



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

April 11, 2014
PR 14-09

Mr. Brendan McQuade

RE: McQuade v. Rhode Island Department of Public Safety

Dear Mr. McQuade:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Department of Public Safety (“DPS”) is complete. You alleged the DPS violated the APRA when it denied your request seeking “documents pertaining relating [sic] to the Rhode Island State Fusion Center (RISFC) and related programs and activities of the Rhode Island State Police and its partner agencies.”¹ See May 30, 2012 Request. You further alleged that the DPS did not provide any statutory reasons for denying your request and did not attempt to release reasonably segregable portions of the requested documents.

In response to your complaint, we received a substantive affidavit from legal counsel for DPS, Lisa S. Holley, Esquire. Ms. Holley states, in pertinent part:

3. I am assigned as the Public Records Officer for the Rhode Island State Police (“RISP”), and I am responsible for responding to records requests under the Access to Public Records Act, R.I. General Laws 38-2-1 et seq. (“APRA”).]

¹ Specifically, you request documents regarding three different areas of the Rhode Island State Fusion Center’s operations: (1) Policies and Standard Operating Procedures; (2) Information-Sharing Agreements; and (3) Contracts, Reports and Audits.

4. On or about May 30, 2012, Brendan McQuade, a graduate student and representative of Binghamton University, in New York, submitted a written request to the Rhode Island State Police under APRA requesting nineteen (19) different categories of records relating to the “Rhode Island State Fusion Center and related programs and activities of the Rhode Island State Police and its partner agencies.”
5. On June 7, 2012, I responded in writing to Mr. McQuade, extending the statutory response time an additional twenty business days pursuant to §38-2-7(b) due to the breadth and volume of the request. ***
6. The Rhode Island State Fusion Center is a centralized, comprehensive criminal intelligence center which is staffed by the Rhode Island State Police, the Department of Homeland Security, and local police departments.
7. The Rhode Island State Fusion Center is guided by an extensive thirty-five (35) page Privacy Policy, which was developed under the guidance of the United States Department of Homeland Security, who funds the Fusion Center operations.
8. After an extensive review of the Rhode Island State Fusion Center Privacy Policy I contacted the Rhode Island State Police Lieutenant responsible for overseeing the Fusion Center to determine whether they were in possession of any documents responsive to the inquiry, and to make my determination as to whether the documents were public under APRA.
9. I was advised that under the Homeland Security Act of 2002, only the Fusion Center Privacy Policy could be publically distributed and that all other documents requested were either For Official Use Only (“FOUO”) or did not exist.
10. I was advised that FOUO is the term used by the Department of Homeland Security to identify unclassified information of a sensitive nature, not otherwise characterized by statute or regulation, the unauthorized disclosure of which could adversely impact a person’s privacy or welfare, the conduct of federal programs, or other programs or operations essential to the national interest.
11. On July 9, 2012, I responded to Mr. McQuade’s request in writing. ***
12. The Rhode Island State Fusion Policy that was provided to Mr. McQuade was responsive to his request for “Policies and Standard Operating Procedures” #1, #2, #3, and “Information-sharing agreements” #3.

13. Moreover, in my July 9, 2012 response, I denied the release of the other documents based on the FOUO classification by the Department of Homeland Security, and directed Mr. McQuade to the Privacy Office of the U.S. Department of Homeland Security, providing the address to contact Homeland Security to request the other documents he was seeking.

In a subsequent affidavit, Ms. Holley states in pertinent part:

11. On or about February 20, 2014, I contacted Ms. Priscilla Waters, Department of Homeland Security, Office of Intelligence and Analysis, Freedom of Information Act (FOIA) in Washington, D.C. to ascertain the federal authority which precludes state and local authorities from disclosing Homeland Security information which is deemed to be FOUO.

12. Ms. Waters provided language from the Homeland Security Act, PUBLIC LAW 1007 [sic]-296-NOV.25, 2002 116 STAT 2135, which states in pertinent part,

SEC. 892. FACILITATING HOMELAND SECURITY INFORMATION SHARING PROCEDURES.

(a) PROCEDURES FOR DETERMINING EXTENT OF SHARING OF HOMELAND SECURITY INFORMATION.—

(1) The President shall prescribe and implement procedures under which relevant Federal agencies—

(A) share relevant and appropriate homeland security information with other Federal agencies, including the Department, and appropriate State and local personnel;

(B) identify and safeguard homeland security information that is sensitive but unclassified;

(c) SHARING OF CLASSIFIED INFORMATION AND SENSITIVE BUT UNCLASSIFIED INFORMATION WITH STATE AND LOCAL PERSONNEL.—

(1) The President shall prescribe procedures under which Federal agencies may, to the extent the President considers necessary, share with appropriate State and local personnel homeland security information that remains classified or otherwise protected.....

(e) FEDERAL CONTROL OF INFORMATION.—Under procedures prescribed under this section, information obtained by a State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information

shall not apply to such information. [emphasis in original]

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

Under the APRA, a record is public unless it falls within an enumerated exception or the balancing test. See R.I. Gen. Laws § 38-2-2(4)(i)(A)-(AA). Specifically, Rhode Island General Laws § 38-2-2(4)(S) exempts “[r]ecords, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court.” Further, a public body generally has no obligation to create a document that does not exist. See R.I. Gen. Laws § 38-2-3(h).

In her affidavit, Attorney Holley states that “I was advised that under the Homeland Security Act of 2002, only the Fusion Center Privacy Policy could be publically distributed and that all other documents requested were either For Official Use Only (“FOUO”) or did not exist.” In her subsequent affidavit, Attorney Holley states “*** I re-examined the nineteen (19) separate requests for documents *** to determine with specificity if the requested information 1) EXISTS, 2) DOES NOT EXIST, or 3) IS A DOCUMENT NOT MAINTAINED by the RISFC.” [Original emphasis] The following documents were found to “[contain] information that should be requested of the Department of Homeland Security:”

Numbers 5, 6, and 7 under the heading “Policies and Standard Operating Procedures”

Number 3 under the heading “Information-Sharing Agreements”

Numbers 1, 2, and 3 under the heading “Contracts, Reports and Audits”

Pursuant to section 892(e) of the Homeland Security Act, “ *** information obtained by a State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information shall not apply to such information.” Consistent with this provision, and based upon the evidence presented, we conclude that the DPS did not violate the APRA when it denied your request for the above-mentioned categories. See R.I. Gen. Law § 38-2-2(S). Notably, you presented no evidence or objection to Attorney Holley's representations or evidence.

Moreover, according to Attorney Holley the following documents were found to not exist:

Second number "1" and 4 under the heading "Policies and Standard Operating Procedures"

Numbers 1, 2, 4, 5, 6, and 7 under the heading "Information-sharing agreements"

Number 4 under the heading "Contracts, Reports and Audits"

There being no evidence to the contrary, this Department concludes that the documents you requested were not in existence at the time of the request and that "[n]othing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time of the request***". See R.I. Gen. Law §38-2-3(h).²

Additionally you allege that DPS did not provide any "statutory reasons" for denying your request.³ The APRA does not require a public body to provide "statutory reasons," but instead provides that a public body must issue a written denial stating "the specific reasons for the denial***." See R.I. Gen. Laws § 38-2-7(a). After reviewing Attorney Holley's denial letter to you, it is clear that certain reasons for the denial were stated. In her letter, Attorney Holley states that "[a]ll requested items not contained in the RIFC Privacy Policy are categorized as 'For Official Use Only'" and further explains the meaning and purpose behind that categorization. Attorney Holley continues to explain how disclosure could "adversely impact a person's privacy or welfare, the conduct of Federal programs, or other programs or operations essential to the national interest." This Department finds that the stated reason for the denial is sufficient to satisfy the requirement of R.I. Gen. Laws § 38-2-7. Thus, we find no violation.

Finally, this Department acknowledges your contention that similar requests in neighboring states have led to an "extensive release of documents." Nevertheless, the Connecticut and Massachusetts decisions have neither binding consequence nor persuasive effect on this Department's findings and the basis for their decision, namely whether the Homeland Security Act of 2002 was considered, is unclear.

Although the Attorney General has found no violations, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or

² Attorney Holley indicates that numbers 1, 2, and 3, under the heading "Policies and Standard Operating Procedures", were provided to you in the Privacy Policy and you have presented no evidence or objection to contradict this assertion.

³ You also allege that DPS did not attempt to release reasonably segregable portions of the requested documents. Our finding, and the application of the Homeland Security Act of 2002, makes discussion of this allegation unnecessary.

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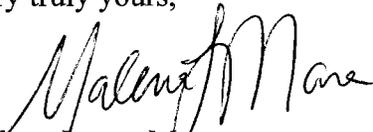
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declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

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

Very truly yours,


Malena Lopez Mora
Special Assistant Attorney General
Extension 2307

MLM/pl

Cc: Ms. Lisa Holley, Esquire