STATE OF RHODE ISLAND
SUPREME COURT

Dimitri Lyssikatos Plaintiff/Petitioner	:	
v.	:	No. MP-SU-2019-0162 (C.A. No. PC-2017-3678)
TINA GONCALVES, IN HER CAPACITY AS THE CHIEF OF POLICE FOR THE CITY OF PAWTUCKET; AND FRANK J. MILOS, JR., ESQ., IN HIS CAPACITY AS CITY SOLICITOR FOR THE CITY OF PAWTUCKET Defendants/Respondents	:	

PETITIONER, DIMITRI LYSSIKATOS'S, REPLY TO RESPONDENTS' OBJECTION TO HIS PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE PROVIDENCE COUNTY SUPERIOR COURT

Petitioner,
Dimitri Lyssikatos,
By His Attorneys,

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I. INTRODUCTION

Respondents' objection to Petitioner, Mr. Lyssikatos's, petition for issuance of a writ of certiorari relies upon a mistaken interpretation of R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), ignores the clear holdings in The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982) (rejecting the assertion that hearing officer's reports—the equivalent of internal affairs reports—were personnel records and ordering their disclosure in redacted form) and Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998) ("DARE") (holding that records that are redacted to protect the identities of the individuals referenced therein do not qualify for exemption from disclosure under the APRA and ordering the disclosure of police internal affairs records), and fails to take any account of the differences between the federal Freedom of Information Act ("FOIA") and the Rhode Island Access to Public Records Act ("the APRA"). Respondent also dismisses the significant public policy implications of the Superior Court's decision and the significant harm that will be done to both Mr. Lyssikatos and the public as a result of the approach adopted by the superior court.

For these reasons, and many others, Petitioner, Dimitri Lyssikatos's, petition for the issuance of a writ of certiorari to the Rhode Island Superior Court should be granted and the March 18, 2019 Order of the Superior Court should be reversed and this Court should direct entry of summary judgment in favor of Mr. Lyssikatos, along with any other relief that it deems appropriate.

II. ARGUMENT

a. The issuance of a writ of certiorari is necessary because this case implicates important questions of public policy and the failure to issue a writ of certiorari will mean that the improper process endorsed by the Superior Court evades review

The APRA is a disclosure statute intended to "enlarge the scope of the public's access to documents in the possession of governmental agencies." DARE, 713 A.2d at 222. See also

Pawtucket Teachers All. Local No. 920, AFT, AFL-CIO v. Brady, 556 A.2d 556, 558 (R.I. 1989); In re New England Gas Co., 842 A.2d 545, 548 (R.I. 2004); and Providence Journal Co. v. Rhode Island Dep't of Pub. Safety ex rel. Kilmartin, 136 A.3d 1168, 1173 (R.I. 2016). Unfortunately, the Superior Court's denial of Mr. Lyssikatos's motion for summary judgment threatens the APRA's primary purpose.

The Superior Court's decision endorses an erroneous interpretation of the APRA, particularly R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), and ignores this Court's decisions in The RAKE and DARE. By endorsing an *in camera* review in this case, the Superior Court invites public bodies to use unnecessary procedural hurdles to block APRA requests. In addition, an *in camera* review imposes significant transaction costs that most applicants for the release of records cannot afford. This cannot be allowed to stand.

It is, at best, naïve for Respondents to claim that the Superior Court's decision will have no impact on the public good because it was explicitly limited to the "the facts and circumstances presented in this case," see Exhibit 2, page 3. Public bodies and those with an interest in the APRA will look to, and rely upon, the Superior Court's decision in this case as justification for withholding records and insisting upon additional procedural burdens before releasing records. Indeed, Respondents' call for an "independent third party" to perform an "independent review" of the documents is exactly the type of hurdle that the Superior Court's decision will invite.[1] See Respondent's Memorandum of Law in Opposition to the Petition for the Issuance of a Writ of Certiorari, page 10. The process that was endorsed by the Superior Court, if it goes unchecked,

[1] Respondents' insistence upon the need for an "independent" or "neutral" party to review the documents in this case flies in the face of its obligation to produce "[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4)[.]" § 38-2-3(b). What Respondents are doing in this case is directly contrary to the letter and spirit of the APRA which requires disclosure of as much information as possible.

will have a long term and lasting impact on the APRA in Rhode Island. The Superior Court's decision—although said to be limited to its facts—will, in reality turn the APRA on its head by increasing transaction costs and inviting public bodies to raise procedural hurdles to disclosure. The public interest is, therefore, materially damaged by the Superior Court's decision and, absent reversal by this Court, the Superior Court's decision regarding the process to be followed in cases like this will be cited as authority for potentially years to come.

While Mr. Lyssikatos concedes, as he must, that he could file an appeal from any eventual judgment in this case, if it is adverse, this Court has exercised its discretion to review the denial of a motion for summary judgment in other cases involving interlocutory orders, see Boucher v. McGovern, 639 A.2d 1369, 1373 (R.I. 1994) (collecting cases in which a writ of certiorari was granted to review the denial of a motion for summary judgment), and should do so again. Indeed, this Court issued a writ of certiorari in light of important public policy questions in De Rentiis v. Lewis. 258 A.2d 464, 465 (R.I. 1969). Issuance of a writ of certiorari in this case is justified by the important public policy and constitutional principles that are at stake.

b. The effort to distinguish The Rake and DARE on the grounds that they addressed internal affairs reports generated following "citizen complaints" is spurious; the decisions of this Court in The Rake and DARE interpreted statute and are, therefore, of universal application

Respondents' assertion that the decisions in The Rake and DARE are distinguishable on the grounds that they related only to "citizen complaints" is patently incorrect. As Mr. Lyssikatos has argued at length throughout these proceedings, a plain reading of both cases demonstrates, beyond dispute, that those cases interpreted the predecessor to R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) to apply only in circumstances where the records are identifiable to an individual. In The Rake, this Court stated, "[t]he **statute requires that the records must be identifiable to an individual** applicant **in order for the exemption to take effect."** 452 A.2d at 1148 (emphasis added). In

DARE this Court held that a rule has evolved that **permits the disclosure of records that do not specifically identify individuals** and that represent final action." 713 A.2d at 224 (emphasis added). In so holding, this Court cited its decision in The Rake with approval noting that, "[in The Rake] we also held that the personnel records exemption was inapplicable **because the information identifying the police officers or the civilian complainants had been redacted.**" DARE, 713 A.2d at 223 (emphasis added).

Neither decision was predicated upon the source of the complaint. The statutory question remains the same whether the reports are generated as a result of citizen complaints or internal complaints; it turns on whether the records are identifiable to an individual. If the records are not identifiable then the exemption does not apply. The decisions in The Rake and DARE, therefore, are dispositive in this case and mandate the reversal of the Superior Court's decision denying Mr. Lyssikatos's motion for summary judgment.

c. Respondents' reliance on the FOIA and federal precedents interpreting the FOIA is misplaced. In contrast to 5 U.S.C. § 552(b)(6), R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) contains a condition precedent to the application of a balancing test; the records in question must be identifiable to an individual

As anticipated, Respondents' objection completely ignores an obvious distinction between R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) and 5 U.S.C. 552(b)(6) that justifies a different approach to that adopted by federal courts, including the Supreme Court of the United States in Department of Air Force v. Rose, 425 U.S. 352 (1976).

§ 38-2-2(4)(A)(I)(b) provides for an exemption to disclosure for:

> Personnel and other personal individually 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.*

In contrast, 5 U.S.C. 552(b)(6) provides an exemption to disclosure for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

The obvious distinction between the two statutes is dispositive. Reliance on the pure balancing test employed under federal law is misplaced in Rhode Island. In Rhode Island, unlike under federal law, balancing is required only where the records in question are "individually identifiable." Since the records are being requested in a redacted form no balancing is required in this case.

In addition, Respondents' concerns about incidental identification have repeatedly been rejected by this Court. Acknowledging that "the facts set forth in each report could be matched with newspaper accounts that gave rise to the complaint" resulting in the identification of the parties involved stating, this Court rejected the argument that such a concern would justify withholding the records in question: "[w]hile recognizing that the scenario defendant presents us with could occur, we feel that on balance the public's right to know outweighs such a possibility." The Rake, 452 A.2d at 1149. Similarly, in Brady, 556 A.2d 556, this Court held that "the public's right to know under APRA, we stated, outweighed the fortuitous possibility that police officers' identities might be ascertained by matching the reports with newspaper accounts of the incidents." Id. at 559 (emphasis added).

In addition Respondents' argument that Mr. Lyssikatos's membership or association with the Rhode Island Accountability Project is relevant to this case must be rejected; it flies in the face of both the letter and the spirit of the APRA. § 38-2-3(j) of the APRA expressly prohibits a public body from withholding records based on the purpose for which the records are sought and from requiring that a person or entity provide a reason for a request for records. In addition, courts have

held that the identity of the party requesting the records "has **no bearing** on the merits of his or her FOIA request." U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 771 (1989). Similarly, in Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004), the Supreme Court of the United States held that "[a]s a general rule, withholding information under FOIA **cannot be predicated on the identity of the requester**." Id. at 170. Any effort by Respondents to leverage Mr. Lyssikatos's relationship with The Rhode Island Accountability Project should, therefore, be rejected—as it was by the Superior Court, see Exhibit 2, pages 3-4.

d. The fact that the Superior Court has conducted *in camera* reviews in other contexts is not dispositive in this case; no *in camera* review is required here when the records are redacted.

Although they are correct that the Superior Court conducted an *in camera* review in Kilmartin, 136 A.3d 1168, Respondents' reliance on that decision is misplaced. Not only is Kilmartin based on a different exemption, the exemption for criminal investigative records under § 38-2-2(4)(D), but this Court's decision in Kilmartin was clearly motivated by the fact that the requested documents related to named and identified individuals. In Kilmartin, the Court adjudicated the Providence Journal's request for information regarding to the investigation of underage drinking during a party hosted by Caleb Chafee, son of then Governor Lincoln Chafee at a property owned by the Governor. Id.

While this Court denied the Providence Journal's request for the records in question because the records "could reasonably be expected to be an unwarranted invasion of personal privacy," id. at 1171, this analysis was conducted under the exemption for records maintained for law enforcement purposes,[2] not the personnel records/privacy exemption. Id. This is significant because the balancing test under § 38-2-2(4)(A)(I)(b) is significantly weighted in favor of

[2] § 38-2-2(4)(D).

disclosure requiring a **"clearly unwarranted invasion of privacy"** before an agency may choose to exempt the records from public disclosure as opposed to the **"unwarranted invasion of privacy"** that would permit an agency to exempt the records under section 38-2-2-(4)(D)(c).

This Court's decision in Kilmartin was motivated by the obvious connection between the records requested and one or two known individuals. The records requested in Kilmartin could not be produced in any manner that would not have significant implications for the privacy of the individuals involved. Redaction was obviously not a solution in that case. The facts of Kilmartin are, therefore, distinguishable from the facts in the present case because, once redacted, no one will be identified in the records at issue in the case at bar and, therefore, no privacy interest will exist to be invaded. As a matter of law § 38-2-2(4)(A)(I)(b) does not apply.

Similarly, the decision of the Superior Court in The Providence Journal Co. v. Town of West Warwick, 2004 WL 1770102 (Sup. Ct. July 22, 2004) is distinguishable. While Judge Pfeiffer engaged in an *in camera* review of records relating to the Station Fire tragedy, the records in question clearly implicated that privacy interests of members of the general public, not public officials as is the case here.[3] Further, the types of records at issue were vastly different, and the case did not include a request for redacted internal affairs reports.

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[3] Many courts have found that police officers, including patrol-level officers are public figures with less interest in their privacy when engaged in official actions. See, for example, Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287 (Mass. 2000) (holding, "police officers, even patrol-level police officers ... are 'public officials' for purposes of defamation." (footnotes omitted)); Roche v. Egan, 433 A.2d 757 (Me. 1981) (finding that law enforcement is a uniquely government affair and noting that most courts have decided that police officers are "public officials" under federal Constitutional law.); Dixon v. Int'l Bhd. of Police Officers, 504 F.3d 73, 88 (1st Cir.2007) (school resource officer was a public official); Coughlin v. Westinghouse Broad. & Cable Inc., 780 F.2d 340, 342 (3d Cir.1986) (police officer is a public official); McKinley v. Baden, 777 F.2d 1017, 1021 (5th Cir.1985) (same); Meiners v. Moriarity, 563 F.2d 343, 352 (7th Cir.1977) (DEA agents are public officials); Speer v. Ottaway Newspapers, 828 F.2d 475, 476 (8th Cir.1987) (applying actual malice standard to police officer's defamation claim); Rattray v. City of Nat'l City, 36 F.3d 1480, 1486 (9th Cir.1994) (same); Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir.1981) (police officer is a

III. Conclusion

The 57 internal affairs reports at issue in this case, with appropriate redactions, are public and should be disclosed. Indeed, that is the result that was reached by this Court in The Rake and DARE. There is no reason for this Court to depart from that conclusion. Put simply, the personnel records/privacy exemption does not apply. The Superior Court's denial of Mr. Lyssikatos's motion for summary judgment constitutes an error of law and should be reversed.

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public official); Perkins v. Freedom of Info. Comm'n, 228 Conn. 158, 177, 635 A.2d 783, 792 (1993) ("when a person accepts public employment, he or she becomes a servant of and accountable to the public.").

CERTIFICATE OF SERVICE

I hereby certify that, on the 19th day of July, 2019,

[X] I filed and served this document on the following parties:

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