STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

DIMITRI LYSSIKATOS, *Plaintiff/Petitioner,* v. TINA GONCALVES, IN HER CAPACITY AS 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.*	No. MP-SU- 2019-0162 (C.A. No. PC-2017-3678)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI

I. Introduction

Petitioner, Dimitri Lyssikatos ("Petitioner" or "Lyssikatos"), has filed a petition requesting that the Court issue a writ of certiorari to review and reverse an interlocutory order of the Rhode Island Superior Court denying his motion for summary judgment. The Petitioner has filed an action against the Chief of the Pawtucket Police Department and the City Solicitor to compel the production of certain Pawtucket Police Department Internal Affairs Division documents pursuant to the Rhode Island Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 et. seq ("APRA"). It is respectfully submitted that the Court deny the petition because it is

interlocutory, premature and because the Superior Court's decision was proper under the circumstances.

II. Background

On February 17, 2017, Mr. Lyssikatos sought certain documents from the City of Pawtucket ("City") pursuant to the APRA. Specifically, Plaintiff requested the "last 2 years of internally generated reports investigated by the [Pawtucket Police Department's] Internal Affairs Division that were not the result of a citizens' [sic] complaints against police officers." Petitioner's Appendix at Statement of Undisputed Facts at Exhibit A. The City identified 57 Internal Affairs reports that were responsive to Plaintiff's request, however, based on its interpretation of The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982), and Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998), the City informed Plaintiff that it was not releasing the reports because the reports were *not generated from citizen complaints*. Petitioner's Appendix at Statement of Undisputed Facts at Exhibit B. The City concluded that The Rake and Gannon decisions were inapplicable to Plaintiff's request because those decisions dealt strictly with *citizen-generated* Internal Affairs reports. Id.

The City also determined that that the identified reports were more akin to personnel investigations regarding the job performance of individual officers and were exempt from disclosure pursuant to APRA's personnel records exemption. See id.; see also R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). The City concluded that, even in redacted form, the disclosure of the reports would not shed light on the official acts and workings of government nor would it shed light on how the Pawtucket Police Department operates. Petitioner's Appendix at Statement of Undisputed Facts at Exhibit B. Ultimately, the City concluded that: (1) the reports were not

presumptively public; (2) public interest in the reports was negligible; and, (3) the disclosure of the reports would constitute a clearly unwarranted invasion of personal privacy. Id.

As a result of the City's decision, Plaintiff filed a complaint in Providence Superior Court seeking injunctive and declaratory relief. In the compliant, Plaintiff seeks: (1) a declaration that the requested records constitute public records; (2) a declaration that there is a public interest in the records; (3) an order compelling the City to produce the records, with appropriate redactions, and; (4) an order waiving fees associated with the search or retrieval of the records. Complaint at 5.

In December 2018, Petitioner moved for summary judgment. Respondents objected. In essence, Petitioner argued that because he was seeking redacted records, no privacy exemption applied, and thus, the records must be immediately produced. Respondents argued that, *under the particular circumstances of this case*, fundamental fairness dictated that the records must be reviewed by the Superior Court, in camera, to determine if a privacy exemption applied. After reviewing the memorandum submitted by the parties and hearing arguments on the motion, the Superior Court denied Petitioner's motion. The Superior Court held that, after reviewing the limited record in the case,

> [i]n light of prior case law, particularly Department of Air Force v. Rose, Direct Acton for Rights and Equality v. Gannon and Providence Journal Company v. Kane, I don't believe the Court can determine whether the [Respondents] are right or wrong about their bases for denial of this case without reviewing the records.

Petitioner Appendix at March 18, 2019, Transcript of Decision of the Superior Court at 10. Despite Respondents' request, however, the Superior Court *declined* to adopt a rigid protocol in all future circumstances where there is a challenge to a public agency's decision to withhold documents under the personal privacy balancing test. Id. In fact, particularly important to the

nature of this petition, the Superior Court "limit[ed] its ruling . . . to the facts and circumstances presented in this case, and in its current procedural posture." Id. (emphasis added).

III. Argument

A. The Denial of a Summary Judgment Order is Interlocutory and Not Subject to Appeal.

Generally, this court does not "review an order denying a motion for summary judgement because such a denial is an interlocutory determination and it is not entitled to appeal as a matter of right." Bocher v. McGovern, 639 A.2d 1369, 1373 (R.I. 1994); Walsh v. Lend Lease Construction, 155 A.3d 1201, 1203 n.1 (R.I. 2017) (same); Souza v. Erie Strayer Co., 557 A.2d 1226, 1226 (R.I. 1989) (same). In certain "very limited circumstances[,]" however, the Court has granted a writ of certiorari to review an order denying summary judgment. Boucher, 639 A.2d at 1373; see also Rule 13 of the Rhode Supreme Court Rules of Appellate Procedure.

> Ordinarily, certiorari does not lie where another adequate remedy is available whereby the applicant's rights can be reviewed and determined by this court, nor where the applicant seeks a review of an interlocutory order nor where to grant certiorari would result in bringing a matter before [the court] in piecemeal fashion. This is the rule which has been followed for many years, except where it is show that unusual hardship or exceptional circumstances would void the benefits of an otherwise adequate remedy at law.

Concannon v. Concannon, 356 A.2d 487, 490 (R.I. 1976) (emphasis added).

This Court has made it clear that simply alleging "some injury or prejudice" is insufficient to bring the case within the exception to the general rule of waiting for the final disposition of the case before an appeal may be taken. Coen v. Corr, 156 A.2d 406, 409 (R.I. 1959). In fact, in order to gain interlocutory review, an alleged injury must be "clearly imminent and irreparable unless an immediate appeal is allowed." Id. at 409 (emphasis added); see also Fayle v. Traudt, 813 A.2d 58, 62 (R.I. 2003) ("an appeal may be taken from an order which, although . . . interlocutory in a strict sense, still possesses such an element of finality that it

warrants appellate review before the case is finally terminated to prevent clearly imminent and irreparable harm") (internal quotation marks omitted).

Petitioner "concedes that he could file an appeal from any eventual judgment in this case, if it is adverse . . . ." Petition for the Issuance of Writ of Certiorari at 3-4. He also argues that there is a "significant likelihood" and "potential" that the Superior Court's purported error of law will evade review. Id. at 4, 5. He avers that he will incur "substantial harm and injustice" and that review by certiorari is the only manner in which his "rights . . . can be established." Petitioner's Memorandum of Law in Support of Petition at 5.

It is respectfully submitted that Petitioner has not met the high bar in order to gain review of an interlocutory order. Mere speculation, "likelihood," or "potentiality" concerning what may or may not occur before the Superior Court certainly is not sufficient injury to invoke review by writ of certiorari by this Court. Petitioner has not shown *clearly imminent and irreparable* harm as a result of the denial of the motion for summary judgment. Fayle, 813 A.2d at 62. Petitioner certainly will not suffer any irreparable harm as a result of the unfolding of the normal litigation process. The Superior Court limited its ruling specifically to facts and circumstances of this case – and this case only. The ruling has no application outside of this case. The interlocutory order is not worthy of appeal absent a final adverse ruling against Petitioner. It is respectfully submitted that the petition for writ of certiorari be denied because the denial of summary judgment is an interlocutory order and Petitioner has failed to show unusual hardship or exceptional circumstances and clearly imminent and irreparable harm. See generally Concannon, 356 A.2d at 490; Fayle; 813 A.2d at 62.

B. The Petition is Premature Because the Superior Court May Order the Documents Released After an In Camera Review.

Before the Superior Court, Respondents argued that Petitioner's request invoked the balancing test outlined in APRA's personnel records' exemption. See generally R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). Specifically, the APRA personnel records exemption provides that "[p]ersonnel 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" the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 et seq., are not public records. R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). Respondents argued that the only fundamentally fair manner in which to evaluate Petitioner's request is that the balancing test in § 38-2-2(4)(A)(I)(b) must be performed by an independent third party – i.e., the Superior Court in an in camera review. Petitioner, however, argued that an in camera review was unnecessary because redaction cured all ills and thus removed any document from ambit of the personnel records exemption in APRA. Once the Superior Court's issued its decision, however, Respondents were ready, willing and able to turn over the 57 identified internal affairs reports to the Superior Court Judge so she could perform an in camera review. Mr. Lyssikatos, however, decided to forgo that route and, instead, filed this petition.

Respondents submit that this petition is premature. If the Superior Court Judge performs an in camera review of the documents she may, in fact, agree with Petitioner and rule that redaction will protect against any unwarranted invasion of personal privacy. In short, allowing an in camera review may result in Plaintiff procuring the release of all 57 redacted reports. Furthermore, any in camera review and any subsequent decision and/or analysis of the Superior Court will aid this Court by better identifying and streamlining any specific factual issues in the

event of appellate review as a matter of right. It is respectfully submitted that the petition for writ of certiorari be denied because it is premature.

C. The Petition Should Be Denied Because The Superior Court Made the Proper Decision Under the Circumstances.

The purpose of APRA 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. Although the basic policy behind APRA is to favor disclosure of information to the public, the Rhode Island Legislature did not intend to "bestow upon the public carte blanche access to all publicly held documents." Pawtucket Teachers' Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 (R.I. 1989). Rhode Island courts interpret APRA consistent with FOIA. Providence Journal Co. v. R.I. Department of Public Safety, 136 A.3d 1168, 1174 (R.I. 2016). FOIA, like APRA, focuses on a citizen's right to be informed of "what their government is up to." United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989) (internal quotation marks omitted).

A public record is a record "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Pontarelli v. R.I. Department of Elementary and Secondary Education, 176 A.3d 472, 479 (R.I. 2018) (internal quotation marks omitted); see also R.I. Gen. Laws § 38-2-2(4). Generally, the public body bears the burden of showing that the requested records are not subject to disclosure. Pontarelli, 176 A.3d at 480.

R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) contemplates a balancing test whereby the public interest in disclosure is weighed against the applicable personal privacy interest of the applicable individual. See generally id. In determining whether to release the documents, a court must

weigh the public interest and the privacy interest involved to determine whether disclosure of the requested records would constitute "a clearly unwarranted invasion of privacy." Id. In evaluating a clearly unwarranted invasion of personal privacy under FOIA, the United States Supreme Court has held that the "limitation of a clearly unwarranted invasion of personal privacy provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." Department of Air Force v. Rose, 425 U.S. 352, 372 (1976) (emphasis added) (internal quotation marks omitted). The relevant public interest in the balancing test is the "extent to which disclosure of the information would shed light on an agency's performance of its statutory duties or otherwise let citizens know what its government is up to." New Hampshire Right to Life v. HHS, 976 F. Supp. 2d 43, 63 (D.N.H. 2013).

This matter involves a request for reports of incidents investigated by the Pawtucket Police Department Internal Affairs Division that were *not* the result of a citizen's complaint against a police officer. The *non-citizen* initiated complaints may concern issues that arise in non-law enforcement work-related situations and non-work related situations. The Rhode Island Supreme Court has *not* addressed an APRA request for *non-citizen* generated Internal Affairs Division reports. The Court has, however, addressed an APRA request for citizen-generated reports. See e.g The Rake, 452 A.2d 1144 (R.I. 1982) (citizen-generated reports) and Direct Action for Rights and Equality, 713 A.2d 218 (R.I. 1998) (citizen-generated reports). As noted during oral argument before the Superior Court, the Internal Affairs Division of the Pawtucket Police Department investigates complaints generated by citizens and complaints from within the Department. On one end of the spectrum, the internal Department-generated reports could

include an investigation into a report concerning a police officer complaining about the use of excessive force by another officer. On the other end of the spectrum, however, the internal Department-generated reports could also be as a result of a complaint that an officer was not wearing the proper uniform on a particular day or the length of an officer's hair. In the latter type of situation, the Internal Affairs Division acts in a context more akin to a Human Resources Department. See Petitioner's Appendix at Transcript of March 6, 2019, Arguments Before Superior Court at 22, 32, 35-37. Consequently, at multiple instances along the spectrum, the Internal Affairs Division may be acting as a Human Resources Department and may perform deliberations on attributes found in personnel files that are "highly personal in nature, such as work-performance evaluations . . . and employment related disciplinary matters . . . ." Brady, 556 A.2d at 559.

The Rhode Island Attorney General, the agency that the Legislature has entrusted with administration and enforcement of APRA, see R.I. Gen. Laws § 38-2-8, has determined that Internal Affairs reports generated from citizen-initiated complaints are more presumptively public than non-citizen initiated reports. See Piskunov v. Town of Narragansett, PR 17-05, 2017 R.I. AG LEXIS 7; see also Pawtucket Power Assocs. Ltd. P'Ship v. City of Pawtucket, 622 A.2d 452, 456 (R.I. 1993) (reviewing court should accord deference to an agency's interpretation of a statute whose administration and enforcement the General Assembly entrusted to the agency).

R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) clearly implicates a balancing test. See generally id.; see also Harris v. City of Providence, No. PR 16-37, 2016 R.I. AG LEXIS 51. The balancing test compares the public interest in disclosure as weighed against the privacy interest of the individual(s) involved in the record. Harris, No. PR 16-37. In the end, the two are compared to determine whether disclosure of the requested records would constitute a clearly unwarranted

invasion of personal privacy. Id.; see also R.I. Gen. Laws § 38-2-2(4)(A)(I)(b); Rose, 425 U.S. at 372.

Respondents submit that the only fundamentally fair manner in which to evaluate Petitioner's request is that the balancing test must be performed by an independent third party. As a result of the statutorily required case-by-case balancing test, this matter cannot be decided by one collective decision. Instead, each report must be reviewed separately, utilizing the balancing criteria set forth above. Because Petitioner is not aware of the extent of the information contained in the 57 reports identified by the City, he cannot effectively engage in any meaningful analysis of the balancing test. Nor should Respondents, in this case, be allowed to advocate for their position to withhold against an unknowing Petitioner. Furthermore, in this instance, the City is placed in the unenviable position of weighing the public interest against the privacy rights of its own individual employees.

The challenged documents simply call for an independent review, in this instance by the Superior Court, mindful of the applicable criteria. Consequently, as a matter of law, Petitioner cannot succeed in showing that the public interest in disclosure outweighs the particular privacy interests involved in each applicable report. Petitioner cannot challenge what he does not know. Respondents submit that the only proper course in this instance is for the Superior Court to review the records in camera and determine whether the purported public interest outweighs the privacy interests of the individual(s) involved in each record.

Once a public body has decided to deny the right to inspect a record, the individual seeking disclosure may file a complaint with the Rhode Island Department of the Attorney General. See R.I. Gen. Laws § 38-2-8. In this instance, Petitioner decided to forego that avenue and instead chose to institute proceedings directly in the Rhode Island Superior Court. Had the

Petitioner decided to file a complaint with the Rhode Island Department of the Attorney General, the Department would have performed exactly the type of independent third-party review that Respondents are requesting that the Superior Court perform.

Petitioner contends that redaction is a cure all and eliminates any and all privacy concerns and renders the documents public as a matter of law. Mr. Lyssikatos argues that the redaction of individual identifiers protects the individual police officer's identities and any privacy interest that they may have in the report. It is respectfully submitted, however, that neither Petitioner, nor any other individual or entity, can make that assertion without reviewing the reports and the specific circumstances and context under which each arose.

A review of this Court's decision in Brady identifies the flaw in Petitioner's argument that redaction is a cure-all. In Brady, this Court held that, in determining whether documents constitute a personnel file, the documents must be examined in "light of the particular circumstances of each case." Brady, 556 A.2d at 559. In Brady, however, the Court *distinguished* The Rake and held that unlike the "situation in The Rake, the report at issue in [Brady] specifically relates to the job performance of single readily identifiable individual. Even if all references to proper names were deleted, the [individual's] identify would still be abundantly clear from the context of the report." Id.[1] Consequently, it is respectfully submitted that Brady stands for the proposition that redaction is *not* a cure all.

Respondents submit that a court must synthesize the decisions in Rose, The Rake, Dare, and Brady to properly address this question. The Superior Court performed exactly that exercise. In Rose, student editors of the New York University Law Review conducting research on

[1] Petitioner contends that the "same cannot be said for any of the fifty-seven reports at issue in" this matter. Memorandum of Law in Support of Petition at 14. It is respectfully submitted, however, that Petitioner cannot make that conclusion without first reviewing the documents.

disciplinary systems and procedures in military academies were denied access to cadet case summaries of honor and ethics hearings – with personal references or other identifying information deleted. Rose, 425 U.S. at 355. The Air Force Academy argued that the case summaries constituted "personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of person privacy," and, as a result, were exempt from mandatory disclosure under FOIA. Id. at 357 (emphasis added) (internal quotation marks omitted). The Supreme Court acknowledged, however, that the Appeals Court refused to hold: (1) that the Air Force Academy "must, now without any prior inspection by a court," turn over redacted summaries; or, (2) that the FOIA personnel file exemption "covers all or any part of, the summaries in issue." Id. at 358 (emphasis added). Rather, the Supreme Court noted that the Appeals Court held that further inquiry was required and agreed that the Air Force Academy should produce the records in Court for an in camera inspection. Id.

The Rose court, however, recognized that even a redacted file may not guarantee complete anonymity because "what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the pubic, but also from the vantage of those who would have been familiar" with aspects of the cadet's career at the Air Force Academy. Id. at 380. The Court held that the risk to the privacy interests of the cadet posed by his identification by otherwise unknowing former colleagues or instructors was not "trivial." Id. at 381.

Petitioner belongs to a group that concentrates its activities on the investigation of alleged police misconduct. The group posts reports it obtains from Police Departments on its website. As a result, the group is well versed in the manner and timing of requesting police department records and can specifically target a particular report of a readily identifiable individual

disguised as a general request for numerous reports over a span of time. Moreover, the public disclosure of otherwise confidential reports may lead to the disclosure of an individual's protected privacy interests to other colleagues (including superiors) on the Pawtucket Police Department. See generally Rose, 425 U.S. at 381. The risks associated with disclosure must be evaluated from the perspective of those "in the know." Id. The "identification of disciplined cadets – a possible consequence of even anonymous disclosure – could expose the formerly accused [cadet] to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment . . . ." Id. at 377 (emphasis added) (internal quotation marks omitted). In light of the overall consequences of disclosure, Rose recognized that to "be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of disclosure of identity can admittedly be severe." Id. at 382 (emphasis added).

In evaluating the clearly unwarranted invasion of privacy balancing test, Rose concluded that an in camera review was proper under the circumstances because it furthered the statutory goal of the FOIA personnel records exemption and resulted in a "workable compromise between individual rights and the preservation of public rights to Government information." Id. at 381 (internal quotation marks omitted). Rose held that if, in the opinion of the reviewing court, the redaction of personal references and other identifying information was not sufficient to safeguard privacy, then the records should not be disclosed. Id. It is submitted that an in camera review by the Superior Court will accomplish Rose's workable compromise consistent with law. In fact, other judges on the Superior Court have also performed in camera reviews of documents in APRA matters. See generally Providence Journal Co. v. Town of West Warwick, KC 03-207, C.A. No. 03-2697, 2004 R.I. Super. LEXIS 136, at **2, 5 (R.I. Super. Ct. July 22, 2004) (court

conducted an in camera review of, among other things, police department communications and reports, recognizing that APRA protects from disclosure information that would give rise to an unwarranted invasion of individual privacy); Providence Journal Co. v. R.I. Dept. of Public Safety, 136 A.3d 1168, 1172 (R.I. 2016) (APRA case considering whether disclosure of certain documents could be expected to constitute an unwarranted invasion of personal privacy under another APRA exemption, (R.I. Gen. Laws § 38-2-2(4)(D)), noting that the Superior Court judge performed an in camera review of the documents).

In the end, the Superior Court decided that Respondents raised genuine issues of fact that could not be addressed without an in camera review of the 57 Internal Affairs Reports. That decision was proper under the circumstances and should not be disturbed.

IV. Conclusion

Accordingly, for the reasons outlined above, Respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

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CERTIFICATION OF SERVICE

I hereby certify that a true and accurate copy of the within document was mailed, postage pre-paid, on this 19th day of June 2019 to:

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