



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

August 21, 2015  
PR 15-51

Kevin P. Gavin, Esquire

**RE: Town of Portsmouth v. Rhode Island Department of Public Safety**

Dear Attorney Gavin:

The investigation into your Access to Public Records Act (“APRA”) complaint filed on behalf of your client, the Town of Portsmouth, against the Rhode Island Department of Public Safety (“DPS”) is complete. By email correspondence dated October 3, 2014, you allege that the DPS violated the APRA when it improperly denied the Town’s APRA request dated September 5, 2014.

In response to your complaint, we received a substantive response from the DPS’s legal counsel Danica A. Iacoi, Esquire. Attorney Iacoi states, in pertinent part:

“On or about September 5, 2014, the [DPS] received a letter from Kevin P. Gavin, Esq., the Town of Portsmouth Town Solicitor seeking copies of ‘any and all records concerning an investigation relating to the Town and/or other persons or entities involving the provision of ferry service to and from Prudence Island . . .’ (emphasis [in original]) \* \* \* On September 17, 2014, the [DPS] responded via email with a letter to Mr. Gavin denying his request for records related to this particular investigation. \* \* \* The [DPS] stated the basis for the denial of said records was based on the following:

- a. This was not a circumstance where a crime had occurred and no arrest was made.
- b. The privacy interests of the individuals involved were found to be substantial.
- c. R.I.G.L. Section 38-2-2 excludes personal information relating to an individual in any file and law enforcement records that could reasonably be

expected to be an unwarranted invasion of personal privacy or could disclose information furnished on a confidential basis.

d. In re Cumberland Police Department, ADV PR 03-02 was cited and explained to Mr. Gavin as further grounds for the denial of his request.

\* \* \*

In re Cumberland Police Department specifically stated that:

. . . the General Assembly has concluded that when a law enforcement agency finds probable cause to make an arrest, the public has the right to access the record of that arrest.

[However,] [w]hen a law enforcement agency investigates a complaint and determines that an arrest is not warranted, there exists a strong presumption that records arising out of that investigation fail to meet the threshold requirement established by R.I.G.L. Section 38-2-2(4)(i)(D). In other words, when the police determine probable cause does not exist, disclosure of related records can reasonably be expected, in most cases, to constitute an unwarranted invasion of personal privacy. \* \* \*

In Higginbotham v. Department of Public Safety, PR 09-15, it was found that APRA was not violated when the Department of Public Safety withheld an incident report related to a specific and identifiable private citizen that did not lead to an arrest. \* \* \*

In the instant matter, there has been no showing to indicate that the public interest in disclosure outweighs the privacy interest involved. Mr. Gavin argues that the [DPS] should provide documents because a complaint was filed alleging corruption by officials of the Town of Portsmouth, as well as private individual/s. However, this argument does not tip the scales of the balancing test toward disclosure. Furthermore, the Court in [National Archives and Records Administration v. Favish, 541 U.S. 157 (2003)] stated that ‘where there is a privacy interest protected by [the exemption] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requestor must establish more than a bare suspicion in order to obtain disclosure.’ \* \* \*

The Supreme Court further noted that ‘where the subject of the documents is a private citizen, the privacy interest is at its apex.’ \* \* \* The [DPS] argues that the same privacy concerns arise here. After a thorough review, the [DPS] asserts that the public interest in disclosure does not outweigh the privacy interests of the affected individuals.”

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 one of several enumerated exceptions or the balancing test. See R.I. Gen. Laws § 38-2-2(4)(A)-(AA); see also Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998). Additionally, the stated purpose of APRA is set forth in R.I. Gen. Laws § 38-2-1, which provides:

“[t]he public's right to access [public] records. . .and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society. The purpose of this chapter is to facilitate public access to [public] records. It is also the intent of this chapter 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.”

Various cases lead us to the conclusion that the DPS violated the APRA when it failed to provide redacted documents responsive to the Town's APRA request.

For instance, the Rhode Island Supreme Court has held that names of police officers may be redacted and are exempt from public disclosure even when the rest of the record is public. See DARE, 713 A.2d 218; The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982). In The Rake, Brown University students sought Providence Police Department records regarding civilian complaints of police misconduct over a seven (7) year period. There, the City claimed the requested documents were exempt from disclosure in the entirety pursuant to what was enumerated as R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) because the requested reports contained the names and identities of police officers. The trial justice, on the other hand, agreed with the defendants that the documents should be redacted to remove the identities of the complainants and the police officers, and thus ordered the redacted documents disclosed. On appeal, the Rhode Island Supreme Court concluded that the requested civilian complaints must be publicly disclosed, but in redacted form. The Supreme Court explained:

“[t]he statute requires that the records must be identifiable to an individual applicant in order for the exemption to take effect. In the present case, the reports do not identify the citizen complainants or the police officers because the names of both have been deleted as ordered by the Superior Court justice. Consequently, an important prerequisite for application of the exception has not been met.” The Rake, 452 A.2d at 1148 (emphasis added).

Accordingly, The Rake stands for authority that certain police records, i.e., civilian complaints, are public records after information identifying named police officers is redacted and that the

names of police officers fall within the purview of what was enumerated as R.I. Gen. Laws § 38-2-2(5)(i)(A)(I).

The Court revisited this issue in DARE, overturning a decision by the trial court to release records regarding civilian complaints in unredacted form. See DARE, 713 A.2d at 225. In DARE, a community-action group, Direct Action for Rights and Equality (“DARE”), made an APRA request to the Providence Police Department seeking records pertaining to civilian complaints of police misconduct, which included the name of the person filing the complaint and the name of the officer who was the subject of the complaint. See id. at 218. The records sought were:

- a.) “Every ‘Providence Police Civilian Complaint report’...filed within the Providence Police Dept. from 1986 to present.
- b.) A listing of all findings from investigations that was [*sic*] conducted by the Bureau of Internal Affairs, in reference to all ‘Providence Police Civilian Complaint reports’ on record from 1986 to present.
- c.) All reports made by the ‘Providence Police Department Hearing officers [] on their [*sic*] decisions [*sic*] from the findings of investigations conducted in Re: Providence Police Civilian Complaints’ ...from 1986 to present.
- d.) Reports on all disciplinary action that’s [*sic*] been taken as a result of recommendations made by the Hearing Officers [’] Division since 1986 to present.”

See id. at 220.

The trial justice concluded that documents relating to the above categories were public records and that the requested documents must be disclosed in unredacted form, i.e., with the names of the complaints and officers included. See id. at 221. The Supreme Court disagreed and concluded that documents relating to category (b) were exempt from public disclosure (based upon the determination that the requested documents did not exist) and, similar to its reasoning in The Rake, documents relating to categories (a), (c), and (d) were public records, but the names of the complainants and the officers could be redacted. See id. at 225. Specifically, the Supreme Court in DARE examined its past precedent and stated that “a rule has evolved that permits the disclosure of records that do not specifically identify individuals and that represent final action.” See id. at 224 (emphasis added).

Here, by letter dated September 5, 2014, the Town wrote to the DPS and, in relevant part, indicated that it had been advised by the DPS of “an investigation relating to the Town and/or other persons or entities involving the provision of ferry service to and from Prudence Island and related issues or matters.” The Town’s letter requested, pursuant to the APRA, “any and all records, including without limitation any complaints, statements, reports, memos and other documents or records, relating to said investigation.” In response, the DPS denied the Town’s request, in its entirety, citing R.I. Gen. Laws § 38-2-2(4)(D)(c), which exempts from disclosure law enforcement records relating to the detection and investigation of crime where disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” In

doing so, the DPS denied the Town's request in its entirety and appears to have been under the belief that because "this matter is not a circumstance where a crime was proven to have occurred, and no arrest was made," no documents or incident reports need be disclosed pursuant to the APRA. Respectfully, this Department has never adopted such a rule.

Indeed, even in In re Cumberland Police Department, ADV PR 03-02, the case cited by the DPS in its denial, we explained that "[w]hen a law enforcement agency investigates a complaint and determines that an arrest is not warranted, there exists a strong presumption that records arising out of that investigation fail to meet the threshold requirement established by R.I. Gen. Laws § 38-2-2(4)(i)(D)(c)." (Emphasis added). We continued that "[i]n other words, when the police determine probable cause does not exist, disclosure of related records can reasonably be expected, in most cases, to constitute an unwarranted invasion of personal privacy." (Emphasis added). Accordingly, even in the case cited by the DPS, we were careful not to adopt the per se rule that the DPS appears to have applied in this case.

Our recognition that a "strong presumption" would apply "in most cases" is well founded because "in most cases" the person or entity making the APRA request is seeking records concerning a specifically identifiable individual. As an example, in In re Cumberland Police Department, ADV PR 03-02, the APRA request at issue concerned "any and all Cumberland Police Department reports regarding the July 19, 1998, incident involving [name redacted]." In Higginbotham v. DPS, PR 09-15, we examined an APRA request for "an incident report filed against [Mr. Higginbotham] by [name redacted] on or about November, 2008," and in Snow v. DPS, PR 10-12, an APRA request sought "copies of all Rhode Island State Police reports concerning any and all investigations of [name redacted]." See also Fusaro v. Westerly Police Department, PR 15-09 (seeking background reports on oneself). With respect to all of these cases, the admonition of the Rhode Island Supreme Court is equally applicable:

"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." Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 559 (R.I. 1989).

In this case, however, the Town has not requested reports identifiable to a particular person(s). Instead, the Town has sought "any and all records, including without limitation any complaints, statements, reports, memos and other documents or records, relating to said investigation." To be clear, we do not mean to suggest that an APRA request that does have as its purpose the disclosure of records relating to a particular identifiable individual can be written in such a manner to avoid the results of In re Cumberland Police Department and its progeny. Stated differently, we will examine the substance of an APRA request over its form.

Applying these principles, and having examined in camera the incident report at issue, we find nothing in the record to demonstrate that this request – in form or in substance – seeks records concerning a particular identifiable individual(s). This conclusion should not be construed to mean that the incident report at issue does not contain identifying type information, such as name

and other information that could lead to one's identity. Indeed, the incident report at issue does contain this type of detail. But, the APRA provides an avenue for this contingency, specifically, "[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after the deletion of the information which is the basis of the exclusion." R.I. Gen. Laws § 38-2-3(b). The DPS's September 17, 2014 denial failed to take into consideration this provision. Moreover, considering the DPS's determination that the entire document was exempt from public disclosure, the APRA required the DPS to "state in writing that no portion of the document or record contains reasonable segregable information that is releasable." *Id.* The September 17, 2014 denial failed to contain this advisement. Perhaps if the DPS had complied with this latter requirement, it would have reached the conclusion we now reach: the document responsive to the Town's APRA request was susceptible to redaction so that the DPS could have redacted any information, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-2(4)(D)(c). While recognizing that the facts set forth in the report could, for the sake of argument, be matched with other information to identify individual(s) named in the report, this same concern was addressed in The Rake, where the Supreme Court acknowledged this possibility but concluded that "on balance the public's right to know outweighs such a possibility." The Rake, 452 A.2d at 1149.

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). Here, no evidence exists to find a "knowing and willful" or "reckless" violation. Notwithstanding, we direct the DPS to provide you with a copy of the record responsive to your APRA request, which may be redacted consistent with the discussion herein, the APRA, and our past findings. The DPS must provide a response within ten (10) business days of this finding and may not assess a charge for the production of these documents. See R.I. Gen. Laws § 38-2-7(b). If you do not receive the records within ten (10) business days, kindly advise this Department so that we may review this matter further to ensure compliance with the APRA.

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

Very truly yours,



Lisa A. Pinsonneault

Special Assistant Attorney General

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Cc: Danica Iacoi, Esquire