



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 1, 2014
PR 14-32

Mr. Douglas Clarke

Mr. Dennis Desaulniers

RE: Desaulniers v. Woonsocket Superintendent's Office

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Dear Mr. Clarke and Mr. Desaulniers:

The investigations into your Access to Public Records Act ("APRA") complaints filed against the Woonsocket Superintendent's Office ("Superintendent's Office") are complete. Since both complaints were submitted against the Superintendent's Office and since both complaints contained similar allegations, this Department will address this issue in a single finding.

By email correspondences dated March 3 and 4, 2014, you both alleged that the Superintendent's Office violated the APRA when it denied your requests for a copy of "the evaluation of superintendent from the November 13, 2013 Woonsocket School Committee meeting." Specifically, Mr. Clarke's February 15, 2014 APRA request was timely denied by the Superintendent's Office by letter dated February 24, 2014, which indicated that "the evaluation is an [sic] personal individually identifiable record which would constitute a clearly unwarranted invasion of personal privacy." Mr. Desaulnier's February 13, 2014 APRA request was also timely denied by the Superintendent's Office by letter dated February 24, 2014, which indicated that "the evaluation is an [sic] personal individually identifiable record which would constitute a clearly unwarranted invasion of personal privacy."

In response to your complaints, the Superintendent's Office submitted several documents including affidavits from then-Superintendent Giovanna M. Donoyan and Attorney Richard Ackerman, open and closed session minutes from the November 13, 2013 Woonsocket School Committee meeting along with a CD recording of the open session, open session minutes from the November 21, 2013 Woonsocket School Committee meeting, a Memorandum of Law in support of Woonsocket Education Department/Superintendent's Office, and an Amicus Brief in support of exempting superintendent evaluations from disclosure under the APRA. A copy of

then-Superintendent Donoyan's evaluation was also submitted to this Department for an *in camera* review.

In sum, the Superintendent's Office argues that under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), disclosing Dr. Donoyan's evaluation "would constitute a clearly unwarranted invasion of personal privacy." In pertinent part, the Superintendent's Office states that "[t]he privacy interest of our superintendents significantly outweighs the public interest in obtaining and examining these evaluations, as no superseding legitimate interest exists as to these evaluations.***The public has several means available by which to evaluate the performance of the superintendent and the school department as a whole through parent-teacher interactions; school committee meetings; PTOs; and inquires from the media." See Brief in Support of Exempting Superintendent Evaluations From Disclosure Under Rhode Island APRA Statute, p. 8. It contends that "[t]he Evaluation's release would be a clearly unwarranted invasion of personal privacy that could injure a person's reputation. In a politically charged environment, the release could hinder the Superintendent's ability to effectively lead the city's schools." See Memorandum of Law in Support of Woonsocket Education Department/Superintendent's Office, p. 3.

In Mr. Ackerman's affidavit, he states, in pertinent part:

"12. While it cannot be gainsaid that a superintendent of schools is a public figure and is ultimately answerable to the public, a superintendent does not lose all rights at the schoolhouse door. The public evaluates the performance of the superintendent, and the school system, every day by means of parent-teacher interactions; school committee meetings; the involvement in school affairs by parent-teacher organizations; and the media. Access to an evaluation of the superintendent is, thus, not critical in the public's evaluating the school system.***

14. ***The evaluation of the superintendent could easily become a tool for retribution as opposed to an instrument for the public good.

24. The resulting evaluation*** lacks reliability and objectivity.*** Further, it is unknown whether the comments are meant to be representative of the entire committee, or the single comment of one or more members. Also, the chair of the committee, without review, unilaterally calculated individual scoring by committee members and chose comments to insert in the evaluation.

25. Evaluations are typically treated as personnel matters in Rhode Island and, as such, are not public. They are not public because they often are subjective, biased,

and lacking uniform measurement standards, all of which applies here.***[T]he evaluation is not a useful tool for disclosure to the public and treats the superintendent unfairly.”

Additionally, Superintendent Donoyan states, in pertinent part:

“4. While I am generally an advocate of formal evaluations of all administrators as well as teachers, I have always believed that they were personnel records and, as customary in Rhode Island, were never deemed public records.

20. For the same reasons that make this evaluation unreliable to the public, the evaluation is a clearly unwarranted invasion of personal privacy. A responsive evaluation reveals the personality, character and values of the person being judged. It is among the most invasive intrusions into one’s privacy.”

We acknowledge Mr. Clarke’s rebuttal.¹

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

Here, the Superintendent’s Office denied your request under the personal privacy exemption, R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), as such, a brief explanation of the exemption is warranted. In pertinent part, R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) exempts from public disclosure:

“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).

This Section is modeled after the federal Freedom of Information Act (“FOIA”), 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.”

¹ Mr. Desaulniers did not submit a rebuttal.

The United States Supreme Court has made clear that 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).

Thus, in order to determine whether disclosure of a document “would constitute a clearly unwarranted invasion of person privacy,” a balancing of the public’s interest in disclosure against the implicated privacy interest is required. In other words, pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), a balancing of the public’s interest in the Superintendent’s evaluation against the Superintendent’s privacy interest in nondisclosure is required.

A similar APRA complaint was filed by Ms. Cynthia Boss with the factual distinction that, in the Superintendent’s denial letter, the Superintendent’s Office denied access to the same requested evaluation under R.I. Gen. Laws § 38-2-2(4)(K) only. See Boss v. Woonsocket Superintendent’s Office, PR 14-31.

As we explained in Boss, under R.I. Gen. Laws § 38-2-7(a):

“[a]ny denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial within ten (10) business days of the request and indicating the procedures for appealing the denial. Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” (Emphases added).

After reviewing the evidence presented in Boss, we found that the Superintendent’s Office was estopped from later raising the personal privacy exemption because the Superintendent’s Office failed to show sufficient “good cause” to overcome the waiver provision in R.I. Gen. Laws § 38-2-7(a) and, as a result of this waiver, the evaluation must be disclosed. Specifically, we held that:

“there is no doubt that the Superintendent Office’s December 5, 2013 denial did not specifically reference the personal privacy exemption and the Superintendent Office’s argument [that all subsequent APRA requests for the evaluation were denied on the grounds that disclosure would “constitute an unwarranted invasion of personal privacy”], only highlights the fact that the Superintendent’s Office could, and should, have also specifically stated R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) as a reason for denying [Ms. Boss’s] request. Indeed, in the

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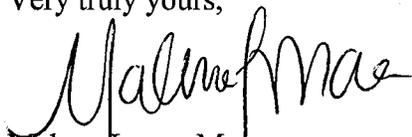
Superintendent's affidavit the Superintendent affirms that she "[has] always believed that [evaluations] were personnel records and, as customary in Rhode Island, were never deemed public." See Superintendent's Affidavit ¶ 4. Faced with the situation where the Superintendent indicates that she "always believed" that evaluations were exempt, yet clearly did not specifically reference the personal privacy exemption as required by R.I. Gen. Laws § 38-2-7(a), it is difficult for us to conclude that "good cause" has been demonstrated in this situation." See Boss v. Woonsocket Superintendent's Office, PR 14-31.

Our finding in Boss, which is being released concurrently with the present finding, has a significant impact here. Due to the fact that the instant evaluation must be disclosed in accordance with Boss, we must conclude that in this case any privacy interest in the instant evaluation is now diminished. Here, when we weigh the diminished privacy interest against the public's interest, the scales tip in favor of the public's interest in disclosure. In doing so, we acknowledge that the public interest in disclosure of a now former Superintendent's evaluation may not be substantial; nevertheless as a result of the disclosure required in Boss, we conclude that the public interest outweighs the privacy interest. Therefore, by virtue of our holding in Boss, we find that the Superintendent's Office violated the APRA when it denied you access to the Superintendent's evaluation.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting "injunctive or declaratory relief." See R.I. Gen. Laws § 38-2-8(b). A court "shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***." See R.I. Gen. Laws § 38-2-9(d). Here, we conclude that insufficient evidence exists at this time to find a "knowing and willful" or "reckless" violation. Notwithstanding, we direct the Superintendent's Office to provide you with a copy of the Superintendent's evaluation within ten (10) business days of this finding. If you do not receive the evaluation within ten (10) business days, kindly advise this Department so that we may review this matter further to ensure compliance with the APRA.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Malena Lopez Mora
Special Assistant Attorney General
Extension 2307

Cc: Benjamin M. Scungio, Esquire