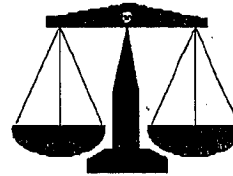
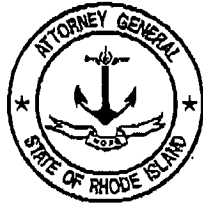


STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ATTORNEY GENERAL

150 SOUTH MAIN STREET, PROVIDENCE
PATRICK C. LYNCH, ATTORNEY GENERAL



Civil Division
Environmental
FACSIMILE COVER PAGE

CONFIDENTIALITY NOTE:

The documents accompanying this facsimile transmission may contain legally privileged/confidential information. The information is intended only for the inspection and use of the recipient (s) named below. If you are not an intended recipient, you are hereby notified that any inspection, use, disclosure, copying, distribution, or exploitation of, or of taking any action in reliance on the contents of this facsimile is unauthorized and prohibited. If you have received this facsimile in error, please notify us immediately by telephone to arrange for return of the original documents to us at our expense.

To: Joseph V. Cavanagh, Esq.
Fax #: 401-401-751-7542
From: Michael W. Field, SAAG
Pamela Lopes, Administrative Assistant
Open Government Unit/Civil Division
Rhode Island Department of Attorney General

RE: Judicial Nominating Commission Advisory Opinion

DATE: August 19, 2008 TIME: 10:00 am

TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET: 8

If you do not receive all papers as transmitted, please advise by phoning Pamela Lopes at (401) 274-4400 Ext. 2329 during office hours.

**State of Rhode Island and Providence Plantations****DEPARTMENT OF ATTORNEY GENERAL**

150 South Main Street • Providence, RI 02903

(401) 274-4400

TDD (401) 453-0410

Patrick C. Lynch, Attorney General

August 19, 2008

ADV PR 08-04

Stephen J. Carlotti, Esquire
Chairperson
Judicial Nominating Commission
Department of Administration
3rd Floor – Conference Room 2
One Capitol Hill
Providence, Rhode Island 02908

Re: **Judicial Nominating Commission**

Dear Chairman Carlotti:

In your capacity as the Chairman of the Judicial Nominating Commission (“JNC”) you have written to Attorney General Patrick C. Lynch requesting an Access to Public Records Act (“APRA”) advisory opinion. You relate that:

“[t]he JNC is charged with recommending to the Governor not less than three nor more than five persons for vacancies created by the death, resignation or removal of existing justices of the Supreme, Family, Superior, District and Workers’ Compensation Courts. Under the [JNC’s] rules, the names of applicants are kept confidential and all applications are treated as confidential. Recently, the Providence Journal Company made an oral request to the [JNC] for the release to the public of copies of any letters of recommendation received by the [JNC] on behalf of applicants for judicial office. Historically, the [JNC] does not disclose the name of applicants other than those the [JNC] selects for personal interview and public hearing. In no event does the [JNC] release the application and the required supporting documents. Although not during my tenure, I am informed that in the past the [JNC] has on occasion released letters of recommendation.

“Each applicant is required to submit and fill out a detailed application which contains a multitude of personal information. In addition, each applicant is required to file a financial statement and to file his or her individual federal and state income tax returns for the three years next

Stephen J. Carlotti, Esquire
August 19, 2008
ADV PR 08-04
Page 2

preceding the year of the application. While there is no requirement that applicants submit letters of recommendation, it has been the custom and practice for applicants to request people to write on their behalf. The letters are made a part of the application submitted by the applicant and are not kept separate and apart from the application itself."

Based upon the above, the JNC contends that the APRA "provides that certain information shall not be deemed public records including information in personnel files maintained to hire, evaluate, promote or discipline any employee of a public body." R.I. Gen. Laws § 38-2-2(4)(i)(A)(I). You continue that the JNC "is an integral part of the appointment of judges to the courts over which the [JNC] has recommendatory power" and that "[t]he [JNC] believes that the application and the accompanying letters are documents of a nature exempted under [R.I. Gen. Laws § 38-2-2(4)(i)(A)(I)] in that they are part of files maintained as part of the process for 'hiring' judges." Accordingly, the JNC requests that this Department "confirm that its interpretation of the [APRA] is correct in this regard and that the [JNC] is under no obligation to release letters of recommendation submitted on behalf of applicants to the public."

Subsequent to the receipt of your request, this Department received a correspondence from the Providence Journal Company's attorney, Joseph V. Cavanagh, Jr., Esquire. Mr. Cavanagh makes clear that:

"the Journal does not seek the applications submitted by any candidate for a judicial position, or the financial information submitted by any candidate as required by the JNC. Moreover, the letters requested by the Journal are only those letters submitted in support of or against the candidacy of those eight (8) individuals whose names have been submitted to the Governor for his consideration, thus excluding letters that may have been submitted in support of or against any individual who was not interviewed by the JNC and/or who was not selected among the three to five names to be submitted to the Governor to fill the vacancy created by Judge Ragosta's retirement." (Emphasis in original).

In response to the JNC's argument that the requested letters are "part of [the] files maintained as part of the process for 'hiring' judges," Mr. Cavanagh relates that:

"it is evident that the JNC's files are not 'personnel files,' and the JNC does not 'hire' any judicial candidates. Rather, the [requested letters] are voluntarily submitted by citizens as part of a deliberatively open merit-selection process for the vetting of candidates for lifetime judicial appointments. Disclosure of [the requested letters] would not constitute an unwarranted invasion of personal privacy, see § 38-2-1, but rather is consistent with the compelling interest that the public has in ensuring that highly qualified individuals are considered to fill the important public role

Stephen J. Carlotti, Esquire
August 19, 2008
ADV PR 08-04
Page 3

as a member of the State's judicial branch, and that the selection process is fair, balanced, and open to public scrutiny."

Mr. Cavanagh also notes that the JNC's current position is contrary to the statement available on its website¹ and its past practice of allowing access to letters written for or against judicial candidates. Based upon its past practice and website, Mr. Cavanagh posits that "there is no expectation that written comments would be subject to confidential considerations by the JNC." Moreover, Mr. Cavanagh argues that to the extent that the requested letters "are not kept separate and apart from the application itself," Rhode Island General Laws § 38-2-2(4)(ii) requires that "any reasonably segregable portion of a public record excluded by this section shall be available for public inspections after the deletion of the information which is the basis of the exclusion, if disclosure of the segregable portion does not violate the intent of this section." Based upon the foregoing provision, the Journal submits that the requested letters "are readily segregable from the balance of the application." As an example, the Journal cites its access to curriculum vitae of individuals being interviewed by the JNC.

We begin by making clear our understanding that the Journal requested access only to those letters written in support of, or against, the eight finalists for the Superior Court vacancy created by the retirement of The Honorable Vincent A. Ragosta,² hereafter ("requested letters"). None of the requested letters have been submitted for our in camera review, and accordingly, we have no knowledge concerning the content or the authors of these letters.

Our legal analysis begins by observing that the JNC asserts that the APRA exempts from public disclosure "information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body." R.I. Gen. Laws § 38-2-2(4)(i)(A)(I). It is unnecessary for us to determine whether the requested letters fall within this phrase,

¹ Mr. Cavanagh represents that the JNC's website includes the following:

"In addition to the interviews and background checks, the Commission schedules a public meeting to receive comment about the applicants under consideration. This public meeting is advertised in the Providence Journal and each applicant is notified in writing of the date and time of the meeting. The Commission also welcomes the submission of written comment concerning the applicants." (Emphases in original).

Respectfully, we do not read the above to suggest that letters written in support or against a candidate will be made available to the public at-large.

² These finalists are: Fausto C. Anguilla, Stephen M. Isherwood, Sandra A. Lanni, Henry S. Monti, George M. Muksian, Kristen E. Rodgers, James V. Murray, and Carol A. Zangari.

Stephen J. Carlotti, Esquire
August 19, 2008
ADV PR 08-04
Page 4

however, because this phrase represents only a segment of Rhode Island General Laws § 38-2-2(4)(i)(A)(I) and it is our responsibility to read and consider this provision in its entirety. See generally Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 796 (R.I. 2005). In its entirety, R.I. Gen. Laws § 38-2-2(4)(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,³ 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(4)(i)(A)(I)(emphases added).

In our opinion, the plain language of R.I. Gen. Laws § 38-2-2(4)(i)(A)(I) contains two clauses exempting documents. The first clause exempts from disclosure “[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee” and then continues to provide several examples. The second clause exempts from disclosure “all personal or medical information relating to an individual in any files” and then continues to provide several examples, including but not limited to, “information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body.” R.I. Gen. Laws § 38-2-2(4)(i)(A)(I).

Here, the JNC has requested advice on the second clause and believes the requested records are exempt from public disclosure since they contain “information in personnel files maintained to hire, evaluate, promote or discipline any employee of a public body.” Respectfully, the APRA’s plain language demonstrates that its exemption “for information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body,” is an example of the types of documents exempt and is subject to a condition precedent, namely, that the requested document contain “personal

³ The language preceding this footnote was part of the APRA as originally enacted by the General Assembly. In 1991, the General Assembly amended what is now codified as R.I. Gen. Laws § 38-2-2(4)(i)(A)(I) by adding the remaining language. See P.L. 1991, ch. 208, § 1.

Stephen J. Carlotti, Esquire

August 19, 2008

ADV PR 08-04

Page 5

or medical information relating to an individual in any files." Accordingly, the JNC should focus on whether the requested letters contain "personal or medical information," rather than whether the requested letters contain "information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body." See Bernard v. Vose, 730 A.2d 30 (R.I. 1999)(exempting parole board records since "board records contain personal information about inmates"). Since we have not been provided access to the requested letters, this Department cannot determine whether any of the requested letters, in whole or in part, contain "personal or medical information." It suffices to say, however, that this determination must be made on letter-by-letter basis.

Notwithstanding the above interpretation, we feel compelled to address the JNC's argument that the requested letters are exempt from disclosure since the requested letters "are part of files maintained as part of the process for 'hiring' judges." A similar argument was previously reviewed by the Rhode Island Supreme Court, and rejected.

In The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982), the Supreme Court examined whether civil complaints made against members of the Providence Police Department were exempt from public disclosure. Similar to the argument advanced by the JNC, the Providence Police Department argued that the requested records were exempt from disclosure since the requested civilian complaints were "personnel-records," and in fact, were "placed in personnel files." The Court rejected this reasoning and explained that the Police Department's determination that the requested records were "personnel-records," and thus were "placed in personnel files," was "of little persuasive value." *Id.* at 1147. The Court continued that if the Police Department's determination that the requested documents were "personnel-records" controlled, "[a] governmental agency could label all of its records personnel records, leaving nothing accessible to the public." *Id.* at 1148. For this reason, the fact that the JNC may maintain the requested letters in "personnel files," or otherwise considers the requested letters part of a candidate's "personnel file," holds little weight.

Several years later, in Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989), the Court discussed a "personnel-record" issue when it examined whether a management study report was exempt from disclosure. Because the management study report related to a specifically identifiable employee, consistent with the first (and then only) clause of R.I. Gen. Laws § 38-2-2(4)(i)(A)(I), the Court concluded that the requested document was exempt from disclosure, and in doing so, provided some additional insight into "personnel records." Specifically, the Court explained that:

"[i]n determining whether documents constitute a personnel file, we examine the report in light of the particular circumstances of each case. Generally we consider whether the report in issue possesses attributes ordinarily found in personnel files. These attributes include information highly personal in nature, such as work-performance evaluations, past criminal convictions, and employment-related disciplinary matters . . . , as

Stephen J. Carlotti, Esquire
August 19, 2008
ADV PR 08-04
Page 6

well as less intimate data, such as 'place of birth, date of birth, date of marriage, employment history, and comparable data.' Id. at 559 (R.I. 1989)(citations omitted).

As we explained earlier, we have not been provided access to the requested letters, and therefore, cannot "examine the [requested letters] in light of the particular circumstances of each case." Id. It is conceivable that requested letters may contain "personal or medical information," and therefore, be exempt (either in whole or part) pursuant to the second clause of R.I. Gen. Laws § 38-2-2(4)(i)(A)(I). It is equally possible that exemptions not cited by the JNC in its advisory request may apply. Furthermore, even if none of the enumerated exemptions apply, the Supreme Court has explained that non-exempt documents, or portions therein, may be exempt from disclosure if the privacy interests implicated by disclosure outweigh the public interest in disclosure. See e.g., Direct Action for Rights and Equality v. Gannon, 713 A.2d 218, 225 (R.I. 1998). Once again, since we have not been provided access to the requested letters, nor have we been asked to opine on these other matters, our consideration would be inappropriate.

In conclusion, we believe this advisory opinion sets forth a framework for the JNC to determine whether the requested letters are public records, in whole or in part. See R.I. Gen. Laws § 38-2-2(4)(ii). We do not believe the second clause set forth in R.I. Gen. Laws § 38-2-2(4)(i)(A)(I) permits the withholding of the requested letters except to the extent that the requested letters, or portions therein, contain "personal or medical information." Of course, this Advisory Opinion reflects our consideration only of the second clause set forth in R.I. Gen. Laws § 38-2-2(4)(i)(A)(I) and does not consider any other portion of R.I. Gen. Laws § 38-2-2(4)(i)(A)(I), any other APRA exemption, or the balancing test. Moreover, the determination whether a requested letter is exempt from public disclosure, either in whole or in part, must be made on a case-by-case basis after review and consideration of each requested letter. Since we have not been provided access to the requested letters, it is impossible for this Department to express a further opinion.

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 JNC. This Advisory Opinion does not consider any other provision of the APRA, nor does this Opinion address the JNC's responsibility under any other State law, rule, regulation, or ordinance. This Opinion also does not shield the JNC from a complaint filed in the Superior Court by a citizen or entity filed pursuant to R.I. Gen. Laws § 38-2-8.

Stephen J. Carlotti, Esquire
August 19, 2008
ADV PR 08-04
Page 7

We hope that this advisory opinion is of assistance to the JNC 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
Special Assistant Attorney General

Cc: Joseph Cavanagh, Esq.