2021 NEW ENGLAND FIRST AMENDMENT CONFERENCE

By
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ACCESS TO PUBLIC RECORDS:

General Purpose

The purpose for APRA is to "enlarge the scope of the public's access to documents in the possession of governmental agencies." *Direct Action for Rights and Equality v. Gannon,* 713 A.2d 218 (R.I. 1998). Our Supreme Court has recognized that there is a "strong public policy in the APRA in favor of public disclosure." *In re New England Gas Co.,* 842 A.2d 545 548 (R.I. 2004).

Police reports and related law enforcement records

Statutory language

1. All records maintained by law enforcement agencies are public unless one of the enumerated exceptions apply.

> (D) All records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency. Provided, however, such records shall not be deemed public only to the extent that the disclosure of the records or information (a) could reasonably be expected to interfere with investigations of criminal activity or with enforcement proceedings, (b) would deprive a person of a right to a fair trial or an impartial adjudication, (c) **could reasonably be expected to constitute an unwarranted invasion of personal privacy,** (d) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, or the information furnished by a confidential source, (e) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions or (f) could reasonably be expected to endanger the life or physical safety of any individual. Records relating to management and direction of a law enforcement agency and records or reports reflecting the initial arrest of an adult and the charge or charges brought against an adult shall be public.
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> R.I. Gen. Laws § 38-2-2(4)(D)

2. Notwithstanding the provisions of subsection 38-2-3(e) , the following information reflecting an initial arrest of an adult and charge or charges shall be made available within forty-eight (48) hours after receipt of a request unless a request is made on a weekend or holiday, in which event the information shall be made available within seventy-two (72) hours, to the extent such information is known by the public body:

(1) Full name of the arrested adult;

(2) Home address of the arrested adult, unless doing so would identify a crime victim;

(3) Year of birth of the arrested adult;

(4) Charge or charges;

(5) Date of the arrest;

(6) Time of the arrest;

(7) Gender of the arrested adult;

(8) Race of the arrested adult; and

(9) Name of the arresting officer, unless doing so would identify an undercover officer.

(b) The provisions of this section shall apply to arrests made within five (5) days prior to the request.

R.I. Gen. Laws § 38-2-3.2

Separate rule for arrest reports relating to juveniles

1. (a) All police records relating to the arrest, detention, apprehension, and disposition of any juveniles shall be kept in files separate and apart from the arrest records of adults and shall be withheld from public inspection, but the police report relating to the arrest or detention of a juvenile shall be open to inspection and copying upon request and upon payment of copying costs in accordance with § 38-2-4 by the parent, guardian, or attorney of the juvenile involved. After disposition of an offense and upon execution of an appropriate release and upon payment of copying costs in accordance with § 38-2-4 by the parent, guardian or attorney of the juvenile involved, records relating to the arrest, detention, apprehension and disposition of the juveniles shall be open to inspection and copying by the parent, guardian, or attorney of the juvenile involved.

(b) Notwithstanding subsection (a) of this section, the identity of any juvenile waived pursuant to § 14-1-7.1 or certified and convicted pursuant to § 14-1-7.2 shall be made public.

R.I. Gen. Laws § 14-1-64.

Must also consider APRA provision that exempts "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."

R.I. Gen. Laws § 38-2-2(4)(A)(1)(b)

Judicial interpretation

The Rhode Island Supreme Court has held that names of police officers may be redacted and are exempt from public disclosure even when the rest of the record is public. See *DARE*, 713 A.2d 218 (R.I. 1998); *The Rake vs. Gorodetsky*, 452 A.2d 1144 (R.I. 1982). *The Rake* was the Supreme Court's first interpretation of APRA. It stands for authority that certain police records, i.e., civilian complaints, are public records after information identifying named police officers is redacted and that the names of police officers fall within the purview of what was enumerated as R.I. Gen. Laws § 38-2-2(5)(i)(A)(I).

Rhode Island courts have distinguished APRA requests for records relating to an isolated person or incident from APRA requests for records relating to multiple incidents. *The Rake* involved a student newspaper that sought Providence **Police reports** on excessive force complaints spanning a seven (7) year period. Because the reports were susceptible to redaction (since there were numerous reports over a 7 year period), the reports were ordered disclosed with the names of the citizens and police officers redacted.

Similarly, in Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989), the Court examined a single management study report created to investigate a particular school's operations. The Court explained that:
"[u]nlike the situation in The Rake, 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 principal's identity would still be abundantly clear from the entire context of the report." Id. at 559. (Emphasis added).

Balancing of competing interests: privacy v. observation of government activity

1. *Fuka v. Rhode Island Department of Environmental Management (*Superior Court, 2007) applied a balancing test to exempt a clearly public record from disclosure:

"When the General Assembly enacted the APRA, it did so with the intention of limiting "access to certain documents in order to avoid disclosure of confidential information to protect individuals from invasion of their privacy." *Providence Journal v. Kane,* 577 A.2d 661, 663. If this Court finds that the record does not fit the statutory definition of "public record," or if the record falls into one of the numerous exemptions to public disclosure, then "[t]here is no public interest to be weighed in the disclosure," as determined by the General Assembly. *Id.* Therefore, "any balancing of interests arises only after" this Court determines the record is public and not exempt. *Id. Kane* established a balancing test whereby records that are public by definition may still be withheld

when the associated privacy interests outweigh the public's interest in disclosure. *In re New Eng. Gas Co.,* 842 A.2d 545, 449-551 (R.I. 2004); *see also Kane,* 577 A.2d at 663-64."

The Superior Court found that commercial fishing licensees' addresses could be redacted from public records before disclosure: "Further, under the FOIA, disclosure is used to **"shed light" on government agency activity through the request of "official information**." *Reporters Committee,* 489 U.S. at 772-780. The records disclosed reveal an agency's actions relative to its statutory obligations. *Id.*

The list of addresses of the licensees "will provide little or no insight into the performance of the DEM. While the request for documents pertaining to how the DEM regulates the licenses or meeting minutes relative to a rejected application may fit within the public's right to know under the APRA, certainly a mere list of addresses does not open the DEM to the public scrutiny as contemplated by this balancing test. *Id.* Turning to the other half of the balancing test, the privacy interests involved in the information sought are enough to outweigh the public's right to know, thereby keeping the information confidential. *In re New Eng. Gas Co.,* 842 A.2d at 557; *Kane,* 577 A.2d at 663-64. The basic tenet of the privacy prong of the balancing test is that "it was the intent of the Legislature to protect from disclosure information about particular individuals whose records are maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of privacy." *Charlesgate,* 568 A.2d at 777.

2. *The Providence Journal v. Rodgers, 711 A.2d 1131 (R.I. 1998): balancing of interests tips in favor of public right to know*

Section 11–37–8.5(a) provides that "[a]ll court records which concern the identity of a victim of child molestation sexual assault shall be confidential and shall not be made public."

Supreme Court reversed Superior Court's practice of sealing all child molestation records. "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations." *Cox,* 420 U.S. at 491–92, 95 S.Ct. at 1044, 43 L.Ed.2d at 347.

We direct that the Superior Court, under the auspices of the Presiding Justice, establish through its Rules of Practice specific procedures by which the following policy shall be implemented. The public file shall contain the charging document (indictment or information) with the name and identifying information of the child victim redacted.

"It is our opinion that implementation of this procedure reconciles the important interests at stake here: protecting the identity of child victims with making information on prosecutions available to the public."

3. *"Sufficient reason" test: must produce evidence that government impropriety might have occurred*

Providence Journal Co. v. Rhode Island Dept. of Public Safety , 136 A.3d 1168 (2016)

"First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted."

"To effect [the balance of privacy interest against the public interest in disclosure] and to give practical meaning to the exemption, *the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable*."

requested records from the Rhode Island State Police concerning an investigation of an underage drinking incident at property owned by the then-Governor, Lincoln Chafee.

the son of then-Governor Lincoln Chafee, hosted a party on property owned by the then-Governor, during which some underage attendees consumed alcohol. At some point, an underage female left the party and, shortly thereafter, she was taken to a local hospital for alcohol-related illness. As a result, the Rhode Island State Police went to the property to conduct an investigation.

Caleb was charged with the furnishing or procurement of alcoholic beverages for underage persons in violation of G.L.1956 § 3–8–11.1, to which he pled nolo contendere in Rhode Island District Court on August 22, 2012, and received a $500 civil penalty.

Amanda Milkovits sent an email to Colonel O'Donnell in which she "request[ed] copies of state police reports regarding the May 28 incident involving Caleb Chafee."

SP denied request

due to an "ongoing criminal investigation and/or prosecution"; and (ii) the records "could reasonably be expected to be an unwarranted invasion of personal privacy * * *."

excludes records identifiable to an individual in any files and law enforcement records, the disclosure of which could reasonably be expected to be an unwarranted invasion of personal privacy."

"this Court has 'long recognized that the underlying policy of the APRA favors the free flow and disclosure of information to the public.' " *In re New England Gas Co.,* 842 A.2d 545, 551 (R.I.2004)

competing purposes

Among those records deemed to not be public, are:

"All records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency. Provided, however, such records shall not be deemed public only to the extent that the disclosure of the records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]" G.L.1956 § 38–2–2(4)(D)(c).

See National Archives and Records Administration v. Favish, 541 U.S. 157, 160, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004).

Burden of proof has shifted:

Court stated that "[t]he term 'unwarranted' requires us to balance the * * * privacy interest against the public interest in disclosure." *Id.* at 171, 124 S.Ct. 1570. To effectuate this balance, the Court provided a two-step process by which a citizen must prove that it is entitled to disclosure of the records. Specifically, it provided that: "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted."

this standard would be toothless if disclosure were required based upon mere speculation, without the need to provide some evidence of negligence or impropriety

in line with *Favish,* that:
the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish,* 541 U.S. at 174, 124 S.Ct. 1570.

We do not, however, foreclose the possibility that the *Favish* standard may be inapplicable where a party asserts an authentic secondary public interest.

"there is a presumption of legitimacy accorded to the Government's official conduct * * * [and] where the presumption is applicable, clear evidence is usually required to displace it." *Id.* at 174, 124 S.Ct. 1570.

The Vaughn index (which was provided to the Journal) indicates that the investigation resulted in the compilation of 186 pages of documents, including at least eighteen witness statements

The Journal has not pointed to a shred of evidence to suggest that "the investigative agency or other **responsible officials acted negligently or otherwise improperly**," *id.* at 173, 124 S.Ct. 1570, other than to speculate as to the mere possibility that some venality or irregularity may have occurred in the investigation due to the then-Governor's position. When the release of sensitive personal information is at stake and the alleged public interest is rooted in government wrongdoing, we do not deal in potentialities—*rather, the seeker of information must provide some evidence that government negligence or impropriety was afoot.* Because the Journal failed to provide any such evidence, the public interest can, at best, be characterized merely as an

uncorroborated *possibility* of governmental negligence or impropriety. Such a tenuous "public interest" is insufficient to mandate disclosure under the *Favish* standard that we today adopt and thereby imbue upon the APRA.

In the case of the documents developed by law enforcement in the investigation of a private individual, the privacy interest is considerable and should not be easily displaced absent a particularly noteworthy public interest.

Caleb's privacy interest created a barrier that the public interests in disclosure as asserted by the Journal could not overcome.

4. Attorney General application

Farinelli v. City of Pawtucket PR 17-20

APRA request to the City seeking "the last two calls I have placed to the Pawtucket Police Department in regards to The Arrest of [Pawtucket Police Officer John Doe].

'Here, there is no question that Officer Doe has a privacy interest. The two audio recordings that we have reviewed are replete with references to Officer Doe and your accusation that Officer Doe has committed a crime. Repeatedly, you call for Officer Doe's arrest. Case law makes clear that when law enforcement records reference a particular person, the referenced person has significant privacy interests.'

"**Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred.** Id. Mindful that the Rhode Island Supreme Court has recognized that "there is a presumption of legitimacy accorded to the Government's official conduct * * * [and] where the presumption is applicable, clear evidence is usually required to displace it."

Providence Journal v. Pawtucket Police Department PR 16-48

"a copy of the police report from Feb. 11 on the murder-suicide of [Mr. and Mrs. Doe] and Feb. 4 report made by [Ms. Doe] alleging threats by [Mr. Doe]."

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). 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.

Could reasonably be expected to constitute an unwarranted invasion of personal privacy.

when balancing the privacy interest versus the public interest, the privacy interest of the decedent's family must be considered.

the privacy interests implicated belong not to the decedent, but to the decedents' families.

"[W]here there is a privacy interest * * * and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Id. at 174. See Providence Journal, 136 A.3d at 1175
Assuming, arguendo, that we agree with your point that "domestic violence and the steps taken by law enforcement and other public agencies to protect citizens from such abuse are clearly of significant public interest," we find little to no "public interest" - as you have described it - regarding the murder-suicide investigative reports

There is little to no evidence that the **disclosure of these investigative reports "is likely to advance that interest," namely, the steps taken by law enforcement to protect victims of domestic violence.**

Even if we assume you satisfied the Favish standard and presented evidence that disclosure would advance some public interest, case law and our in camera review makes clear that in this case, and based upon the evidence presented, the privacy interests outweigh the public interest and no reasonable segregable portion can be provided.

Newport Daily News v. Department of Public Safety, PR 12-25

the Attorney General denied request for names of police officers who reported to the scene of an incident: "As made clear by *The Rake* and *DARE*, as well as by the plain language of your request, the information you have requested is identifiable to an individual, and therefore is exempt from public disclosure. This conclusion is also supported by *Robinson v. Malinoff*, 770 A.2d 873, 877 (R.I. 2001), another case involving the Newport Daily News where it requested all investigation records pertaining to a specific Newport Police Department officer, Officer Robinson. In *Robinson*, the Supreme Court made clear that R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) "expresses the Legislature's clearly stated intention to exempt from public disclosure those records concerning a particular and identifiable individual."

Based on our review of the APRA law enforcement exemption in its entirety (R.I. Gen. Laws § 38-2-2(4)(i)(D)), the General Assembly made a substantive distinction between initial arrest records, which the APRA deems public, and other reports created by law enforcement agencies, which 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)." Id.

Walters v. Department of Public Safety, PR 11-38

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.

Incident reports submitted by the DPS and have no doubt that these incident reports pertaining to allegations of child pornography concerning a specifically identifiable individual who has not been arrested "could reasonably be expected to constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-2(4)(D)(c)