

July 29, 2019
The Hon. Peter Neronha
Attorney General
150 South Main Street
Providence, RI 02903

Dear Attorney General Neronha:

We are writing as a coalition of non-profit organizations and First Amendment advocates in Rhode Island dedicated to ensuring government at all levels be accessible to the public. This letter is prompted by our review of the recent Memorandum of Understanding (MOU) entered into between your office and the Diocese of Providence governing a review of past allegations of clergy child sexual abuse. Because our coalition has concerns about provisions in the MOU that impact the Access to Public Records Act (APRA), we wanted to share those concerns with you.

We refer specifically to Section V(H) of the MOU, which provides:

H. Files retained by the Attorney General and/or the Rhode Island State Police pursuant to this MOU, as well as any logs, notes, memoranda, or police reports produced in connection with this MOU and the LOU dated August 30, 2016 shall constitute criminal law enforcement records for the investigation and detection of a crime within the meaning of R.I.G.L. § 38-2-2 (4)(D).

Before explaining our concerns about this, we want to begin by acknowledging our understanding that your goal in entering this MOU, as opposed to convening a grand jury, is to allow you to be more transparent with the public about your findings by eschewing the broad secrecy requirements that would enshroud grand jury proceedings. We greatly appreciate that and applaud your goal. At the same time, we fear language in the MOU may establish a precedent that is itself problematic.

Section V(H) troubles us because it declares in advance that tens of thousands of records provided to your agency, regardless of their nature, are pre-emptively exempt from disclosure under APRA as “criminal investigatory records.” This strikes us as inappropriate on a number of levels. The statutory basis offered for this large veil of secrecy is one that we know is not exactly accurate, since these records are being turned over for review of possible criminal or civil liability. Section III(B). In fact, since the documents being turned over encompass such records as “all pleadings ... in prior litigations,” Section II(D)(4), some of the documents being designated exempt by §V(H) are ones that are already in the public domain and would clearly qualify as public records if they were in your possession in any other context.

We fully understand that many of the records being turned over are, and should be, confidential, and assume that Section V(H) was included to provide assurances to the Diocese that records presenting strong privacy concerns would not be disclosed pursuant to an APRA request. But we still find Section V(H)’s language problematic. First, we are concerned about the model propagated by an agreement like this, allowing a private third party to dictate in advance (or a government agency to bind itself regarding) what records provided to the agency are or are not

subject to disclosure under APRA. That is a decision that should be made on a case-by-case basis, and not be preordained based on a public body's side agreement with a private party.

Just as importantly, other aspects of the MOU already address the key privacy concerns that might otherwise exist. For example, Section V(B) explicitly allows the Diocese to withhold even from your office any records that it deems privileged in some way. Thus, documents that might implicate attorney-client privilege or that constitute protected work product are shielded from any disclosure up front.

Further, Section V(D) requires your office to take steps to maintain the confidentiality of any "personally identifiable" information in the documents. These two clauses in the MOU would appear to address the protected status of the overwhelming number of documents that might raise legitimate privacy concerns. To therefore treat every other record received as exempt under APRA's "criminal investigation" exemption seems unnecessary and unduly dismissive of the public's right to know. While many of the records not covered by Section V(B) and (D) may indeed be "criminal investigatory" in nature, to establish a blanket rule as §V(H) does promotes a troubling precedent, in our view.

Normally, those concerns might be assuaged by an understanding that some records initially deemed investigatory could be made available under APRA once the investigation was completed, but language in the MOU could be read as suggesting otherwise. Section IV(A) allows you to "issue a publicly released report or statement in which the Attorney General can describe the review of the Files conducted pursuant to this MOU and any findings, conclusions or subsequent legal actions taken as a result of the review." (emphasis added) In other words, this provision indicates that while you can discuss your review of the files, none of the records themselves are being designated as releasable, even if they would otherwise qualify as a public record and even though any criminal investigation that might have initially warranted their non-disclosure under R.I.G.L. § 38-2-2 (4)(D) has concluded.

Again, we want to emphasize that we recognize, and appreciate that, the approach you have taken on this matter is an effort to promote more transparency. But the inclusion of §V(H) makes us fearful that your office and, going forward, other agencies may see fit to make use of a similar model in obtaining records from third parties, and undermine the APRA process in doing so.

Since we know that our organizations and your office both have the same goal of promoting government transparency and accountability, we urge you to give these comments your careful consideration. Specifically, we ask you to seek an amendment to the MOU clarifying that documents not otherwise exempt by APRA are subject to it. If an amendment is not possible at this point, we respectfully ask that you provide us clarification as to your interpretation of the MOU, and whether any of the documents received by your office once you have reported on the results of your investigation will be accessible to members of the public under APRA. Thank you for your considering our views and concerns, and we look forward to your response.

If you have any questions about this in the meantime, please feel free to get in touch with Linda Lotridge Levin, whose full contact information appears below.

Sincerely,

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