



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 19, 2015
PR 15-09

Ms. Alicia Fusaro

Re: Fusaro v. Westerly Police Department

Dear Ms. Fusaro:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Westerly Police Department (“Police Department”) is complete. By email correspondence dated September 18, 2014, you allege the Police Department violated the APRA when it improperly denied your APRA request dated August 28, 2014. More specifically, under the APRA, you requested “a copy of [your] police background check * * * including the detective notes.”¹

In response to your complaint, we received a substantive response from the Interim Solicitor for the Town of Westerly, John Stockwell Payne, Esquire. Solicitor Payne states, in pertinent part:

“That, on August 28, 2014, Ms. Fusaro contacted this office directly via e-mail making a request under the access to public records act; * * *

That, on September 2, 2014, Ms. Fusaro exchanged communications with the Town Manager regarding the forthcoming response; * * *

That, on September 2, 2014, I indicated to Ms. Fusaro that I would be meeting with the Chief of Police to discuss the matter further; * * *

¹ It appears you applied for employment with the Westerly Police Department and were denied. You indicated in your APRA complaint that you “confirmed that the Westerly [Police Department] made no attempt to contact any of [your] references.” While your correspondences make various employment-related allegations, our sole focus is whether the requested documents should have been provided to you pursuant to the APRA.

That, on September 4, 2014, I met with Chief of Police Edward St. Clair to discuss Ms. Fusaro's request;

That, on September 5, 2014, I had mailed a letter to Ms. Fusaro detailing the reasons she was not entitled to the records requested; * * *

That, on September 10, 2014, Ms. Fusaro indicated to the Town Manager via e-mail that she had not received a response from my office; * * *

That, upon hearing this information and on the same date, I e-mailed Ms. Fusaro a copy of the same letter; * * *

That, on September 10, 2014, Ms. Fusaro e-mailed me and expressed confusion over the offer to meet with the Police Chief in said letter as she felt similar requests in the past were denied; * * *

That, on September 10, 2014, I contacted the Chief of Police to verify his willingness to meet and he verbally indicated that no such request of a meeting had ever been denied. I arranged for Chief St. Clair and Ms. Fusaro to communicate directly to set up a time; * * *

That, to my understanding and belief, e-mails were exchanged between Chief St. Clair and Ms. Fusaro however no formal meeting ever took place."²

We acknowledge your reply dated October 3, 2014.

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

In the Police Department's September 4, 2014 response to your APRA request, Solicitor Payne states, in pertinent part:

"I am denying your request for a copy of the investigation, which includes third-party personal information and contents of interviews with your former employers, neighbors, and other contacts pursuant to the Access to Public Records Act under 38-2-2(4)(D)(c) * * * concerning law

² In addition to the Police Department's response, this Department was provided a copy of records approximately one inch thick for our in camera review.

enforcement exemptions, as releasing it, ‘.....could reasonably be expected to constitute an unwarranted invasion of personal privacy,’ and 38-2-2(4)(D)(e), as it ‘....would disclose techniques and procedures for law enforcement investigations or prosecutions.[’] Furthermore, the disclosure of the investigation would constitute a clearly unwarranted invasion of personal privacy pursuant to RIGL 38-2-2(A)(I)(b) and 5 U.S.C. 552 et. [s]eq.”

The APRA provides that all records maintained by public bodies are subject to public disclosure unless the document falls within one of the twenty-seven (27) enumerated exceptions. See R.I. Gen. Laws § 38-2-2(4)(A)-(AA). Among the categories exempt from public disclosure 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...[.] (Emphasis added).

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.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

Here, we must determine whether the disclosure of your police background check requested constitutes a “clearly unwarranted invasion of personal privacy.” While we recognize that you have requested the background check performed on yourself, under the APRA we must consider whether this document is available to any person upon request, and not whether this document should be made available to you, as the subject matter of the background check. The United States Supreme Court relied on House and Senate Reports to interpret the foregoing 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. (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.”

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

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

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).

We now turn to the specifics of this case. As indicated supra, this Department was provided with copies of records the Police Department exempted from disclosure. Although our in camera review prevents us from discussing the precise nature of these documents, we have little trouble concluding that these documents contain information consistent with a background check on a particular individual, i.e., you, as well as information obtained from third parties concerning you. In the words of the United States Supreme Court, in these circumstances, the privacy interest is “at its apex.” Reporters Committee, 489 U.S. at 780. In contrast, you provide little evidence to support the “public interest” side of the balancing test. Even if we were to credit what appears to be your asserted public interest – that the Police Department conducted an inadequate background investigation – considering the nature and content of the requested documents, this interest is inadequate to overcome the clearly unwarranted invasion of personal privacy that would result from disclosure. Indeed, disclosure would “reveal [] little or nothing about [the Police Department’s] own conduct.” Id. at 749.

Although you may have a particular interest in the requested documents, we are cognizant that if the requested records are a public record in this situation, the requested records must be a public record in any situation regardless of the identity or the interest of the requester. In Bernard v. Vose, 730 A.2d 30 (R.I. 1999), the Rhode Island Supreme Court held that under the APRA, a requesting party did not have a right to review his own board files, which contained personal and sensitive information about him, because once the files were made public to him under the APRA, the files were then available for inspection by the general public. Id. at 31. Because the privacy interest of the individual outweighed the public’s interest in disclosure, the Rhode Island Supreme Court exempted the files from disclosure despite the fact that the request was made by a person for documents concerning himself. See also Higginbotham v. Department of Public Safety, PR 09-15 (the Department of Public Safety did not violate the APRA when it denied access to an incident report filed against the complainant). Indeed, if we determined that such records were available to you, under the APRA, as a matter of law, we would necessarily conclude that the same records are available to anyone upon request. Therefore, we conclude that the privacy interests outweigh the public interest and the requested records are exempt from disclosure.

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).

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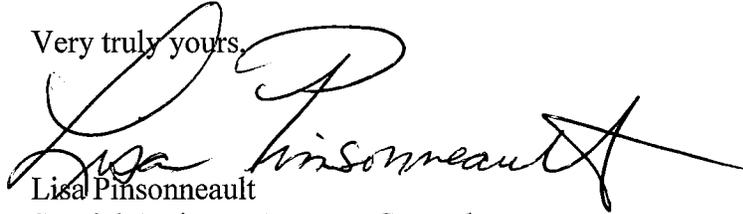
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Although the Attorney General has found no violation and will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior 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,

A handwritten signature in black ink, appearing to read "Lisa Pinsonneault", with a large, stylized initial "L" and "P" at the beginning.

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

Cc: Thomas J. Capalbo, III, Esquire