archives and Records Service, 656 F.2d 856, 865 (D.C. Cir. 1981). 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. See also National Archives and Records Administration v. Favish, 541 U.S. 157 (2004)(death-scene photographs of President Clinton’s deputy legal counsel exempt).

Here, 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. For example, in Citizens for Responsibility and Ethics in Washington (“CREW”) v. Department of Justice, 746 F.3d 1082 1095 (D.C. Cir. 2014), although the Court of Appeals did not determine whether investigatory records relating to a “wide-ranging public corruption” investigation were public records (the Court remanded for this decision to be made), the Court of Appeals nonetheless recognized that Majority Leader Tom DeLay had a “substantial” privacy interest in the disclosure of the records that concerned the FBI’s investigation into his conduct. Similarly, in Kimberlin v. Department of Justice, 139 F.3d 944 (D.C. Cir. 1998), the Court of Appeals reviewed a request seeking documents pertaining to an Assistant Attorney General’s unauthorized disclosure of investigatory records relating to then-Senator Dan Quayle. The court concluded that the Assistant Attorney General’s privacy interest in “avoiding disclosure of the details of the investigation, of his misconduct, and of his punishment” outweighed the public interest in disclosure. Id. at 949.

There is no question that “[c]ourts have repeatedly recognized the ‘substantial’ privacy interest held by ‘the targets of law-enforcemnt investigations . . . in ensuring that their relationship to the

investigation remains secret.” People for the Ethical Treatment of Animals (“PETA”) v. National Institute of Health (“NIH”), 745 F.3d 535, 541 (D.C. Cir. 2014). Later, the court emphasized the significance of the privacy interest, concluding that “[t]here 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 [a law enforcement] investigation.” Id. at 542. The foregoing details the significant privacy interest at stake in this case, and respectfully, your correspondences greatly overlook this consideration. Indeed, this Department has observed “[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. The same rationale – although through a different exemption – applies in this case.

The foregoing should not be interpreted as meaning that you do not assert a valid public interest to be weighed against the privacy interest. Indeed, our conclusion is quite the opposite, although we do conclude that the privacy interest clearly outweighs the public interest. Again, PETA is informative since that organization made a similar public interest assertion. Specifically, in PETA, the Court of Appeals recognized that:

there is a cognizable public interest in learning how NIH handles complaints concerning animal abuse and misappropriation of federal research funds. Responsive documents might illuminate various aspects of NIH’s operations, including how the agency decides whether to investigate complaints and how it conducts investigations. Id. at 542-43.

Despite this recognition, the Court of Appeals held that it has “consistently found [the above] interest, without more, insufficient to justify disclosure when balanced against the substantial privacy interests weighing against revealing the targets of a law enforcement investigation.” Id. at 543.

As we have repeatedly recognized, this Department’s mandate is not to determine whether the requested records should have been disclosed or to step into the Town’s position and determine whether this Department would have disclosed the requested records. Instead, our mandate is to determine whether the Town violated the APRA when it refused to disclose the requested records and in pursuit of our legislative mandate we are reminded by the Rhode Island Supreme Court 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). Indeed, R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) expressly incorporates FOIA into the APRA.

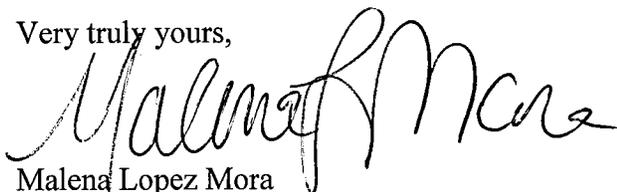
Here, for the reasons detailed, we simply conclude that the Town did not violate the APRA when it determined that the privacy interests clearly outweighed the public interest. Obviously, our determination is based on the specific facts of this case and our in camera review of the requested documents. We also find that several documents fall within APRA Exemption (K) as these documents represent “[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products” that have not been “submitted at a public meeting of a public body.”

See R.I. Gen. Laws § 38-2-2(4)(K). To be fair, these documents appear to be outside the confines of your APRA request, but because we find that all the documents fall within R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), extended discussion of R.I. Gen. Laws § 38-2-2(4)(K) is unnecessary.

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,



Malena Lopez Mora
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MLM/pl

Cc: Patricia Buckley, Esquire