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ADV PR 11-02 In Re Department of Education

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August 22, 2011
ADV PR 11-02

David V. Abbott, Esquire

Re: In re: Department of Education

Dear Mr. Abbott:

Your letter dated May 12, 2011, addressed to Attorney General Peter F. Kilmartin, has been forwarded to me for a response. You seek an Access to Public Records Act ("APRA") advisory opinion and relate:

"[t]he question for which an opinion is sought is whether aggregate performance data of students of an identified public-school teacher, which is used to evaluate the teacher's employment status, is a public record under the APRA. Put another way, does the public have the right to access the aggregate performance data of the students of a named teacher when that data is used to evaluate the teacher?

In aggregate form, the student data is not personally identifiable. An individual public-school teacher is identified, however, to

delineate the student data being sought. The data consists of state assessment results and other student-performance measurements. The data will be analyzed by the employer to measure the teacher's impact on student growth and academic achievement, which will be the primary factor in the teacher's employment evaluation."

In examining whether a particular document or record is or is not considered a public record pursuant to the APRA, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether a requested document should be publicly disclosed, 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. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate and simply provide guidance based upon the plain language of the APRA and our Supreme Court's interpretation of the APRA.

In its entirety, R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) exempts from public disclosure:

"[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee, including, but not limited to, personnel, medical treatment, welfare, employment security, pupil records, all records relating to a client/attorney relationship and to a doctor/patient relationship, and all personal or medical information relating to an individual in any files, including information relating to medical or psychological facts, personal finances, welfare, employment security, student performance, or information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body; provided, however, with respect to employees, the name, gross

salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and other remuneration in addition to salary; job title, job description, dates of employment and positions held with the state or municipality, work location, business telephone number, the city or town of residence, and date of termination shall be public." R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) (emphases added).

We have previously observed that R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) contains two different clauses exempting documents. See In re Judicial Nominating Commission, ADV PR 08-04. A third clause mandates that certain employee-related documents/information are public records.

The Rhode Island Supreme Court has examined R.I. Gen. Laws § 38-2-2(5)(i)(A)(I)[FN1] on numerous occasions. In Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989), the Court examined whether a management study report related to an identifiable employee - a school principal - was exempt from public disclosure. The Supreme Court examined R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) and held that the management study report was exempt from public disclosure because it was identifiable to an individual employee, i.e., the school principal. Specifically, the Court noted:

"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." Brady, 556 A.2d at 559.

Two years later, in Providence Journal Co. v. Kane, 577 A.2d 661 (R.I. 1990), the Supreme Court considered an APRA request from

the Providence Journal wherein several categories of employee-related records were requested concerning specifically identifiable employees. At a time when R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) did not contain the third clause referenced earlier in this advisory opinion,[FN2] the Court examined R.I. Gen. Laws § 38-2-2(5)(i)(A)(I), affirmed the granting of a motion to dismiss, and related that "[g]iven the clear and specific exemption in the [APRA] of all records identifiable to an individual employee, the complaint, in our opinion, is insufficient." Id. at 663. The Court concluded its opinion with clear and unmistakable language equally applicable to the present matter, elucidating that the "request for information that will uniquely identify State employees by name, address, and employment history directly contravenes the clear proscription set forth in § 38-2-2 against disclosure of all records which are identifiable to an individual employee, including personnel records." Id. at 665.

Subsequently, the Court considered Providence Journal v. Sundlun, 616 A.2d 1131 (R.I. 1992), where an APRA request was made for the names and positions of state employees who would be laid off. Three separate lists were maintained responsive to the request: list one consisted of the names of state employees who the Governor determined would receive layoff notices, however, the list was never implemented; list two consisted of the names of state employees who received layoff notices, but who had not actually been terminated because they were engaged in the "bumping" process; and list three consisted of names of state employees who would actually be laid off from state employment. Id. at 1133.

Relying on R.I. Gen. Laws § 38-2-2(5)(i)(A)(I), the Court concluded that lists one and two were exempt from public disclosure. In doing so, the Court observed that:

"although the legislative intent may have been to protect against the release of personal or confidential information, it implemented this intention by prohibiting the release of all records that would be identifiable to an individual person, whether or not such records might in another context be construed as either personal or confidential.

*** * ***

"There is no question that pursuant to the APRA, plaintiffs are not entitled to have access to lists No. 1 and 2. First and foremost, § 38-2-2[(5)(i)(A)(I)] explicitly exempts from disclosure records identifying an employee. It is not until an employee has been terminated from his or her employment that the last proviso [or clause] of § 38-2-2[(5)(i)(A)(I)] becomes operative and, in effect, authorizes the release of the names of those terminated employees to the public. The plaintiffs contend that a record that merely identifies an individual employee is insufficient for exemption under § 38-2-2[(5)(i)(A)(I)]. They submit that the exemption applies exclusively to records revealing personal information relating to an identified employee. We disagree." Id. at 1134-35 (emphasis added).

With language equally applicable to the instant matter, the Court concluded its opinion by relating that:

"[t]he unambiguous language embodied in § 38-2-2[(5)(i)(A)(I)] makes it unmistakably clear that the Legislature intended to limit the public's access not only to personal information contained in an employee's personnel file but also to any record that identified a particular employee. In the case at bar it is of no consequence, as plaintiffs contend, that the lists do not reveal personal, intimate, or embarrassing information about any employee." Id. at 1136.

Robinson v. Malinoff, 770 A.2d 873 (R.I. 2001) is another case examining R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) wherein the Newport Daily News sought "all reports of investigations concerning [Officer] Robinson," who had been accused of serious misconduct while on duty. Id. at 874. Although the Court dismissed the Newport Daily News' APRA argument on non-relevant procedural grounds, the Court nonetheless reached the merits of the APRA issue. Even though Officer Robinson was no longer employed by the Newport Police Department, the Court noted 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." Id. at 877. See also Direct Action for Rights and Equality v. Gannon, 713 A.2d 218, 224 (R.I. 1998) (reviewing past cases and noting that "a rule has evolved that permits the disclosure of records that do not specifically identify individuals and that represent final action").

For the reasons explained above, we respond to your question "whether aggregate performance data of students of an identified public-school teacher * * * is a public record under the APRA" in the negative. (Emphasis added). As discussed above, R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) exempts from public disclosure records identifiable to an individual employee. Moreover, since these records fall within an enumerated APRA exemption, "[t]here is no public interest to be weighed in disclosure of nonpublic records." Gannon, 713 A.2d at 225. In other words, "[a]ny balancing of interests arises only after a record has first been determined to be a public record." Id.[FN3]

Having determined that the records at issue fall within the purview of the R.I. Gen. Laws § 38-2-2(5)(i)(A)(I), we must next

determine whether the "aggregate performance data of students of an identified public school teacher" falls within the last clause mandating that certain identifiable employee-related information or records be deemed public. We respond in the negative.

Again, our task here is to determine whether the requested records fall within the last clause and not to substitute our independent judgment. The last clause of R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) makes clear:

"with respect to employees, the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and other remuneration in addition to salary; job title, job description, dates of employment and positions held with the state or municipality, work location, business telephone number, the city or town of residence, and date of termination shall be public." R.I. Gen. Laws § 38-2-2(5)(i)(A)(I).

Nowhere in this last clause does the General Assembly extend mandatory disclosure to records that are used to "evaluate [a] teacher's employment status." In fact, portions of R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) expressly exempt records that evaluate the performance of an identifiable employee of a public body. See R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) (exempting all records relating to "student performance, or information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body"). See also Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 559 (R.I. 1989)("If we were to order the release of Toomey's report in these circumstances, this court would effectively license the public to review the performance of any principal or teacher under the guise of an investigation into school operations and administration. Such a result would clearly be in derogation of public policy and directly contravene the

express language of APRA.").

This Advisory Opinion does not abrogate any rights that the Department of Attorney General is vested with pursuant to R.I. Gen. Laws § 38-2-8 and is strictly limited to the Department of Attorney General's interpretation of the APRA as raised by the Department of Education. This Advisory Opinion does not consider any other provision of the APRA, nor does this Opinion address the Department of Education's responsibility under any other State law, rule, regulation, or ordinance. This Opinion also does not shield the Department of Education from a complaint filed in the Superior Court by a citizen or entity filed pursuant to R.I. Gen. Laws § 38-2-8. It should also be noted that this Department has not received or reviewed any particular document that may be subject to a public records request and upon review of a particular document subject to an APRA request, this Department's opinion may change.

We hope that this Advisory Opinion is of assistance to the Department of Education as this Department is committed to ensuring that public bodies comply with the APRA. We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Michael W. Field
Assistant Attorney General

MWF/pl

Footnotes:

1. In 1989, this exemption was actually designated as R.I. Gen. Laws § 38-2-2(d)(1), although its language mirrored the language set forth in the present version of the APRA. For consistency, we refer to this exemption as presently designated throughout this advisory opinion.

2. At the time Kane was decided, R.I. Gen. Laws § 38-2-2(5)(i)(A)(I) exempted in its entirety:

"[a]ll records which are identifiable to an individual applicant for benefits, clients, patient, student, or employee, including, but not limited to, personnel, medical treatment, welfare, employment security, and pupil records and all records relating to a client/attorney relationship and to a patient/doctor relationship." Kane, 577 A.2d at 662.

3. A question not posed by your request, and therefore not fully addressed in this advisory opinion, is whether documents responsive to a request could be redacted. For instance, if a request was made for all aggregate performance data for all teachers, as opposed to a request for data pertaining to one identified teacher, it is entirely possible that the Department of Education could respond by redacting any information identifiable to a particular employee and then providing the redacted documents. Cf. Robinson v. Malinoff, 770 A.2d 873 (R.I. 2001)(records relating to request for investigation records relating to one particular officer exempt) with Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998)(records relating to request for investigation records relating to all officers over a 7 year period were public, but identifying information was exempt).

Back