



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

November 6, 2014
PR 14-26

Ms. Meghan Gill

RE: West Broadway Associates v. Portsmouth Police Department

Dear Ms. Gill:

The investigation into your Access to Public Records Act (“APRA”) complaint filed, on behalf of West Broadway Associates (“WBA”), against the Portsmouth Police Department (“Police Department”) is now complete. By correspondence dated August 6, 2014, you alleged that the Police Department violated the APRA when it improperly denied your request for “all reports and dispatch log entries that involve John Doe.”¹

In response to your complaint, this Department received a substantive response from the Portsmouth Town Solicitor, Mr. Kevin Gavin, Esquire. Attorney Gavin states, in pertinent part:

“It is plain from the face of Lt. Bucci’s letter, and acknowledged by WBA in its complaint, that Lt. Bucci denied the request for the following reasons:

1. Disclosure of the records could reasonably be expected to constitute an unwarranted invasion of personal privacy.
2. Disclosure would deprive a person of a right to fair trial or an impartial adjudication.

As you know, these exceptions are found in subsections (b) and (c) of R.I. Gen. Laws § 38-2-2(4)(D).

¹ Because we ultimately determine that the requested records are not public records, we redact the identity of the subject of these records.

It is the Department's position that Lt. Bucci acted properly in evaluating the request and applying the appropriate balancing test, which resulted in his determination that the records sought by Ms. Gill in this case were exempt from public disclosure under APRA.

***"

We acknowledge your September 19, 2014 rebuttal.

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

The APRA provides that all records maintained by public bodies are subject to public disclosure unless the document falls within one of the twenty-seven (27) enumerated exceptions. See R.I. Gen. Laws § 38-2-2(4)(A)-(AA). Among the categories exempt from public disclosure are "[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime," provided the requested records fall within one or more of the criteria set forth in subsections (a)-(f). See R.I. Gen. Laws § 38-2-2(4)(D).

This Department has consistently held that where an arrest has not taken place, there is a presumption that incident reports are exempt from public disclosure. See R.I. Gen. Laws § 38-2-2(4)(D). For example, in In re: Cumberland Police Department, ADV PR 03-02, the Cumberland Police Department sought an opinion from this Department as to whether "all" police reports regarding an incident, and not just the initial arrest report, were public records under the APRA. In that instance, we noted that based on our review of the APRA law enforcement exemption in its entirety, the General Assembly made a substantive distinction between initial arrest records, which the APRA deems public, and other offense reports created by law enforcement agencies, which may describe an incident lacking sufficient cause to prompt an arrest. Therefore, we concluded that "when 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).² 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." Id. See also Zompa v. West Warwick Police Department, PR 13-07; Radtke v. Rhode Island Department of Public Safety, PR 13-11; Snow v. Dept. of Public Safety.

Applying the foregoing standard and based upon the evidence presented, which includes our review of the incident report(s), we determine that the privacy interest outweighs the public

² This law is now codified as R.I. Gen. Laws § 38-2-2(4)(D)(c).

interest in disclosure. Respectfully, you assert no “public interest” as recognized through the APRA. The public has an interest in a document that “sheds light” on how government operates. See Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-773 (1989).³ Not only do we question whether the incident report(s) shed light on how government operates, but the report contains personal and sensitive information. The privacy interests therefore outweigh any interest the public may have in disclosure of such a report, particularly given the presumptive nature of an incident report that does not culminate in an arrest.

Furthermore, while we do not disagree with your contention that, as a property manager for West Broadway Associates, you “have a duty to [your] current tenants to ensure that all prospective applicants will not create an issue or disturbance,” it must be remembered that you seek this information under the APRA and that under the APRA, you do not have any greater interest in gaining access to a record than any member of the general public.⁴ Indeed, if we determine that such records were available to you under the APRA, as a matter of law, we would necessarily conclude that the same records are available to anyone upon request. Although in the proper case we would not rule out the possibility that either a redacted or unredacted incident report could be disclosed that did not invade the personal privacy of the named individuals, in this case, for the reasons discussed, disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Accordingly, we find the requested records are exempt under R.I. Gen. Laws § 38-2-2(4)(D)(c) and that the Police Department did not violate the APRA when it denied you access to those records.⁵

³ The United States Supreme Court has made clear that with respect to the federal Freedom of Information Act (“FOIA”):

“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 the agency’s own conduct.” (Emphasis supplied).

⁴ In Bernard v. Vose, 730 A.2d 30 (R.I. 1999), the Rhode Island Supreme Court held that under the APRA, a requesting party did not have a right to review his own board files, which contained personal and sensitive information about himself, because once the files were made public to him under the APRA, the files were then available for inspection by the general public. Id. at 31. Because the privacy interest of the individual outweighed the public’s interest in disclosure, the Rhode Island Supreme Court exempted the files from disclosure even though the requester was the subject of the records that sought disclosure. See also Higginbotham v. Department of Public Safety, PR 09-15 (the Department of Public Safety did not violate the APRA when it denied access to an incident report filed against the complainant).

⁵ Although the Police Department also cites R.I. Gen. Laws § 38-2-2(4)(D)(b) as grounds for denying your APRA request, because this Department has determined that the records are exempt under R.I. Gen. Laws § 38-2-2(4)(D)(c), we do not need to determine whether they are also exempt under § 38-2-2(4)(D)(b).

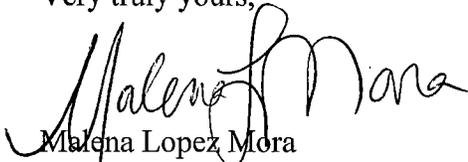
Before we conclude, we must address your argument that your request was unlawfully denied under R.I. Gen. Laws § 38-2-3(j) and (k). Under R.I. Gen. Laws § 38-2-3(j), “[n]o public records shall be withheld based on the purpose for which the records are sought, nor shall a public body require, as a condition of fulfilling a public records request, that a person or entity provide a reason for the request or provide personally identifiable information about him/herself.” Here, no evidence has been presented to suggest that the Police Department withheld the records “based on the purpose for which the records are sought.” On the contrary, the evidence shows that the records were denied, on among other grounds, that disclosure could “constitute an unwarranted invasion of personal privacy.” As such, we find no violation.

Respectfully, we also reject your argument that the Police Department violated R.I. Gen. Laws § 38-2-3(k). Rhode Island General Laws § 38-2-3(k) states: “[a]t the election of the person or entity requesting the public records, the public body shall provide copies of the public records electronically, by facsimile, or by mail in accordance with the requesting person or entity’s choice, unless complying with the preference would be unduly burdensome due to the volume of records requested or the costs that would be incurred. The person requesting delivery shall be responsible for the actual cost of delivery, if any.” Here, your request specified no manner of delivery and for this reason alone, we find no violation.

Although the Attorney General has found no violation and 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,



Malena Lopez Mora
Special Assistant Attorney General
Ext. 2307

Cc: Kevin Gavin, Esquire