



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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VIA EMAIL ONLY

March 2, 2016

PR 16-07

Mr. Robert Borkowski
editor@warwickpost.com

Mr. John Howell
Johnh@Rhodybeat.com

Re: Warwick Post v. Warwick School Department
Warwick Beacon v. Warwick School Committee
Howell v. City of Warwick

Dear Messrs. Borkowski and Howell:

The investigation into your Access to Public Records Act (“APRA”) complaints filed against the Warwick School Department (“School Department”), the Warwick School Committee (“School Committee”), and the City of Warwick (“Warwick”) is complete. Since the three (3) complaints contain similar allegations, this Department will address the complaints in a single finding and collectively refer to the three (3) entities as “Warwick.” All allegations arise from APRA requests seeking two (2) oral reports (hereafter “Reports”), which were presented to the School Committee in executive session. The Reports, which were transcribed, concern the School Committee’s review of the handling of accusations of inappropriate conduct with a student(s) leveled against a Junior High School teacher, Mr. Mario Atoyan.

On July 14, 2015, Mr. Howell made the first APRA request, which sought a copy of the Reports. In his APRA request, Mr. Howell explained that “[t]he interest here is not what Mr. Atoyan is alleged to have done, but rather how the school administration handled the matter and, assuming there was a policy or lack of policy to deal with such issues, what should happen going forward.” Similarly, on July 16, 2015, Mr. Borkowski made an APRA request seeking “a copy of the [R]eport on the handling of inappropriate student interaction” regarding Mr. Atoyan. By letters dated July 21, 2015, Warwick denied both APRA requests, noting in relevant part, that “[p]ursuant to R.I.G.L. 38-2-2(4)(P), the information you have requested constitutes an investigatory record of a public body and is therefore not deemed to be a public document.” No other exemption or basis was cited in the July 21, 2015 denial letters.

Both Mr. Borkowski and Mr. Howell subsequently filed the instant APRA complaints. By an undated complaint, Mr. Borkowski contended, among other things, that R.I. Gen. Laws § 38-2-

2(4)(P) “does not include records of final reports,” such as the Reports, and that “the language through[h]out APRA makes a distinction between investigatory records and final reports, as in the related language involving police records and investigations.” Mr. Borkowski added that disclosure of the Reports will provide “a crucial look at the operation of the Warwick School Department under extreme circumstances.” By email dated August 16, 2015, Mr. Howell filed a similar APRA complaint, which related that the School Committee pressed for an independent investigation and the School Committee retained Attorney Paul Ragosta to perform this review. Among the arguments presented by Mr. Howell is that:

“[i]n this case the investigation has been completed. I don’t see how this [is] an ‘investigatory record.’ This is not an ongoing investigation and [Attorney] Ragosta’s work constitutes a narrative. It’s a report.”

After the aforementioned APRA complaints were filed with this Department, we were advised that the Warwick City Council and/or Warwick’s Mayor subpoenaed the two (2) Reports that Attorney Ragosta delivered to the School Committee in executive session on May 11, 2015 and May 21, 2015. The School Committee filed a lawsuit in Superior Court seeking to Quash the subpoena and in December 2015, the Honorable Bennett R. Gallo issued an Order directing that the Reports be produced to the City Council and to the Mayor “subject to redactions from the sought after documents which relate to the provision of legal services to the School Committee and the names and/or any identifying information of any students, minors, alleged victims and their parents and/or guardians.” The Superior Court Order did not in any manner consider whether the Reports, in whole or in part, were public records under the APRA.

Apparently following the Superior Court’s Order, by letter dated December 11, 2015, Mr. Howell made a second APRA request for the Reports, this time through the City Clerk’s Office. In his request, Mr. Howell explained that “[s]eeing that the report was prepared at public expense and a judge has ruled that it does not come under attorney/counsel privilege and further that the names of juveniles and parents have been redacted from the report, it would seem to be a public record.” On December 21, 2015, this APRA request was also denied and Warwick explained, in relevant part:

“[t]he Mayor’s office has been informed that the Records concern a continuing investigation by the School Committee and School Department concerning the subject of the information contained in the Records and are not subject to disclosure under that exemption of the APRA. I have no independent evidence to determine otherwise and must rely on the representations of the School Committee and Department made to the Mayor on this aspect of the Records.”

By email dated December 23, 2015, Mr. Howell filed a second APRA complaint with this Department, this time relating to his December 11, 2015 APRA request.

In response to your complaints, we received responses from the School Department and School Committee's legal counsel, Aubrey Lombardo, Esquire, who included affidavits from the Chairperson of the School Committee, Ms. Jennifer Ahearn. We also received a substantive response from the City of Warwick's Solicitor, Peter Ruggiero, Esquire. Since the City of Warwick's response effectively incorporated the School Department's and the School Committee's responses, both of which were substantially the same, we set forth the relevant facts contained in the School Committee Chairperson's sworn affidavit. Chairperson Ahearn states, in pertinent part:

"Pursuant to R.I. Gen. Laws § 38-2-2(4), 'public record' or 'public records' shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, computer stored data (including electronic mail messages, except specifically for any electronic mail messages of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities) or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

There are listed exceptions to the above-stated statute, which include R.I. Gen. Laws § 38-2-2(P), which states that the following shall not be deemed a public record, 'All investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule or regulation other than records of final actions taken provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public.'

The document which Mr. Borkowski seeks is an investigatory record and therefore, not a public document, pursuant to the exemption listed under R.I. Gen. Laws § 38-2-2(4)(P). This is evidenced by the following:

- a. On or about March 23, 2015, a Warwick teacher, Mario Atoyan, was charged with first-and second-degree sexual assault on a minor.
- b. On or about March 26, 2015, the mother of a former student of Mr. Atoyan's alleged in the news media that Mr. Atoyan drew a sexually explicit picture on her daughter's hand in 2013.
- c. In response to the above, the School Committee, on or about April 6, 2015 [] appointed Attorney Vincent Ragosta to investigate the circumstances surrounding teacher Mario Atoyan and to look at how the School Department handled the sexual assault complaint against him and any prior complaints.

- d. Attorney Ragosta delivered a verbal report on his investigation during two School Committee meetings in executive session. There was a stenographer present at these meetings. This transcript is the only 'report' which exists of the investigation done by Attorney Ragosta.
- e. The transcript details Mr. Ragosta's investigation, and therefore, is an investigatory record, and not a public document pursuant to R.I. Gen. Laws § 38-2-2(4)(P).

The Investigatory Report is not a 'record of final action taken.'

- a. The transcript in which Attorney Ragosta discusses his investigation with, and gives legal analysis to the School Committee is not a 'record of final action.'
- b. No final written report was made by Attorney Ragosta.
- c. The record of final action by the School Committee with respect to the matter o[f] Mario Atoyan was made in the form of a verbal statement by the Chairperson of the School Committee, Jennifer Ahearn, at the July 14, 2015 School Committee meeting. During said meeting, Ms. Ahearn made a statement outlining the final conclusions of the investigation. This record of final action taken was documented in the July 14, 2015 meeting minutes."

Although the July 21, 2015 and December 21, 2015 denials did not raise the attorney/client privilege as a basis for withholding the Reports, Chairperson Ahearn also contended in her affidavit that disclosure of the Reports was barred by the attorney/client privilege. See R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). We acknowledge Mr. Borkowski's rebuttal. Mr. Howell did not file a rebuttal in either of his two APRA cases.

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

As an initial matter, we address the Superior Court's December 2015 Order that the Reports – in redacted fashion – be disclosed, pursuant to the issuance of a subpoena, to the City Council and the Mayor. (Hereinafter this material shall be referred to as Category 1). As noted, supra, Justice Gallo Ordered that the Reports be produced to the Warwick City Council and Mayor, "subject to redactions from the sought after documents which relate to the provision of legal services to the School Committee and the names and/or any identifying information of any

students, minors, alleged victims and their parents and/or guardians.” The Superior Court’s December 2015 Order has several effects on this APRA matter.

First, the Category 1 material Ordered redacted by Justice Gallo cannot be considered a public record. See R.I. Gen. Laws § 38-2-2(4)(S). Second, although Warwick did not reference the attorney/client privilege as part of its July 21, 2015 and December 21, 2015 denials, assuming that the attorney/client exemption is properly before this Department, the Superior Court’s Order allowing the School Committee to redact Category 1 material pertaining to the attorney/client privilege – as well as information identifiable to minors and their parents or guardians – can no longer be the basis for withholding the instant Reports – in their entirety – under the APRA. In other words, the now redacted Reports – by virtue of the Court-ordered redactions – no longer contain material pertaining to the attorney/client privilege. See R.I. Gen. Laws § 38-2-3(b)(“Any reasonably segregable portion of a public record excluded by [the APRA] shall be available for public inspection after the deletion of the information which is the basis of the exclusion.”). For this reason, our APRA analysis focuses on the only remaining exemption cited by Warwick as a basis for denying the instant APRA requests – R.I. Gen. Laws § 38-2-2(4)(P).

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 is “[a]ll investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, or regulation other than records of final actions taken provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public.” See R.I. Gen. Laws § 38-2-2(4)(P).

We have reviewed, in camera, the Reports submitted by Warwick, as redacted by the Superior Court’s Order. Generally speaking our review finds that the Reports contain: (1) redactions made pursuant to the Superior Court’s December 2015 Order,¹ i.e., Category 1; (2) discussion relating to the underlying incident involving Mr. Atoyan, which we shall refer to as Category 2; and (3) Warwick’s response to the underlying incident, which we shall refer to as Category 3. As noted, supra, the first category of documents – the Court-ordered redactions – are exempt from public disclosure. See R.I. Gen. Laws § 38-2-2(4)(S). While the majority of the Reports concern Warwick’s response to the underlying incident, inevitably some discussion of the underlying facts involving Mr. Atoyan – as presented or accepted by the School Committee – is contained within the Reports. This material, the so-called second category, is beyond the scope of the instant APRA requests.

To explain, by letter dated July 16, 2015, Mr. Borkowski requested “a copy of the report on the handling of inappropriate student interaction regarding Mr. Mario Atoyan, a science teacher at

¹ We were not provided an unredacted copy and have no knowledge concerning the nature of the Category 1 subject-matter redacted. The review of this court-ordered redacted subject-matter is beyond the scope of this APRA complaint since it was redacted pursuant to the Superior Court’s December 2015 Order.

Gorton Jr. High, omitting student identities.” (Emphasis added). Mr. Howell’s July 14, 2015 APRA request was even more explicit, seeking the Report relating to “an investigation of the school administration’s response to parental complaints concerning the actions of Gorton Junior High School Science teacher Mario Atoyan.” (Emphasis added). Thereafter, Mr. Howell observed “[t]he interest here is not what Mr. Atoyan is alleged to have done, but rather how the school administration handled the matter and, assuming there was a policy or lack of a policy to deal with such issues, what should happen going forward.” (Emphasis added). For this reason, we conclude that matters pertaining to the second category, *i.e.*, the underlying incident relating to Mr. Atoyan, are beyond the scope of your APRA request and need not be disclosed.²

With respect to the third category of documents that comprise the Reports – how the school administration handled this matter – the APRA exempts from public disclosure “[a]ll investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, or regulation other than records of final actions taken provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public.” *See* R.I. Gen. Laws § 38-2-2(4)(P). As already noted, this exemption was the only basis for the July 21, 2015 and December 21, 2015 denials and any argument that disclosure would infringe on the attorney/client privilege has been rendered a nullity by virtue of the Superior Court’s December 2015 Order. While Warwick firmly asserts that the remaining portions of the Reports – Category 3 – are exempt pursuant to R.I. Gen. Laws § 38-2-2(4)(P), the plain language of this provision does not exempt “[a]ll investigatory records,” but rather only exempts “[a]ll investigatory records * * * pertaining to possible violations of statute, rule or regulation other than records of final actions taken[.]” (Emphasis added). By all accounts the School Committee’s investigation concerned how the school administration responded to the incident involving Mr. Atoyan, rather than investigating the actual underlying incident involving Mr. Atoyan. Moreover, as we read your APRA requests, you seek the Reports that detail Warwick’s response to the underlying incident, rather than seek the portions of the Reports that contain information relating to the underlying incident.

While the School Committee’s investigation no doubt concerned the administration’s response to the incident involving Mr. Atoyan, Warwick has made no effort to identify the “statute, rule or regulation” that was possibly violated by the school administration in its handling of the underlying incident and no such “statute, rule or regulation” is apparent to us. In this respect, the Chairperson’s affidavit, *see supra*, focuses on demonstrating that the Reports constitute “investigatory records,” but fails to address the “statute, rule or regulation” that served as the basis for the School Committee’s investigation, and thus implicated Exemption (P). Even assuming we were to resolve all other issues regarding R.I. Gen. Laws § 38-2-2(4)(P) in Warwick’s favor, its failure to identify the “statute, rule or regulation” that the administration possibly violated is fatal to its assertion that the Category 3 portions of the Reports constitute

² It is our understanding that Mr. Atoyan is presently awaiting trial on sexual assault related charges and that these charges are unrelated to the underlying matters that became the subject of the School Committee’s investigation.

“investigatory records of public bodies * * * pertaining to possible violations of statute, rule or regulation[.]” R.I. Gen. Laws § 38-2-2(4)(P).³ Moreover, we have thoroughly reviewed the arguments presented and Warwick has failed to assert the applicability of any other exemption. Thus, we need not consider other non-asserted exemptions.

For these reasons, we conclude that the portions of the Reports pertaining to the third category are not exempt from disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(P), and in the absence of any other asserted exemption, must be disclosed. Other portions of the Reports not responsive to the APRA requests (Category 2) need not be disclosed, or in the case of records redacted pursuant to the Superior Court’s December 2015 Order (Category 1), must not be disclosed. See R.I. Gen. Laws § 38-2-2(4)(S). If possible, we would recommend that Warwick redact any material so that it can be distinguished from the redactions made pursuant to the Superior Court’s Order.

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).

While we find that a civil fine is not appropriate, we conclude that Warwick must respond to the APRA requests in a manner consistent with the APRA and this finding. In doing so, we are cognizant that individuals identified in the Reports – besides Mr. Atoyán – have asserted an interest in non-disclosure. Indeed, we are aware of a threat of litigation against Warwick, if Warwick decides to disclose the Reports. Although we do not believe that these non-disclosure arguments should prevail, it is this Department’s responsibility to ensure that any asserted rights are properly considered and reviewed. Accordingly, this Department directs that Warwick disclose the Reports, in a manner consistent with the APRA and this finding, within twenty (20) business days of the date of this finding. This timeframe should provide Warwick ample opportunity to review the Reports and any interested parties ample time to consider any legal options.

Although the Attorney General will not file suit in this matter, at this time, 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). If you do not receive a response from Warwick consistent with this finding within twenty (20) business days, kindly advise this Department so that we may further review this situation. Please be advised

³ Although beyond the scope of your APRA requests, as a way of further distinguishing the records that are responsive to this APRA request (Category 3) – and the records that are not responsive to your APRA request (Category 2) – the underlying allegations concerning Mr. Atoyán may very well have concerned a possible violation of a “statute, rule or regulation.”

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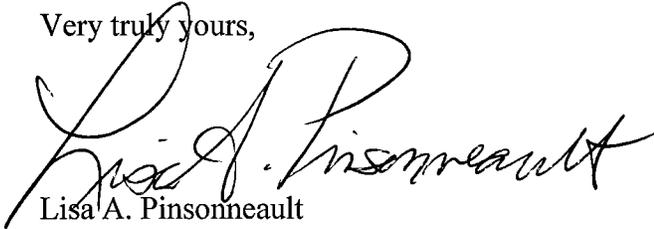
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that we are closing this file as of the date of this letter, but reserve the right to reopen our file if necessary.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa A. Pinsonneault". The signature is written in a cursive style with a large initial "L".

Lisa A. Pinsonneault

Special Assistant Attorney General

LP/pl

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