Case Number: KC-2018-0473
Filed in Providence/Bristol County Superior Court
Submitted: 10/12/2018 1:26 PM
Envelope: 1754564
Reviewer: Alexa G.

STATE OF RHODE ISLAND SUPERIOR COURT

PATRICIA MORGAN v. PETER F. KILMARTIN, in his official capacity as Attorney General of the State of Rhode Island	KC-2018-0473

MEMORANDUM OF AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND AS AMICUS CURIAE

Patricia Morgan ("Morgan"), a pro se plaintiff, has brought this action against the Attorney General in order to obtain records pursuant to the Access to Public Records Act, R.I.Gen.Laws chapter 38-2 ("APRA"), relating to the expenditure of moneys recovered as part of the "Google" settlement. While the Attorney General has provided a substantial number of pages of documents to date, it is undisputed that he has not provided documents spanning the entire time period requested by Morgan. Many of the documents produced are wholly or partially obscured by redactions. Morgan has been charged, and already paid, over $3,500 to obtain these heavily redacted documents, and is facing a charge of at least $4,000 more if she wants the rest.

Morgan's first request for a waiver of fees was denied without prejudice. She has returned to Court, seeking a waiver of the new charges and a determination that the extent of redactions undertaken by the Attorney General is unwarranted. She has also refined her request. The Attorney General opposes any relief.

The American Civil Liberties Union of Rhode Island ("ACLU-RI") has been advised that the Court will be issuing its decision on Morgan's request for relief on October 15, 2018, and that the Court may consider a submission by the ACLU-RI so long as it is presented before October

15, 2018. The ACLU respectfully submits the within Memorandum and asks that it be accepted in support of Morgan as amicus curiae.

Interest of the American Civil Liberties Union of Rhode Island to Appear as Amicus Curiae

ACLU-RI, with over 6,000 members, is the Rhode Island affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, non-profit, nonpartisan organization. ACLU-RI, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution, including the First Amendment, and in statutes, like APRA, that promote open government.

ACLU-RI, directly or through its volunteer attorneys, has appeared in numerous cases in state and federal court on issues involving the exercise of the First Amendment right of free speech, and the corresponding interest in transparency in government. "The United States Supreme Court has recognized that the public's right to know and have access to information is an essential part of the First Amendment. *The Rake v. Gorodetsky*, 452 A.2d 1144, 1146 (R.I.1982)." *Providence Journal Co. v. Pine,* 1998 WL 356904 (R.I. Super. 1998).

For example, volunteer attorneys for the ACLU-RI served as counsel for the plaintiffs in *The Rake v. Gorodetsky*, the R.I. Supreme Court's first case interpreting APRA, and in other major lawsuits interpreting APRA and the Open Meetings Act ("OMA"), including *Direct Action for Rights and Equality v. Gannon*, 713 A.2d 218 (R.I. 1998)(*DARE I)* and *Solas v. Emergency Hiring Council of Rhode Island*, 774 A.2d 820 (R.I. 2001). ACLU-RI also routinely makes use of APRA to obtain information from state and municipal agencies to further its mission, and has been a plaintiff in numerous cases under APRA and OMA. See, e.g., *Rhode Island ACLU v. Bernasconi*, 557 A.2d 1232 (R.I. 1989).

I. APRA Must Be Broadly Construed to Fulfill its Stated Policy to Effectuate the Free Flow and Disclosure of Information to the Public.

In considering the matters at issue here, the Court should be guided by the unmistakable remedial purpose of APRA to promote transparency and accessibility to public records, while preserving the privacy interests of individuals in matters that are truly private. As the Supreme Court stated in *Downey v. Carcieri,* 996 A.2d 1144 (R.I. 2010), the "Court has long recognized that the underlying policy of the APRA favors the free flow and disclosure of information to the public." 996 A.2d at 1151 (internal quotations omitted), *quoting In re New England Gas Co.,* 842 A.2d 545, 551 (R.I. 2004), *quoting Providence Journal v. Sundlun,* 616 A.2d 1131, 1134 (R.I. 1992). *See also Direct Action for Rights and Equality v. Gannon*, 819 A.2d 651 (R.I. 2003)("*DARE II*").

Applying those concepts in *Downey,* the Court, among other things, rejected the government's claim that record requestors should be required to exhaust administrative remedies before seeking relief from the courts. 996 A.2d at 1151. Applying those concepts in *Providence Journal Co. v. Pine,* 1998 WL 356904 (R.I. Super. 1998), the Superior Court held that exemptions to APRA should be narrowly construed. In *DARE II,* the Court affirmed the trial court's decisions to limit redactions, to waive "costs for production, retrieval and redaction of relevant documents," and to award the prevailing plaintiff attorneys' fees and costs. 819 A.2d 651.

II. A Waiver of Fees to Produce the Records Sought By Morgan is Clearly Warranted.

Morgan, a private citizen and member of the General Assembly, has requested records relating to the expenditure by the Attorney General of millions of dollars received from a settlement with Google in 2012. While the request is broad, it is unquestionably directed to a

matter of public interest directly focusing on the choices of the Attorney General as to how to spend large sums of money entrusted to that office which are subject to the requirements of the settlement. There can be little question about the strong public interest in a settlement which made millions of dollars available for public expenditure. With government and the public still saddled with fiscal responsibilities of poor government decision-making in incidents like the 38 Studios debacle, the public interest in transparency in the disbursement and expenditure of such a huge sum by a state agency is undeniable. In her most recent filing with the Court, Morgan has persuasively explained her reasons for the broad scope of her request, including documents that might, without that explanation, seem unimportant. No commercial interest of the requester has been identified or suggested.

Under the circumstances, the Court is authorized by APRA, R.I.G.L. §38-2-4(e), to waive the fees sought by the Attorney General to complete production of the requested records. That section provides:

> (e) A court may reduce or waive the fees for costs charged for search or retrieval if it determines that the information requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

There are at least several reasons why the Court should waive all further fees and consider waiving or reducing fees previously imposed. First, as the Court in *DARE II* recognized in granting retrospective effect to the fee waiver and attorneys' fees components of APRA added in 1998, these provisions were designed to assist individuals seeking public records by removing financial barriers to obtaining records otherwise occasioned by the imposition of substantial retrieval charges and the cost of hiring legal counsel to pursue a court claim. The harm imposed by excessive

fees falls not only on requesters who may be dissuaded from pursuing a request for records, but also on the public, which is deprived of useful information that may otherwise have been disclosed.

The Attorney General at oral argument on August 14, 2018, transcript at 14, suggested that Morgan was required, but failed, to provide evidence of financial hardship or inability to pay for the requested records. However, the waiver provision does not incorporate a "means" test, and the Court should not lightly infer one. Even for a person of unlimited resources (and there is no evidence that Morgan is such a person),[1] the imposition of a substantial expense in order to access public records serves as a deterrent where the APRA default clearly favors disclosure and eliminating barriers to open government.

The fee waiver provision incorporates a "purpose" test, striking the balance between commercial and non-commercial purposes. Yet, even where there are commercial benefits, the waiver provision may be invoked provided that the information required is not "primarily" sought for commercial purposes. Morgan's intended and stated use clearly has no identifiable commercial purpose.

The Attorney General remarkably impugned the propriety of Morgan's intended use of the records on the basis that they "are at least in part being used for political purposes." Tr. at 14. While running for and holding elective office has certainly been diminished in the eyes of many, it is still considered a public service and not a commercial enterprise, and it is disappointing to

[1] The Attorney General, in its oral argument, tr. at 14, cited to Morgan's campaign finance reports to show that she had $185,000 or $100,000 in campaign finance funds, suggesting that it showed that Morgan had ample funds to pay for the request. In contrast, the *Providence Journal* reported on October 11, 2018, that Morgan "spent $268,000 in her own unsuccessful campaign for the Republican gubernatorial nomination," and that "her campaign [now] has around $98,000 in outstanding debt, including $65,000 in personal loans." "Raimondo has spent over $5 million on reelection campaign," by Patrick Anderson, accessed October 11, 2018 at http://www.providencejournal.com/news/20181010/raimondo-has-spent-over-5-million-on-reelection-campaign.

learn that our Attorney General, who is charged with enforcing APRA, would mount such an argument to oppose a fee waiver.

Second, the record to date reflects that the Attorney General utilized an excessive guideline for redactions—all at Morgan's expense—in its initial production. For example, acceptance of the Attorney's General's interpretation of the exemption for preliminary draft memoranda as justifying the withholding, through redaction, of any document entitled "memorandum," or that could be characterized as a "memorandum" (Defendant's Response to Plaintiff's' Motion for Relief, page 7), contravenes the courts' recognition that the exemptions should be narrowly construed.

The Attorney General further decided that "purchase order numbers" should be redacted, speculating that providing the numbers might permit a breach of its vendor system. In contrast, Morgan quite convincingly has demonstrated that purchase order and contract numbers are useful and often necessary to "match up" bids, awards, and contracts. Indeed, the Rhode Island Department of Administration ("DOA"), in its APRA request forms (*see* Appendix A attached hereto), has underscored the importance and utility of such information, specifically requesting inclusion of "Bid/RFP Number, Purchase Order Number, etc." to facilitate retrieval of documents.

The position of DOA (Appendix A) in processing APRA requests refutes the Attorney General's contrary speculation. Moreover, if there were any valid concern, a partial redaction, such as disclosing the last four numbers of bids and orders, would enable Morgan to match up documents without exposing the entire number. By redacting the numbers completely, Morgan cannot make any comparisons.

Similarly, the Attorney General determined that business/commercial addresses and phone numbers should be redacted. Information concerning businesses responding to requests for proposals with public bids and those with whom the government contracts is not private, personal

information. The default should be disclosure, even if there is no strong public interest in these discrete pieces of information.

In that regard, the Attorney General's position in this case significantly, and unnecessarily, expands the redaction and non-disclosure of information in public records for no good purpose, and at the same time dramatically increases and passes along the costs for such redaction to the records requester. The Attorney General's argument here, if sustained, would invite each public agency to scour every record *required* to be produced in order to redact each number, word or sentence in an otherwise public document on the grounds that those snippets have no public interest. Under that theory, just about any document could face discretionary redactions when the public body concludes, for example, that the page numbers or closing courtesy lines in a letter are of no public interest.

The Attorney General's heavy hand in redaction warrants a waiver of fees, as its approach to redaction has almost certainly imposed excessive fees on Morgan to date, since the time spent in redaction was passed on as a retrieval cost to Morgan.

III. A Reduction in the Redaction of Documents is Also Warranted.

The Court should further direct the Attorney General to produce all additional records with limited redactions, and specifically prohibit redaction solely on the basis of the inclusion of the word "memorandum" in a document, or the Defendant's conclusion that a document constitutes a "memorandum" (as opposed to a preliminary or draft document). Similarly, the Attorney General should be prohibited from redacting bid, contract, purchase order identifiers, or similar identifiers, or commercial or business contact information. The Court should further direct the Attorney General to reproduce the records previously produced without these redactions and at no additional

expense to Morgan. Finally, in view of the Attorney General's heavy hand in redaction, the Court should direct the return to Morgan of some or all of the fee previously tendered by her.

Respectfully submitted,

/s/ Lynette Labinger
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Cooperating Counsel,
American Civil Liberties Union Foundation of Rhode Island

CERTIFICATE OF SERVICE

I hereby certify that, on October 12, 2018:

☑ I electronically filed and served this document through the electronic filing system.

☑ The document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

☑ I further certify that a copy has been sent via e-mail and first-class mail, postage prepaid, to:
Patricia L. Morgan
411 Wakefield St.
West Warwick, RI 02893
Pmorgan14@cox.net

/s/ Lynette Labinger

Appendix A

Request to Inspect and/or Copy Public Records

Access to Public Records

State of Rhode Island, Department of Administration
Division of Purchases
One Capitol Hill, Providence Rhode Island, 02908
www.purchasing.ri.gov
Tel: (401) 574-8100
Fax: (401) 574-8387

Pursuant to Chapter 38-2 entitled "Access to Public Records"

A request for public records need not be made on this form and may be made verbally, as long as the request is otherwise readily identifiable as a request for public records. In making a records request, a person is not required to provide personally identifiable information about him/herself. Copies of this form may be obtained at Division of Purchases or at www.purchasing.ri.gov.

Request to inspect: _____ Request to Obtain Copies:_____

REQUESTOR'S INFORMATION:

REQUESTOR: _____
NAME OF BUSINESS: _____
STREET ADDRESS: _____
CITY, STATE & ZIP CODE: _____
TELEPHONE NO: _____ FAX NO: _____
E-MAIL ADDRESS: _____

RECORDS REQUESTED:

Title/Document ID # (Insert Bid/RFP Number, Purchase Order Number, etc.):
_____

Description of records requested. If you need more space, attach a separate sheet to this form.
_____
_____
_____

FORMAT REQUESTED: _____ Paper _____ Fax _____Electronic _____

SIGNATURE OF REQUESTOR: _____

PRINTED NAME: _____

DATE: _____