



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

April 18, 2017

PR 17-16

Ms. Johanna Harris

hirefire@hirefireandretire.com

Re: **Harris v. City of Providence**

Dear Ms. Harris:

The investigation into your Access to Public Records Act ("APRA") complaint against the City of Providence ("City") is complete. In relevant part, you related the following.

You requested "[t]he videotape in the matter of Mile and Quarter House d/b/a The Loft, submitted and shown at the April 28, 2016 public meeting of the Providence Board of Licenses." Your APRA request related that R.I. Gen. Laws § 38-2-2(4)(K) states "any documents submitted at a public meeting of a public body shall be deemed public," and accordingly, you asked that the City "please provide an 'electronic' version of the requested document." In due course, the City denied your APRA request, citing R.I. Gen. Laws § 38-2-2(4)(D)(a) & (c). You filed the instant complaint and asserted that "the requested videotape was played in full at [] the public meeting of the Board of Licenses on April 28, 2016, and is therefore by law a public record."

In response to your complaint, we received a substantive response and affidavit from Assistant City Solicitor David Ellison, Esquire. Mr. Ellison noted that "[a]s the sole basis for her Complaint, Ms. Harris relies on R.I. Gen. Laws § 38-2-2(4)(K), which exempts the following from public record: 'preliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.'" Mr. Ellison also references this Department's finding in Chrabaszcz v. Johnston School Department, PR 04-15. In his affidavit, Mr. Ellison affirms, *inter alia*, after receiving your APRA request he viewed the requested videotape. Mr. Ellison relates that this videotape "depict[s] a fight amongst the crowd at Mile and a Quarter" and the "video shows patrons, including individuals who are not partaking in the fight." Mr. Ellison's affidavit continues that "[t]he City of Providence does not have the ability to redact or blur the faces of the individuals in the video, in order to adequately protect their privacy," nor does the City "have the ability to edit this video to only the portion shown to the Board."

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 the law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the City violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

As Mr. Ellison observes, you base the instant complaint upon R.I. Gen. Laws § 38-2-2(4)(K), which exempts from public disclosure “[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.” You contend that because the instant videotape was submitted during a public meeting, the videotape is a public record by virtue of the second clause.

We examined this precise issue in Chrabaszc, PR 04-15, where an APRA request was made for the contract for the Johnston Superintendent of Schools. At the time of our finding, the APRA exempted all records identifiable to an individual employee and Chrabaszc makes clear that “the contract at issue was ‘voted upon and/or discussed and executed in public session.’” Ms. Chrabaszc made the same argument that you make: because the Superintendent’s contract was discussed and voted upon at a public meeting, the contract was a public record pursuant to R.I. Gen. Laws § 38-2-2(4)(K). We disagreed and explained:

“by its plain terms, exemption (K) is limited to ‘[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products....’ Only these preliminary documents, when submitted at a public meeting, become public. It does not appear that the contract at issue was preliminary, or otherwise falls into this exemption. Therefore, the second part of exemption (K), which makes public those ‘preliminary’ or ‘draft’ documents ‘submitted at a public meeting’ simply does not apply.” Chrabaszc, PR 04-15.

Here, Chrabaszc controls. Likewise, the requested videotape does not constitute “preliminary drafts, notes, impressions, memoranda, working papers, and work products.” In fact, your complaint makes no argument that the videotape falls within any of these delineated categories, but rather focuses on the second clause referenced earlier. As Chrabaszc makes clear, however, this second clause only applies to documents that fall within the first clause. For this reason, R.I. Gen. Laws § 38-2-2(4)(K) has no application to this matter.¹

¹ To provide an example that supports our conclusion, if a 911 tape or medical records had been submitted to the Board for its consideration, the argument you advance in this case would require disclosure of these records. The disclosure of both 911 tapes and medical records, however, violates Rhode Island law. See R.I. Gen. Laws §§ 5-37.3-4, 39-21.1-17. As such, the plain language of the second clause set forth in R.I. Gen. Laws § 38-2-2(4)(K) is appropriately limited to “preliminary drafts, notes, impressions, memoranda, working papers, and work products.”

Since your complaint raises R.I. Gen. Laws § 38-2-2(4)(K) only, our rejection of this basis may very well end this matter. Nonetheless, for completeness purposes, we briefly address the City's basis for exempting this videotape. In relevant part, R.I. Gen. Laws § 38-2-2(4)(D) exempts from public disclosure:

“[a]ll 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 * * * (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

As the Rhode Island Supreme Court has explained, R.I. Gen. Laws § 38-2-2(4)(D)(c) requires public bodies to balance the public interest in disclosure versus the privacy interest in non-disclosure. See Providence Journal Co. v. Department of Public Safety, 136 A.3d 1168 (R.I. 2016).

The United States Supreme Court has explained that the Freedom of Information Act (FOIA), or in this case the APRA:

“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.” U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481-82 (1989) (emphasis added).²

Therefore, when conducting the balancing test, the proper inquiry is whether the public interest – “official information that sheds light on an agency’s performance of its statutory duties” – outweighs individual privacy interests. Id.

You assert no public interest and Mr. Ellison’s affidavit raises, at least, some privacy interest, namely images of third parties/private citizens (who the City represents it cannot remove or blur from the video) as well as the images of a crime victim being assaulted. See Providence Journal, 136 A.3d at 1175 (“the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable”). Since you assert no public interest to be balanced against a

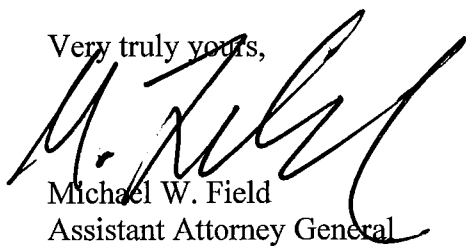
² The Rhode Island Supreme Court has stated that “[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law.” Pawtucket Teacher’s Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

cognizable privacy interest, based upon the evidence and arguments presented, we conclude that the City did not violate the APRA when it exempted the requested videotape. See also Favish v. National Archives and Records Administration, 541 U.S. 157, 170 (2004) (“Our holding ensures that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases.”)(suicide photos); New York Times Co. v. NASA, 782 F.Supp. 628, 631, 632 (D.D.C. 1991) (sustaining families' privacy claim with respect to an audiotape of the Space Shuttle Challenger astronauts last words because “[e]xposure to the voice of a beloved family member immediately prior to that family member's death ... would cause the Challenger families pain” and inflict “a disruption [to] their peace of mind every time a portion of the tape is played within their hearing”). For all of these reasons, we find no violation.

Although the Attorney General has found no violation and will not file suit in this matter, 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). Please be advised that we are closing this file as of the date of this letter.

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 'M. Field', written over the typed name and title.

Michael W. Field
Assistant Attorney General

MWF/kr

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