



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

December 12, 2014  
PR 14-35

Mr. Kenneth T. Jackson

**RE: Jackson v. Town of Coventry**

Dear Mr. Jackson:

This Department's investigation into your Access to Public Records Act ("APRA") complaint filed against the Town of Coventry ("Town") is complete. By email correspondence dated March 20, 2014, you alleged that the Town violated the APRA when it denied your request to review the resumes of the top five (5) individuals who applied for the position of Finance Director and the resume of the individual selected for that position, and the resumes of the top five (5) individuals who applied for the position of Director of Public Works and the resume of the individual selected for that position.

This Department received a substantive response from Coventry Town Solicitor Frederick G. Tobin. Mr. Tobin states in pertinent part:

"Kenneth Jackson filed five (5) APRA requests for various Town records on or about January 13, 2014. The Town provided records to Mr. Jackson with respect to three (3) of the requests, none of which are an issue in this matter.

In two (2) of the requests Mr. Jackson sought resumes for the 'top five (5) applicants and the selected individual for the position of Financial Director/Treasurer (and Director of Public Works)'.

On January 23, 2014, Mr. Jackson was notified by the Coventry Town Solicitor that the information sought by him regarding the two (2) positions would

constitute a clearly unwarranted invasion of privacy, and as such was not accessible under the APRA.

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In the case at hand, the complainant seeks resumes of private individuals, the disclosure of which could subject them to adverse consequences with their current employers. And such disclosure of these resumes, or any parts thereof, will reveal little or nothing about the Town Manager's hiring process.

In addition, if resumes can be distributed after selections, it could have a chilling effect on the availability of future candidates for Town positions, since some would not want to risk their current employment by seeking employment with the Town."

The Town's response also included an affidavit from Mr. Thomas R. Hoover, the Town Manager. Mr. Hoover's states in pertinent part:

"I received resumes from individuals interested in applying for job openings for Director of Finance and Director of Public Works.

After receiving thirty-six (36) resumes for Director of Finance and twenty-eight (28) resumes for Director for Public Works. [sic] I narrowed the list of applicants for the Department of Public Works to nine (9) candidates and ten (10) candidates for the position of Director of Finance.

I then conducted interviews with each finalist for those positions, before selecting the person to be hired.

The resumes were useful in reducing the applicants for each position, but not critical in my final selections, and I relied heavily on the interviews.

I do not believe the resumes could be redacted without compromising the privacy of the applicants, since name, address, phone numbers, and prior personal and employment history tend to reveal the identity of the individuals."

On June 9, 2014, the undersigned contacted Attorney Tobin and requested that the Town provide this Department with copies of the resumes requested in your APRA request for an *in camera* review.<sup>1</sup>

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<sup>1</sup> Although this Department requested that the Town provide us with the resumes you requested, it appears that the Town provided us with the resumes of all the candidates that applied to both positions. Furthermore, while your APRA request sought the resumes of the top five (5) applicants and the individuals ultimately selected for each position, it appears that the Town narrowed its selection to nine (9) applicants for the Public Works position and ten (10) applicants

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 Town violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.<sup>2</sup>

The statutory mandate referenced above is particularly important because the instant case implicates R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). This provision was amended in 2012 and 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 constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et. seq...[.]*” (Emphasis added).

The 2012 amendment 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.” Since the Town asserts that R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) is applicable, and since this exemption expressly requires our consideration of 5 U.S.C. § 552, we must consider federal law and apply a balancing test to interpret R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). The United States Supreme Court has interpreted the similar language of 5 U.S.C. § 552 (b)(6), “personnel and medical files and similar files,” to mean “all information which ‘applies to a particular individual[.]’” See Voinche v. Federal Bureau of Investigation, 940 F.Supp. 323, 329 (D.D.C. 1996)(quoting Department of State v. Washington Post Co., 456 U.S. 595 (1982)). Since the records at issue are clearly “personal individually-identifiable” records, the issue before us is whether disclosure of the requested records would constitute a “clearly unwarranted invasion of personal privacy.” It is this inquiry that is the real focus of the discrepancy between the parties.

The United States Supreme Court relied on House and Senate Reports to interpret the phrase “clearly unwarranted invasion of personal privacy.” 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

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for the Director of Finance position. As such, it is unclear whether the Town has documents responsive to your request.

<sup>2</sup> In your February 10, 2014 Complaint you state, in pertinent part, “Please note that Mr. Tobin’s [sic] decided to reference the State of Rhode Island’s law rather than the Coventry Home Rule Charter which in my opinion clearly defines the access to public.” Later, in your April 10, 2014 rebuttal, you again reference the Coventry Town Charter. Please be advised that this Department only has jurisdiction to investigate possible APRA and Open Meetings Act (“OMA”) violations. Accordingly, this finding will focus only on the alleged APRA violations.

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. Rhode Island has adopted a similar inquiry. See DARE v. Gannon, 713 A.2d 218, 222 (R.I. 1998)(balancing test).

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, and in doing so, considered the balancing test. 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. 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 United States Court of Appeals for the Fourth Circuit addressed a similar question to the one presented before us: whether personnel records of unsuccessful applicants are public records. See Core v. U.S. Postal Serv., 730 F.2d 946, 948 (4th Cir. 1984). The Court ruled that while the FOIA required disclosure of requested information about successful applicants, this conclusion did not require disclosure about unsuccessful applicants. Using the balancing test laid out in Rose, the Court concluded that the public's interest in disclosure did not outweigh the privacy interests of the unsuccessful applicants:

“[w]ith respect to the unsuccessful applicants, the balance tips the other way. Even if their names were deleted, the applications generally would provide sufficient information for interested persons to identify them with little further investigation. Though the unsuccessful applicants about whom Core requested information were deemed qualified by the officials who reviewed the files, ultimately they were rejected after interviews by the selecting official. In contrast to the lack of harm from disclosure of the applications of persons who are hired, disclosure may embarrass or harm applicants who failed to get a job. Their present employers, co-workers, and prospective employers, should they seek new work, may learn that other people were deemed better qualified for a competitive appointment. It is no answer to say that only Core seeks information about the unsuccessful applicants and that his purpose is benign. If Core is entitled to information about unsuccessful applicants for a government job, other members of the public, including employers and employment agencies, would be entitled to the same information in this and other instances...

On the other side of the scale, the public interest in learning the qualifications of people who were not selected to conduct the public's business is slight. Disclosure of the qualifications of people who were not appointed is unnecessary for the public to evaluate the competence of people who were appointed. Indeed, comparison of all applications may be misleading, because the appointments were made on the basis of both the applications and interviews.”

See id. at 948-49. Post-Core, the federal courts appear to be in agreement that “unsuccessful applicants have a substantial privacy interest in the withheld information.” See Barvick v. Cisneros, 941 F.Supp. 1015, 1021 (D. Kansas 1996); see also Judicial Watch v. Commission on U.S.-Pacific Trade and Investment Policy, 1999 WL 33944413 (D.D.C. 1999); Holland v. Central Intelligence Agency, 1992 WL 233820 (D.D.C. 1992).<sup>3</sup>

In Professional Review Organization of Florida, Inc. v. U.S. Dept. of Health and Human Services, decided after Core, the United States District Court for the District of Columbia held that professional credentials and other personal information contained in fifty-nine (59) pages of resumes of proposed professional staff members to be used by a successful bidder under contract were properly withheld from disclosure under Exemption (b)(6). See 607 F.Supp. 423 (D.D.C. 1985). The Court found “that the professional credentials and other personal information contained in this information g[a]ve rise to a legitimate privacy concern which the defendant may assert under exemption (b)(6)...[t]his circuit has held that when there is a privacy interest, as this Court finds here, it should prevail against a private commercial interest such as plaintiff's bid protest.” See id. at 427-28.

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<sup>3</sup> You attempt to distinguish some of the cases cited by Mr. Tobin by indicating that the cited cases concerned law enforcement situations, but our review makes clear that the principle referenced extends beyond the law enforcement context.

In Holland, the United States District Court for the District of Columbia found that the CIA properly withheld the name, signature, initials, address and entire resume of an applicant. See Holland, 1992 WL 233820 at \*4. Citing Core, the Court found that the applicant had “a substantial privacy interest” that trumped the “insubstantial” public interest purported by the requester and rejected the argument that the public has a right to know how the CIA chooses its employees through its selection process or “network”:

“[w]hile the Court recognizes that revelation of this individual’s identity, or information that would lead to it, might in some fashion further illuminate this “network,” the Court finds on balance that disclosure of this identity under the circumstances of this case would work a clearly unwarranted invasion of personal privacy.” See id. at \*15.

In Judicial Watch v. Commission on U.S.-Pacific Trade and Investment Policy, the United States District Court found that “names, as well as identifying information that might appear in the withheld documents” of persons ultimately not appointed to the Commission were exempt under Exemption (b)(6) of FOIA. See 1999 WL 33944413 at \*11. Since the FOIA’s statutory purpose is to create open access to government, the Court balanced “the privacy interests of those considered for appointment but not selected, against the public’s interest in the disclosure of their identities” and found that the privacy interests of the individual applicant outweighed any interest the public may have in disclosure:

“[b]ecause the public is entitled to know who serves on government commissions, Commission members reasonably may expect to have some basic information about themselves enter into the public realm. *See Dunkelberger*, 906 F.2d at 781 (citing *Stern*, 737 F.2d at 91-92). Those individuals who were not appointed to the Commission, however, do not serve in any public capacity that would engender in them an expectation of public access to their identities and biographical information. In fact, some people the administration considered for positions on the Commission might not know that they were ever candidates. As noted in previous sections, the workings of the nomination process are generally protected from public disclosure. Further, there is little insight that the public may glean about the nomination process or the work of the Commission from learning the identities of fellow citizens whom the administration never appointed, and who never served on that body. Because there is little, if any, public interest in the identities of these persons, the Court finds that the privacy interests outweigh any public benefit that disclosure would create. As a result, the Court finds that defendant properly withheld under Exemption 6 materials containing the identities of persons whom the administration considered, but ultimately did not appoint.” See id. at \*12.

As explained above, federal courts have found that names of unsuccessful applicants are exempt because the names, along with other identifying information, are “unlikely to ‘open public business to public view.’” See Putnam v. U.S. Dept. of Justice, 873 F.Supp. 705, 712-13 (D.D.C. 1995); see also Voinche v. Federal Bureau of Investigation, 940 F.Supp. 323, 330 (D.D.C. 1996).

The Court in Voinche held that the names and titles of Supreme Court employees and applicants, as well as the names and identifying data of possible candidates for vacancies on the Supreme Court, were properly withheld from disclosure under Exemption (b)(6), stating that “[t]here is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities” of these employees, applicants, and candidates. See 940 F.Supp. at 330. Also, while this Department has yet to address this issue in a finding after the 2012 amendments, we did have the opportunity to issue an advisory opinion which was consistent with federal law on this issue. See In Re Rhode Island Airport Corporation ADV PR 12-02 (“the disclosure of names and resumes of the unsuccessful applicants are not public records because the disclosure would constitute a ‘clearly unwarranted invasion of personal privacy’”). Consistent with the plain language of R.I. Gen. Laws § 38-2-2(4)(i)(A)(b), we must now apply the above case law to this situation.

We begin our analysis by weighing the privacy interests of the individuals selected as Finance Director and Director of Public Works against the public’s interest in disclosure of their resumes. After reviewing the resumes *in camera*, and using the above case law for guidance, we conclude that disclosure of the resumes of the two successful candidates would not constitute a “clearly unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). In reaching this conclusion, we find that the public has at least some interest in knowing that the successful applicants for a public position are qualified and capable to hold that position and that viewing the resumes of the successful applicants will further the public interest. Even more importantly, balanced against this public interest, the Town has articulated no privacy interest in the resumes of the successful applicants and centers its argument on nondisclosure of the resumes of the unsuccessful applicants. For example, the Town argues that disclosure of the resumes “could subject [the applicants] to adverse consequences with their current employers.” While that argument may be applicable to the unsuccessful applicants, since it appears that the successful applicants have begun their employment with the Town, any threat of adverse consequences with their now previous employers has dissipated. Furthermore, the Town cites the holding in Core in support of its position, yet neglects to address the fact that the Court in Core found that the applications of the selected individuals were public records. As such, we find the Town violated the APRA when it denied you access to the resumes of the successful applicants.

On the other hand, after balancing the privacy interests of the unsuccessful applicants against the public’s interest in the resumes, and using case law for guidance, we find the scale tips in favor of nondisclosure. In this respect, you seek to “review the resumes and see if the others were clearly more **qualified** for the position.” (Emphasis original). While we acknowledge that there is some public interest in the documents you seek, we likewise must question whether disclosure of the requested documents will advance the articulated public interest. Specifically, Mr. Hoover relates that while “[t]he resumes were useful in reducing the applicants for each position, [the resumes] were not critical in my final selection, and I relied heavily on the interviews.” For this reason – and although we nonetheless find some public interest in disclosure of the unsuccessful applicant resumes – we question whether disclosure of the unsuccessful applicant resumes will provide insight into whether “others were clearly more qualified for the position,” since the decision to hire was based upon more than just a person’s resume. Federal case law is in accord

with this position. See Core at 949. (“Indeed, comparison of all applications may be misleading, because the appointments were made on the basis of both the applications and interviews”).

With respect to the privacy interests, you contend that your “requests references applicants seeking Public employment which should not be trumped by rights of privacy,” but case law – and even your rebuttal to this Department – contradict this conclusion. As detailed herein, federal cases, and this Department’s prior advisory opinion, are replete with the conclusion that “on balance that disclosure of th[e] identity [of an unsuccessful applicant] would work a clearly unwarranted invasion of personal privacy.” See e.g., Holland, at 15. Even your April 10, 2014 rebuttal acknowledges that “the Town can and perhaps should darken the individuals[’] name, address, telephone number and EMAIL address.” Respectfully, your April 10, 2014 correspondence acknowledges the unsuccessful applicants’ privacy interest, and if “the individuals[’] name, address, telephone number and EMAIL address,” could be redacted with the additional information contained on a resume released without revealing the identity of the unsuccessful applicant your position would have great merit. See R.I. Gen. Laws § 38-2-3(b). The nature of the information on a resume, however, simply does not allow for “[a]ny reasonably segregable portion” of the resume to be redacted, while still providing information that is non-identifiable. Id. See e.g., Core, 730 F.2d at 948 (“Even if the names were deleted, the applicants generally would provide sufficient information for interested persons to identify them with little further investigation.”). Here, after reviewing the resumes *in camera*, and in light of the fact that the decision on who to hire was not based solely on the information contained in the applicants’ resumes but also depended on the interviews (or perhaps other factors), we conclude that disclosure of the unsuccessful applicants’ resumes will constitute a “clearly unwarranted invasion of personal privacy,” and that the Town did not violate the APRA by denying access to these unsuccessful applicant resumes.

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).

While we find that a civil fine is not appropriate, we conclude that the Town must respond to your January 13, 2014 APRA request in a manner consistent with the APRA and this finding by providing the resumes of the successful applicants. In doing so, the Town may redact information contained on the resumes that would constitute a “clearly unwarranted invasion of personal privacy,” such as a home telephone number, home address, and/or personal e-mail address. For the reasons detailed herein, we do not consider the disclosure of the names of the successful applicants to be a “clearly unwarranted invasion of personal privacy.” Although the Attorney General will not file suit in this matter, at this time, 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). If you do not receive a response from the Town consistent with this finding within ten (10) business days, kindly advise

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this Department so that we may further review this situation. Please be advised that we are closing this file as of the date of this letter, but reserve the right to reopen our file if necessary.

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

Very truly yours,

A handwritten signature in cursive script, appearing to read "Malena Lopez Mora".

Malena Lopez Mora  
Special Assistant Attorney General  
Ext. 2307

Cc: Frederick G. Tobin