State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

July 14, 2016
PR 16-27

Ms. Lynn Farinelli

Re: Farinelli v. City of Pawtucket

Dear Ms. Farinelli:

By correspondence dated June 28, 2015, you filed an Access to Public Records Act ("APRA") complaint against the City of Pawtucket ("City") alleging the City violated the APRA when it improperly denied your May 5, 2015 APRA request. More specifically, you requested the completed investigation report of the Internal Affairs complaint you submitted on December 23, 2014. You allege this report would "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." In addition, you also contend that the City violated the APRA when it failed to timely respond to your APRA request dated April 16, 2015 and when the City required that all questions you may have be submitted in the form of an APRA request, only to have the City later respond that the APRA does not require the City to answer questions.

In response to your complaint, we received a substantive response from the City's solicitor, Frank Milos, Esquire. Attorney Milos states, in pertinent part:

> "On May 5, 2015, Mrs. Farinelli emailed an APRA request to the Law Department, which requested, among other things, '[t]he Completed Investigation of the Internal Affairs complaint submitted on December 23rd.' * * *
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> On May 19, 2015, [I] emailed Mrs. Farinelli and asserted the City's need for an additional five (5) business days to respond to her request due to a high volume of requests for records. * * *
>
> On May 26, 2015, [I] prepared and emailed a substantive response to Mrs. Farinelli, which responded to most of the specifically enumerated requests set forth in her May 5, 2015 APRA request. However, the City claimed a second five

(5) business day extension regarding two (2) of the requests, which included Mrs. Farinelli's request for the Internal Affairs report. * * *

On June 2, 2015, [I] prepared and emailed a written response to Mrs. Farinelli denying her request for the Internal Affairs report (#14-59-IA) and setting forth the specific substantive basis for the denial * * *

In support of the decision to deny Mrs. Farinelli's request, the City first contends that the instant matter is distinguishable from the facts established in the matter of Farinelli v. Pawtucket, PR 15-17. In that matter, the City had previously released a report which identified the members of the Pawtucket Police Department who had investigated the death of Mrs. Farinelli's son, Joseph Farinelli. Since Pawtucket had chosen to release the incident report to Mrs. Farinelli, the Department [of Attorney General] determined that it would not be a clearly unwarranted invasion of personal privacy to release the Internal Affairs report regarding the investigation into certain of the officers who had taken part in the investigation.

However, in its written opinion, the Department very clearly states 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 therein.' It is the City's belief that the Department's opinion in Farinelli did not result in a 'per se' rule regarding the release of all internal affairs reports which are specifically identifiable to a particular police officer or officers. As a result, the City continues to perform a separate and thorough analysis regarding whether Internal Affairs investigative reports should be released even in redacted form.

In The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982) and Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998), our Supreme Court concluded, respectively, that copies of all hearing officers' reports concerning civilian complaints filed over a seven (7) year period were public records subject to redaction so that neither the citizen complainants nor the individual police officers could be identified. R.I. Gen. Laws § 38-2-2(4)(i)(A)(I), which exempted from public disclosure records identifiable to an individual employee, was not implicated in either case.

However, in Pawtucket Teachers Alliance Local v. Brady, 556 A.2d 556 (R.I. 1989), a request was made for a management study report related to a specifically identifiable employee – a school principal. Our Supreme Court held that the management study report was exempt from public disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(i)(A)(I), and, in particular, noted that '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.' * * * As a result, the Court held that the report was not a public record.

In North Providence Police Department, ADV PR 01-02, the Department held that a request for copies of internal affairs documents related to an investigation into the conduct of one on-duty patrolman fell within the purview of R.I. Gen. Laws § 38-2-2(4)(i)(A)(I) * * * The Department held that 'unlike DARE, where disclosure of certain reports taken during a seven (7) year period 'relat[ed] to management and direction of a law enforcement agency,'. . . .we do not believe that the instant request for records related to a specific incident/individual, relates to 'management and direction of a law enforcement agency.' As a result, the Department held that the internal affairs records at issue were not public records.

The City is mindful that since the publication of Brady and North Providence, the APRA was amended (in 2012) and * * * supplemented by R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts from public disclosure, in pertinent part, '[p]ersonnel 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 * * *'

In DeAscentis v. Town of Jamestown, PR 14-04, the Department applied 'a two-fold analysis to interpret R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).' First, the Department * * * determined that 'personnel and other personal individually-identifiable records,' includes all information applying to a particular individual. Second, the Department then considered what constitutes a 'clearly unwarranted invasion of personal privacy' and, relying on United States Supreme Court decisions, determined that the legislative intent promulgated a balancing test between the individual's privacy interests and the public's right to disclosure' and that whether disclosure 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.

Based on the analysis set forth in the DeAscentis opinion, the City believes that Investigative Report # 14-59-IA is a 'personnel and other personal individually-identifiable record,' which includes information applying to a particular individual. According to Chief of Police, Paul King, when Mrs. Farinelli filed her December 23, 2014 complaint with the Internal Affairs Division, the Pawtucket Police Department's investigation into Joseph Farinelli's death had been concluded for approximately five (5) months. In addition, Chief King also states that the officer who was the subject of Mrs. Farinelli's Internal Affairs December 23, 2014 complaint was not directly involved in the Police Department's investigation into Joseph Farinelli's death.

In light of the foregoing information provided by Chief King, upon performing the required balancing test between the individual officer's privacy interests and the public's right to disclosure, the City believes that disclosure of the investigative report in this instance, even in redacted form, would not serve to shed light on the official acts and workings of government, nor would it shed light

> on how the Pawtucket Police Department operates. Rather, the City contends that the public interest in disclosure of this report is negligible. In addition, the investigative report cannot be redacted and disclosed without the risk of subjecting one specific police officer to undeserved attention. Further, unlike the officers who were the subject of the Internal Affairs complaint in Farinelli v. Pawtucket, PR 15-17, the officer who was the subject of Mrs. Farnelli's Internal Affairs December 23, 2014 complaint was not directly involved in the Police Department's investigation into Joseph Farinelli's death.
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> As a result of the foregoing, the City concludes that Investigative Report 14-59 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 officer."

We acknowledge your rebuttal, and significantly you state that "I have since obtained this Internal Affairs investigation.[[1]] * * * I obviously don't need the Attorney General to release this information to me."

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

In the typical APRA situation, a person files a complaint with this Department seeking access to a particular document that is being withheld. If this Department determines that a particular complaint is meritorious and that a document has been improperly withheld, among the available remedies is that this Department 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).

In this case, we need not examine whether the City violated the APRA by withholding the requested Internal Affairs document – and thus seek "injunctive or declaratory relief" requiring its disclosure – because the evidence makes clear that you already have access to this document. While the precise manner in which you acquired access is unknown to this Department, what is known is that you have access to this document and, as you relate, you "obviously don't need the Attorney General to release this information to me."[2] As such, since you have a copy of the

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[1] You enclosed a copy of the Internal Affairs report as part of your rebuttal.

[2] You contend that although the Internal Affairs report was denied to you, it was provided to someone else. As we explained above, it is unclear to us how the redacted copy that you obtained made its way into the public domain, and while arguably in the appropriate circumstances, denial to one entity and providing the document to another person could provide some evidence of a willful and knowing, or reckless violation, in this case, no evidence on this

Internal Affairs report, this Department need not determine whether the Internal Affairs report is a "public record" or whether the City violated the APRA when it denied you access.

While our finding that injunctive relief is not appropriate – and thus we need not determine whether the City's actions violated the APRA – the fact that you are in possession of the requested document does not completely end our inquiry. The reasons for this conclusion is because 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). In the appropriate case, we could envision a lawsuit against a public body seeking monetary fines for the willful and knowing, or reckless, denial of a public record, even though the complainant was in possession of the previously withheld document at the time of our finding. Based upon the evidence presented in this case, we conclude that this is not one of those cases.

Specifically, the City submits that the APRA request for the instant Internal Affairs report differs from Farinelli v. City of Pawtucket, PR 15-17; The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982); and Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998). We agree. Most notably, DARE and The Rake concerned the redaction of citizen's and officers' names from reports spanning a number of years such that neither the citizen complainants, nor the individual police officers, could be identified. Under these cases, redacted reports were deemed public.

The fact pattern before us more closely mirrors Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989) where the Rhode Island Supreme Court concluded that since a management study report concerned and identified one individual, the report was not susceptible to redaction and was not a public record, in its entirety. Moreover, as the City points out regarding your reliance on Farinelli, PR 15-17, in that case we warned "[t]he City, as well as those seeking guidance from this finding, * * * that our finding is limited to the unique facts presented herein." Indeed, more recently, we found that the City of Pawtucket did not violate the APRA in facts similar to those presented herein when it denied access to an internal affairs document relating to a specific and identifiable officer. See Lyssikatos v. City of Pawtucket, PR 16-18. For all these reasons, there is no evidence of a willful and knowing, or reckless, violation.

With respect to your allegation that the City failed to timely respond to your April 16, 2015 APRA request, we also find no violation. Here, it appears you made – or attempted to make – an APRA request through two different means: (1) by certified mail and (2) by email. You submit a United States Postal Service Tracking document that evinces that a particular correspondence was delivered to/at a mailbox in Pawtucket, Rhode Island. Although you claim that the Tracking document corresponds to your April 16, 2015 APRA request – an assertion we assume to be true – it bears noting that no evidence has been presented that your April 16, 2015 APRA request was

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point has been presented or gleaned by this Department. See e.g., Fuka v. Department of Environmental Management, No. 07-1050 (R.I. Superior, April 17, 2007)(Indelgia, J.)(no waiver where agency had exempted document previously disclosed).

delivered to the City of Pawtucket until on or about May 5, 2015. In fact, based upon the evidence that we have reviewed, the City contends that it did not receive this APRA request on or about April 17, 2015 and your complaint relates that you were "informed on May 4th that the Confirmed as Delivered APRA was not Received." A May 12, 2015 e-mail from you also relates that "[a]fter many calls around I have discovered that [the April 16, 2015 APRA request] must have been sitting at the Post Office 'mailbox' because mail is not delivered to your office."

Here, based upon the evidence presented, no evidence has been presented that the City was somehow avoiding receipt of your APRA request. In the absence of any evidence that the City was responsible for delaying the receipt of your April 16, 2015 APRA request, we find no violation. See R.I. Gen. Laws § 38-2-3(e)("A public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request.")(emphasis added). Indeed, after the City received your APRA request on or about May 5, 2015, the City timely responded.[3]

As for your second means of delivery, i.e., email, the evidence reveals that on April 16, 2015 you e-mailed what appears to be the April 16, 2015 APRA request, but you e-mailed this document to yourself. No evidence has been presented that this request was e-mailed to any City official or employee. It was not until May 5, 2015 that you e-mailed – actually forwarded – this email to a City of Pawtucket e-mail address and the City responded to this inquiry within ten (10) business days. Because no evidence has been received that the City received your April 16, 2015 APRA request prior to May 5, 2015, we find no violation.

Lastly, you take issue with the City "asking [you] to submit questions that would be ultimately denied." As you observe, the APRA requires public bodies to provide access to public documents, but does not require public bodies to answer questions. See Block v. Block Island Volunteer Fire District, PR 15-45. For this reason, we have grave doubts that your complaint implicates the APRA. Nonetheless, it appears that the focus of your complaint is a May 7, 2015 e-mail from the City's Mayor, Donald R. Grebien. In response to an e-mail inquiry sent by you to the Mayor, the Mayor responded, in pertinent part:

> "I understand the seriousness of this and each and every request that you have sent us. We continue to provide you with the appropriate response to each and every request.
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> As we discussed all the requests for information and records like this fall under the APRA regulations, especially with the ongoing lawsuit.
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> Once again all requests need to go through the City Solicitor Frank Milos.

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[3] You also take issue with the fact that City did not respond to an April 17, 2015 email you sent to the City with the subject heading "Please add this to my apra request." You suggest that the subject heading should have placed the City on notice that you had submitted an APRA request, but this e-mail in no way directs the City to any particular APRA request, and as discussed above, the evidence demonstrates that the City did not receive your April 16, 2015 APRA request until on or about May 5, 2015.

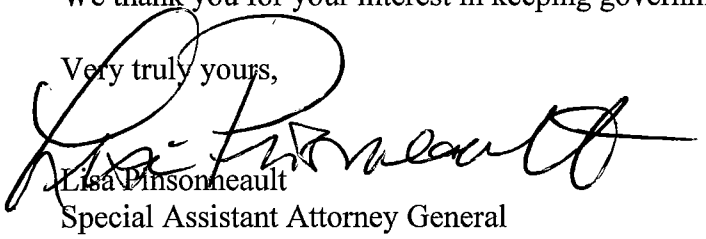
> I've copies him on this and you can expect the appropriate response within the timelines and guidelines of APRA."

As we read this correspondence, it does not appear that you have been asked to submit your questions as APRA requests and you direct this Department to no particular provision of the APRA that this correspondence allegedly violates and we are aware of none. Accordingly, we find no violation.

Although the Attorney General 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,



Lisa Pinsonneault
Special Assistant Attorney General

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