State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 24, 2017
PR 17-05

Mr. Mike Piskunov

RE: Piskunov v. Town of Narragansett

Dear Mr. Piskunov:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Town of Narragansett ("Town") is complete.

On February 5, 2016, you made an APRA request by email correspondence to the Town seeking the last ten completed internal affairs reports from the Narragansett Police Department. The Town responded to your February 5, 2016 APRA request on February 9, 2016. In its response, the Town declined to disclose any documents, stating, in pertinent part:

> "the records you have requested do not constitute public records. The report you have referenced in your request is exempt from public disclosure pursuant to R.I. General Laws § 38-2-2(4)(A)–(Y). Specifically, I refer you to G.L. § 38-2-2(4)(A)(I)(b), which excludes 'Personnel 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.'"

By email correspondence dated March 3, 2016, you filed the instant APRA complaint. You allege that the Town violated the APRA when it failed to disclose the requested documents in redacted form. To support your complaint, you reference Direct Action for Rights and Equality v. Gannon (DARE), 713 A.2d 218 (R.I. 1998) and Farinelli v. City of Pawtucket, PR 15-17.

In response to your complaint, this Department received a substantive response from Dawson Hodgson, Esquire, the Town Solicitor. The substantive response included an affidavit from Kyle Rekas, Lieutenant of the Narragansett Police Department. In his affidavit, Lt. Rekas noted that he had reviewed the ten requested documents and briefly described each of the ten documents and detailed why each is not a public record. All ten documents were withheld for one of two reasons:

(1) "Given the small size of the Narragansett Police Department, release of this report, even in redacted form, would make the subject of the report easily identifiable and constitute an unwarranted invasion of that individual's personal privacy;" or (2) "Pursuant to G.L. § 42-28.6-2(10), public statement regarding this report is prohibited unless specifically requested by [the] officer who is the subject of the report[.]" The substantive response also included the withheld documents for in camera review.

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

We begin by observing that the APRA's stated purpose is both "to facilitate public access to public records" and "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." R.I. Gen. Laws § 38-2-1. Similarly, the United States Supreme Court has made clear that the federal Freedom of Information Act ("FOIA"):

> "focuses on the citizens' right to be informed about 'what their government is up to.' 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." United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989) (emphasis supplied).[1]

In the instant case, the Town's February 9, 2016 denial cites R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts from public disclosure, in pertinent part:

> "Personnel 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 et. seq . . . [.]" (Emphasis added).

The plain language of this provision contemplates a "balancing test" whereby the "public interest" in disclosure is weighed against any "privacy interest." Consequently, we must consider the

[1] Although this case involved the federal Freedom of Information Act, we make reference to FOIA cases because the Rhode Island Supreme Court has made clear that "[b]ecause APRA generally mirrors the Freedom of Information Act * * * we find federal case law helpful in interpreting our open record law." Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

"public interest" versus the "privacy interest" to determine whether the disclosure of the requested records, in whole or in part, "would constitute a clearly unwarranted invasion of personal privacy[.]" R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

The United States Supreme Court relied on House and Senate Reports to interpret this phrase, which also appears in the FOIA. See Department of Air Force v. Rose, 425 U.S. 352, 355–57 (1976). The House report stated that "[t]he limitation of a 'clearly unwarranted invasion of privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." See id. at 373. Similarly, with respect to a "clearly unwarranted invasion of privacy," the Senate report weighed the "interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." See id. The Supreme Court thus determined that the legislative intent promulgated a balancing test between the individual's privacy interests and the public's right to disclosure.

In your complaint, you do not identify a public interest, but instead, rely solely upon DARE and Farinelli. For the reasons explained below, this reliance is misplaced.

In DARE, a community-action group made an APRA request to the Providence Police Department seeking records pertaining to civilian complaints of police misconduct over a seven (7) year period. The fact that DARE was limited to civilian complaints of police misconduct is made clear throughout the Court's opinion. See e.g., DARE, 713 A.2d at 220 (DARE "sought access to Providence police department records pertaining to civilian complaints of police misconduct"). Faced with an APRA request spanning seven years of civilian complaints against Providence Police Department officers, the Court held that "the manner in which a law enforcement agency addresses the concerns of its citizens regarding civilian complaints, 'relat[es] to management and direction of a law enforcement agency.'" Id. at 224 (emphasis added). On this basis, the Court determined that the requested reports were public records, albeit in a redacted manner to obscure the identity of the citizen complainant and officer. See also The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982) (student newspaper seeking years of civilian complaints filed against police officers concerning excessive force).

Here, your APRA request was not limited to civilian-initiated complaints (resulting in internal affairs reports) concerning police misconduct or excessive force – such as DARE and The Rake – but was more expansive and sought the last ten internal affairs reports, with no limitations on subject-matter or initiating party. Your more expansive request included not only citizen-initiated complaints, but other internal affairs matters initiated by the Narragansett Police Department concerning a variety of subjects, including but not limited to subject-matters that arise in non-law enforcement work-related situations. Our in camera review of the last ten internal affairs reports finds that at least seven of these reports were initiated through means other than a citizen complaint. Stated differently, at most, three of the last ten internal affairs reports were the result of a citizen complaint, and two of these three reports appear to have been either withdrawn or not pursued by the citizen complainant. Considering these factors, and observing that even your APRA request suggests that the requested internal affairs reports should be redacted, we find little to no public interest in the disclosure of the three citizen-initiated internal affairs reports (two of

which were withdrawn or not pursued by the complainant) and even less public interest in the disclosure of the non-citizen initiated internal affairs reports. On this point, it is significant that you assert no public interest, and having reviewed the three citizen-initiated internal affairs reports, it is difficult to discern the public interest that will be advanced through the disclosure of these reports in a redacted manner.

You also submit that your APRA request is supported by Farinelli. To be sure, in Farinelli, PR 15-17, we did determine that an internal affairs report concerning a citizen complaint relating to a particular situation was a public record, but within Farinelli we warned "our finding is limited to the unique facts presented herein." Farinelli, PR 15-17. Chief among the unique facts that tipped the balancing scale in favor of public disclosure was that the Pawtucket Police Department had previously publicly released a related un-redacted police report. Indeed, subsequent to Farinelli, PR 15-17, we referenced the foregoing caveat and opined in a case where a single internal affairs report generated from a citizen complaint was requested – and where the Town had not previously disclosed a related document – that the single internal affairs report was exempt from public disclosure. See Lyssikatos v. City of Pawtucket, PR 16-18.

Here, we have great difficulty finding that the Town violated the APRA when you sought the last ten internal affairs reports – regardless of subject-matter or initiating person/entity – and where at least seven of these reports were the result of non-citizen complaints. Our conclusion is further supported by the fact that your assert no public interest. Even if we ignore these factors, as well as the quantity differential (in the number of responsive reports) in DARE as compared to this case, DARE's admonition that "the manner in which a law enforcement agency addresses the concerns of its citizens regarding civilian complaints, 'relat[es] to management and direction of a law enforcement agency,'" clearly has no application to the non-citizen initiated complaints responsive to your request. DARE, 713 A.2d at 224 (emphasis added).

Even if we were to isolate the three citizen-initiated reports, see R.I. Gen. Laws § 38-2-3(b), the remaining situation far more closely resembles Lyssikatos, where a single citizen-initiated internal affairs report was deemed exempt, than DARE, where years of citizen-initiated internal affairs reports concerning police misconduct were deemed public with the citizens' and officers' identities redacted. Again, you assert no public interest and simply rely upon a case where years of citizen-initiated police misconduct reports were requested, as opposed to this case where three citizen-initiated internal affairs reports are responsive to your request, two of which were either withdrawn or not pursued by the citizen-complainant.

Compared to what we have described as a little to no public interest, Lt. Rekas avers that "[g]iven the small size of the Narragansett Police Department, release of this report, even in redacted form, would make the subject of the report easily identifiable and constitute an unwarranted invasion of that individual's personal privacy." While this statement must be fairly scrutinized, you have provided no evidence or argument to rebut this privacy assertion, and equally important, as repeatedly noted supra, you have asserted no public interest.[2] The lack of an asserted public

[2] The lack of an asserted public interest deprives this Department of the opportunity to consider and weigh what you consider to be the public interest advancing disclosure. When a public body

interest is particularly significant in this case where two of the remaining three citizen-initiated complaints were either withdrawn or not pursued by the complaining citizen.

The fact that this situation far more closely resembles Lyssikatos than DARE is self-evident, and our decision in Lyssikatos is consistent with Rhode Island Supreme Court precedent. For instance, 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 single individual. Our Supreme Court held "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 [individual's] identity would still be abundantly clear from the entire context of the report." Id. at 559. As a result, the Court held that release of the report would constitute an unwarranted invasion of personal privacy.

Just last year, the Rhode Island Supreme Court examined a media request for the investigatory records relating to a particular individual. In contrast to DARE, where the Court noted that years of citizen complaints were public in a redacted manner since "the manner in which a law enforcement agency addresses the concerns of its citizens regarding civilian complaints, 'relat[es] to management and direction of a law enforcement agency," DARE, 713 A.2d at 224, the Court explained that any documents disclosed regarding an isolated incident "would provide facts in relation to just that – a single incident." See Providence Journal Co. v. Department of Public Safety, 136 A.3d 1168, 1176 n.6 (R.I. 2016). In such a situation, the Court concluded "[t]he documents would not provide the public with any indication of how this law is enforced generally." Id. Cf. Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 288–89 (9th Cir.1992) ("[t]he single file . . . will not shed any light on whether all such FBI investigations are comprehensive").

While we certainly do not rule out the possibility that we could be presented with a future situation where three citizen-initiated internal affairs reports are deemed public in a redacted or unredacted manner, on the record presented in this case, we are not presented with this situation here. Most notably, disclosure of the three citizen-initiated internal affairs reports in a redacted manner (where two were either withdrawn or not pursued by the citizen complainant) far more closely resembles the situation in Brady, Providence Journal, Hunt, and Lyssikatos than it resembles DARE, The Rake, and Farinelli. Under these circumstances, and based upon the undisputed evidence

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raises an exemption requiring the balancing of interests, as the Town has done in this case, the United States and Rhode Island Supreme Courts have advised that "the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable." Providence Journal Co. v. Department of Public Safety, 136 A.3d 1168, 1175 (R.I. 2016) (citing National Archives and Records Administration v. Favish, 541 U.S. 157, 172 (2004)). Had you asserted that the public interest was to "show that responsible officials acted negligently or otherwise improperly in the performance of their duties, [you would have to] establish more than a bare suspicion in order to obtain disclosure." Providence Journal Co., 136 A.3d at 1175. Rather, the Court has instructed in these circumstances, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Id. at 1175. Here, you have not identified any public interest, and in such a situation, it is hard to imagine a more deferential review than the one identified above when at least some public interest was asserted.

presented, we have neither been presented or discern any evidence that the balancing scale tips in favor of public disclosure. For all these reasons, we find no violation.

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). We are closing this file as of the date of this correspondence.

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

Very truly yours,

Sean Lyness
Special Assistant Attorney General

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Cc: Dawson Hodgson, Esq.