



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 13, 2016
PR 16-18

Mr. Dimitri Lyssikatos

Re: Lyssikatos v. City of Pawtucket

Dear Mr. Lyssikatos:

Your Access to Public Records Act (“APRA”) complaint filed against the City of Pawtucket (“City”) is complete. By correspondence dated July 3, 2015, you alleged the City violated the APRA when it denied your request for a copy of an internal affairs report related to a specific and identifiable incident on the grounds that disclosure “would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et seq.” See R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

Solicitor for the City, Attorney Frank Milos, submitted a substantive response to your complaint. In pertinent part, the City contends:

“On June 23, 2014, Mr. Lyssikatos was a passenger in a motor vehicle which was the subject of a traffic stop initiated by two (2) members of the Pawtucket Police Department. The traffic stop resulted in an arrest of the driver of the motor vehicle, but it did not result in the arrest of Mr. Lyssikatos.

In September of 2014, Mr. Lyssikatos filed a written complaint with the Pawtucket Police Department’s Internal Affairs Division complaining about the conduct of the two (2) police officers involved in the traffic stop.

On October 22, 2014, Detective Napoleon Gonsalves of the Internal Affairs Division wrote to Mr. Lyssikatos and informed him that his complaint had not been sustained.

On May 19, 2015, Mr. Lyssikatos submitted a request for records under the APRA, seeking a copy of the Internal Affairs report regarding his complaint.

On June 24, 2015, The City prepared and mailed a written response to Mr. Lyssikatos denying his request and setting forth the specific substantive basis for the denial...

...

...the City believes that Investigative Report 14-47-IA is a ‘personnel and other personal individually-identifiable record’, which includes information applying to particular individuals. In terms of the balancing test between the individuals’ privacy interests and the public’s right to disclosure, a review of the police report memorializing the traffic stop conducted by the Pawtucket Police Department on June 23, 2014 reveals that Mr. Lyssikatos was neither arrested nor charged with a crime. In addition, the October 22, 2014 letter sent to Mr. Lyssikatos by Detective Napoleon Gonsalves of the Internal Affairs Division also suggests that Mr. Lyssikatos failed to assist the Internal Affairs Division, regarding its investigation into his complaint, by refusing to provide a copy of a video tape which Mr. Lyssikatos claims he had in his possession regarding the entire traffic stop.

In light of the foregoing, the City believes that, on balance, disclosure of the Internal Affairs investigative report in this instance, even in redacted form, would not serve to shed light on the official acts and workings of the government, nor would it shed light on how the Pawtucket Police Department operates. Rather, the City contends that the public interest in disclosure of the report is negligible. In addition, the investigative report cannot be redacted and disclosed without the risk of subjecting the specific police officers to undeserved attention. As a result of the foregoing, the City concludes that Investigative Report 14-47-IA is a ‘personnel and other personal individually-identifiable record’ the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of the individual police officers...”

We acknowledge your rebuttal and will address the relevant points in our finding.

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

According to your APRA request, you were a passenger in a motor vehicle that was involved in a traffic stop by the Pawtucket Police Department. Subsequently, you filed a complaint with the Internal Affairs Department related to the conduct of the police officers involved in the traffic stop and, on May 19, 2015, you filed an APRA request seeking “a copy of the Internal Affairs report regarding my complaint.” Your APRA request provides additional background concerning your request:

“I refused to give identification because I firmly believed that the officer did not have reasonable suspicion to believe I was involved in any criminal activity, I was merely a passenger in a traffic stop initiated for a cracked windshield. After my

refusal I [i]mmediately asked if I was being detained and received confirmation of the detention before I was told to sit on the sidewalk while they searched the vehicle. In the police report, [the Officer] falsely states that he informed me about the laws regarding request for identification prior to detaining me and to this day I have yet to receive an answer on what these laws are. I would like a copy of the Internal Affairs report regarding my complaint because I do not understand how Officer Gonsalves can find that my complaint does not rise to the level of supporting a claim strictly because I refused to give up some video I have of this encounter.”

The City denied your request on the grounds that the report is a “‘personnel and other personal individually-identifiable record,’ which includes information regarding the particular police officers who were the focus of the investigation” and that “disclosure of the investigative report...would not serve to shed light on the official acts and workings of the government, nor would it shed light on how the Pawtucket Police Department operates.” Thereafter, you filed an APRA complaint with this Department, which indicates, in relevant part:

“I believe this report will shed some light on the City’s Operations. As found in *Farinelli vs. Pawtucket, The Rake and DARE* the legal precedents established were in favor of public disclosure. The release of these internal affairs reports are essential and will shed some light on the manner in which law enforcement agencies address concerns of the citizens when it comes to complaints and how they are handled.”

The Rhode Island Supreme Court has stated that “[b]ecause [the] APRA generally mirrors the Freedom of Information Act [(“FOIA”)], 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law.” See *Pawtucket Teacher’s Alliance Local No. 920 v. Brady*, 556 A.2d 556, 558 n.3 (R.I. 1989). Indeed, the provision raised by the City, R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), expressly incorporates FOIA, and as such, we looked to federal case law for guidance in determining whether the City violated the APRA when it denied your APRA request under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

To begin, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989), the United States Supreme Court explained 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 an agency’s own conduct.

The Supreme Court cautioned that “[t]hus, 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 (emphasis added).

While you suggest that this case is controlled by Direct Action for Rights and Equality v. Gannon (DARE I), 713 A.2d 218 (R.I. 1998) and The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982), Rhode Island courts have distinguished APRA requests for records relating to an isolated person or incident from APRA requests for records relating to multiple incidents. For example, in the Court’s first APRA case, The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982), a student newspaper sought Providence Police reports on excessive force complaints spanning a seven (7) year period. Because the reports were susceptible to redaction (since there were numerous reports over a 7 year period), the reports were ordered disclosed with the names of the citizens and police officers redacted. Id. at 1149. In Direct Action for Rights and Equality v. Gannon (DARE I), 713 A.2d 218 (R.I. 1998), the requester also sought police reports concerning incidents of alleged excessive force over a seven year period. Consistent with The Rake, the Rhode Island Supreme Court determined the requested documents were public records, but ordered information identifiable to individuals redacted.

The foregoing cases involving requests of multiple records spanning several years must be compared to a situation where an inmate at the Adult Correctional Institution sought access, through the APRA, to his own file. See Bernard v. Vose, 730 A.2d 30 (R.I. 1999). The Court determined that the Department of Corrections did not violate the APRA when it denied the inmate’s request for his own file.

Similarly, in Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989), the Court examined a single management study report created to investigate a particular school’s operations. The Court explained that:

“[u]nlike the situation in The Rake, the report at issue in the present case specifically relates to the job performance of a single readily identifiable individual. Even if all references to proper names were deleted, the principal’s identity would still be abundantly clear from the entire context of the report.” Id. at 559.¹ (Emphasis added).

The Court further explained that:

“The potential for harm resulting from disclosure of this type of information clearly outweighs any perceived benefit that would accrue to plaintiffs. If we were to order the release of [the] report in these circumstances, this [C]ourt would effectively license the public to review the performance of any principal or teacher under the guise of an investigation into school operation and administration. Such a result would clearly be in derogation of public policy and directly contravene the express language of APRA.” Id. at 559-60 (emphasis added).

The distinction discussed above – documents pertaining to an isolated person or incident versus documents pertaining to multiple persons or incidents – has also been recognized by federal courts. In Hunt v. F.B.I., 972 F.2d 286 (9th Cir. 1992), for example, the Court of Appeals

¹ Although admittedly Brady’s analysis hinged on the plain language of an APRA exemption that has since been amended, the Court’s rationale remains applicable.

determined that records containing the findings of an investigation into the conduct of a particular F.B.I. agent were exempt from disclosure. The Ninth Circuit explained that it reversed the District Court’s order that the records be disclosed in a redacted manner “[b]ecause the redaction ordered would not adequately protect important privacy interests.” Id. at 287. Cf Brady, 556 A.2d at 559. The Court of Appeals elaborated that:

“[t]he single file sought by [the plaintiff] will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common. This situation may be easily contrasted with the FOIA request for numerous disciplinary files submitted to the Air Force in Department of Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592.” Id. at 289 (emphases added).

See also Boyd v. Criminal Division of the United States Department of Justice, 475 F.3d 381, 388 (D.C. Cir. 2007)(“a single instance of a Brady violation in Boyd’s case would not suffice to show a pattern of government wrongdoing as could overcome the significant privacy interest at stake”) (emphasis added).

Therefore, while you suggest that your APRA request is governed by the “legal precedents established” in The Rake and DARE, your request sought a single internal affairs report concerning a single incident, which makes this matter distinguishable and more akin to those cases, see supra, where a requester sought a document relating to a single person or incident. Additional United States Supreme Court precedent provides further guidance.

In National Archives and Records Administration v. Favish, 541 U.S. 157, 174 (2004), the United States Supreme Court considered death-scene photographs of Vincent Foster, Jr., then-Deputy Counsel to President Clinton. After recognizing that the family members of Vincent Foster, Jr. had a privacy interest in the disclosure of the death-scene photographs cognizable in Exemption 7(C),² the Court emphasized that the statute allows nondisclosure where the information “could reasonably be expected to constitute an unwarranted invasion.” Favish, 541 U.S. at 171 (emphasis added). The Court continued that the “term ‘unwarranted’ requires us to balance the family’s privacy interest against the public interest in disclosure,” id., and the Court elucidated some guidelines:

“In the case of Exemption 7(C), the statute requires us to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State. The statutory direction that the information not be released if the invasion of personal privacy could reasonably be expected to be unwarranted requires the courts to balance the competing interests in privacy and disclosure. To effect this balance and to give practical meaning to the exemption, the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable.” Id. at 171-72 (emphasis added).

² Unlike the language contained in R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), the word “clearly” is omitted from FOIA Exemption (7)(C). Nonetheless, the Supreme Court’s analysis sheds light on what factors constitute an “unwarranted” invasion of personal privacy.

Thereafter, the Court continued and articulated what has sometimes become known as the “sufficient reason” test:

“[w]here the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.” Id. at 172 (emphasis added).

After considering the above precedent, we find no violation.

Your rebuttal provides the “public interest” that you claim will be advanced through disclosure. Specifically, you relate:

“I believe that I was illegally detained when I refused to identify myself during the traffic stop in question. I filed an IA complaint in an attempt to discover the standard of reasonable articulable suspicion that the [] officers had in order to detain me according to RIGL 12-7-1[.] My main question is how did these officers get from ‘passenger in a vehicle stopped for a cracked windshield’ to ‘criminal suspect.’ Without the ability to look at the IA report I cannot review the reasoning given by the officers and I can not exercise my right to be informed and determine if this standard was met as stated by the central purpose of the APRA which is to ensure that the governments [sic] activities be open to the sharp eye of public scrutiny.”

While in no way do we seek to minimize your right to be an informed citizen, your rebuttal makes clear that you seek this information for your own sake and not to advance the public interest. As such, you fail to satisfy the Favish first prong. Id. at 172 (“the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake”).

In this respect, although you contend that the internal affairs report “will shed some light on the City’s Operations,” you provide no evidence to support this conclusory statement and the case law, discussed supra, contradicts the conclusion that this interest, by itself, is sufficient in cases where a person seeks documents related to a specific incident. Respectfully, if simply stating that disclosure “will shed some light on the City’s Operations” was sufficient to require disclosure, the balancing test established in R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) would be nothing more than a mere formality. (Emphasis added). See Hunt, 972 F.2d at 290 (“there is little or no public interest served by disclosure of this isolated file”).

Weighed against this asserted “public interest” is the privacy interest of the officer(s) who were the subject of your complaint. It is not lost upon this Department that no evidence was found to substantiate your complaint and that perhaps the best evidence of what occurred during the traffic stop – the video that you captured – was not disclosed by you to the Pawtucket Police

Department in connection with your complaint and the Police Department's internal affairs investigation. It suffices that the privacy interest of these officer(s) in not being associated with unfounded allegations of misconduct outweighs the public interest you assert. See also Boyd v. Criminal Division of the United States Department of Justice, 475 F.3d 381, 388 (D.C. Cir. 2007) (“a single instance of a Brady violation in Boyd's case would not suffice to show a pattern of government wrongdoing as could overcome the significant privacy interest at stake”) (emphasis added).

Finally, you suggest that this matter is akin to Farinelli v. City of Pawtucket, PR 15-17; we respectfully disagree. In Farinelli, the City had previously disclosed, via the APRA, an unredacted copy of the police report associated with an internal affairs report. Subsequently, the City denied Farinelli's APRA request for the internal affairs report on the grounds that disclosure “would constitute an unwarranted invasion of personal privacy.” See R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). After reviewing the internal affairs report in camera, we concluded that disclosure in a redacted manner would not “constitute an unwarranted invasion of personal privacy” since the related police report had already been disclosed in unredacted form through the APRA. We opined that it was “difficult to recognize a privacy interest in the entire internal affairs report where it was the City's decision to release the unredacted police report under the APRA.”

This case is distinguishable. While it appears that you may be in receipt of the police incident report associated with the internal affairs report, there is no indication that the City provided you an unredacted copy of the police report through the APRA. Nevertheless, even if an unredacted copy of the police report has been disclosed to you through the APRA, as indicated supra, the internal affairs report you seek will not further the public interest articulated by you. Moreover, we cautioned in Farinelli that “[t]he City, as well as those seeking guidance from this finding, should be advised that our finding is limited to the unique facts presented herein.” In other words, even if the privacy interests were somewhat diminished due to prior disclosure of the individuals identified in the report, on balance, the scale tips in favor of nondisclosure since the internal affairs report will not further the public interest.

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
Special Assistant Attorney General

Cc: Frank J. Milos, Jr., Esq.