

August 2, 2016

BY FAX

The Hon. Peter Kilmartin
Attorney General
150 South Main Street
Providence, RI 02903

Col. Steven O'Donnell
Rhode Island State Police
311 Danielson Pike
North Scituate, RI 02857

Dear Attorney General Kilmartin and Superintendent O'Donnell:

We are writing to express our deep distress and frustration over your refusal to release any documents related to your agencies' four-year probe into the 38 Studios debacle. Particularly in light of the legitimate and extraordinarily strong public interest in this investigation, we believe the rationales you have offered for continued secrecy are less than compelling and do not hold up to careful scrutiny.

To put it simply, the disaster known as 38 Studios happened because of a deeply ingrained culture of secrecy in this state. The official state investigation into that disaster should not perpetuate that culture.

We therefore urge you to reconsider your decision in order to promote the public's right to know and provide the transparency that Rhode Islanders expect and deserve from this investigation. This need for transparency extends to both the investigatory records considered by the grand jury and the multitude of other records generated by your investigation that were not presented to the grand jury.

We recognize that release of the grand jury records would require court intervention, but as others have pointed out, this is not unprecedented when it comes to issues of great public weight, like the Station Fire tragedy. Your eight-page news release goes into great detail to explain the reasons for the secrecy of the grand jury process. We do not quarrel with this general principle at all. It should be the extremely rare case where the veil of the grand jury process is pierced, but like the Station Fire, this is, we submit, another critical incident in Rhode Island's history that calls for a similar exception.

The reasons for your refusal to follow the path taken in the Station Fire investigation appear to boil down to: (1) the investigation is not officially closed and might be reopened at some indefinite point in the future if, for example, new information arises from the pending civil suit; and (2) there were indictments in that case, unlike this one. Respectfully, neither of these arguments is persuasive.

As for the first argument, it strikes us as incredible that, after touting the depth of your investigation and your interviews with 146 witnesses, and after considering the broad coercive powers and other resources at your disposal, the state's top two law enforcement agencies would justify denying release of records on the grounds that private attorneys – acting without many of those powers, in a case where the evidentiary burden of proof is much lower than what would be required to bring criminal charges – would uncover significant information prompting your re-initiation of a criminal investigation that took you four years to complete.

Further, in both the Station Fire case and the Cornel Young case, discussed below, there were also civil actions pending when those grand jury records were released, yet the pending nature of those actions (which theoretically could also have led to the disclosure of inculpatory information) was not used as an excuse for keeping the records secret. In any event, we fail to see the talismanic significance of deeming a case “inactive” versus “closed,” because it seems to us to be totally irrelevant. We have little doubt you would be prepared to reopen a closed case if new information were brought to your attention that warranted it. It is not as if calling a case “closed” creates some legally enforceable mechanism that ties your hands in the future.

It is also difficult for us to understand why the presence or absence of indictments from the grand jury should matter. True, there were indictments in the Station Fire case, but the grand jury did not indict *every* person who was implicated in the tragedy and whose culpability was considered. Nonetheless, the records were still released.

In any event, there is precedent for the release of grand jury records that did *not* involve the issuance of indictments. In 2000, the grand jury transcripts from the investigation of the police shooting of Cornel Young, Jr. were released even though no indictments were handed up. But as with the 38 Studios investigation, there was an extremely significant public interest in the release of the investigatory records.¹

That leads us to your agencies’ further apparent decision to keep secret the records you gathered that were *not* presented to the grand jury. As your news release points out: “This investigation consisted of numerous incidents in which information was discovered; documents were sought...; and witness interviews occurred ... *independent of the grand jury...*” In fact, of the 146 witnesses your agencies interviewed, only 11 were called before the grand jury. There is thus a wide range of independent information gathered by your agencies that would shed light on this incredibly important incident in Rhode Island history if you publicly released the information – which, under the Access to Public Records Act (APRA), you have the clear right to do.

We recognize that many of these records probably fit within APRA exemptions that would allow for their non-disclosure, and there are undoubtedly some records that definitely should be withheld in order to protect legitimate privacy interests. But that is a far cry from deciding that *all* of the information should be withheld from taxpayers who rightfully believe they are entitled to know more about this financial catastrophe, and the four-year investigation of it, than what is contained in an eight-page news release. After all, APRA was designed to give agencies discretion to release information that might otherwise be kept secret.²

¹ Though not directly relevant, the Access to Public Records Act itself implicitly recognizes that the involvement of a grand jury is not automatically grounds for keeping records secret. Instead, the law ensures that public records considered by a grand jury do not become confidential simply because they are part of a grand jury investigation. R.I.G.L. §38-2-13. This provision was added to APRA after a major state scandal involving the RI Housing and Mortgage and Finance Corporation, which tried to keep secret otherwise public records once they were in the hands of a grand jury for investigation.

² As you know, APRA’s exemptions are discretionary. While a public body has the right to withhold disclosure of certain information under those exemptions, it is not obligated to do so. See, e.g., *In re: New England Gas Company*, 842 A.2d 545, 551.

On two recent occasions, the R.I. State Police has recognized the need for transparency in highly publicized incidents, and released the detailed results of its investigations even when APRA might have allowed for their secrecy. We refer to the State Police report of its investigation of the Cranston parking ticket scandal, and its investigation of the controversial school resource officer “body slam” incident at Tolman High School in Pawtucket. Surely the public deserves similar access to information about an investigation involving millions of taxpayer dollars.

Just last week at the Attorney General’s annual open government summit, it was noted that the public’s right to access to records that have some privacy component to them is at its apex when it involves “official information that sheds light on an agency’s performance of its statutory duties.” Few incidents meet that definition more than the 38 Studios calamity does.

In sum, because the Access to Public Records Act does not in any manner stand in the way of your disclosure of much of the information gathered by your agencies independent of the grand jury’s consideration, we urge you to release that information. In addition, because you have the ability to request – as other Attorneys General have done – the release of grand jury information from this lengthy investigation, we urge you to exercise that ability. (In both instances, of course, we recognize that some limited privacy considerations should apply.)

In light of the deep public interest flowing from the findings you issued last week, we look forward to your prompt, but considered, response in support of this request. For your convenience, please consider Linda Levin as your point of contact.

Sincerely,

Linda Lotridge Levin, President – ACCESS/RI

Steven Brown, Executive Director
American Civil Liberties Union of Rhode Island

John Marion, Executive Director
Common Cause Rhode Island

Jane W. Koster, President
League of Women Voters of Rhode Island

Justin Silverman, Executive Director
New England First Amendment Coalition