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VIA EMAIL ONLY

May 1, 2020
PR 20-39

Cynthia M. Owens, Esquire

Anita E. Flax, Esquire
Legal Counsel, Rhode Island Department of Health

RE: Owens v. Rhode Island Department of Health

Dear Attorneys Owens and Flax:

The investigation into the Access to Public Records Act (“APRA”) complaint filed by Attorney Cynthia M. Owens (“Complainant”) against the Rhode Island Department of Health (“RIDOH”) is complete. For the reasons set forth herein, we find RIDOH violated the APRA.

Background & Arguments

On January 3, 2019, Complainant submitted an APRA request to RIDOH seeking “any and all records, of any and all nature, made by any and all persons and/or entities to the Rhode Island Department of Health concerning residents at the R.I. Veterans’ Home for the period January 1, 2014 to present.” On January 17, 2019, RIDOH legal counsel, Anita E. Flax, Esquire, requested prepayment in the amount of \$397.40 for 25 hours of search, retrieval, review and redaction, as well as copying fees, and retrieval and refiling fees for documents maintained at an off-site storage facility. On that same date, RIDOH informed Complainant that “[t]his request seeks records that are in storage, and, therefore, not available for inspection or copying within 10 business days after the date of your request. Should you decide to submit the \$397.40 fee for search and retrieval fee [sic], a response will be provided as expeditiously as possible.” RIDOH received prepayment from the Complainant on or about January 23, 2019.

RIDOH substantively responded to the request on March 5, 2019, stating that “all responsive documents in its possession are deemed non-public pursuant to R.I. Gen. Laws § 38-2-2(4)(S), which provides that records, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law or rule of court shall not be deemed public. For this reason, your request is denied.” RIDOH asserts that all responsive documents in its

possession constitute reports made to RIDOH pursuant to R.I. Gen. Laws §§ 23-17.8-2 or 23-17.8-3.1.¹ As such, RIDOH asserts that the withheld documents fall within the purview of R.I. Gen. Laws § 23-17.8-9(7), which requires the directors of RIDOH and the Department of Healthcare, Developmental Disabilities, and Hospitals to investigate reports of alleged mistreatment or abuse in healthcare facilities and:

“Maintain a file of the written reports prepared pursuant to this chapter. The written reports shall be confidential, but shall be released to the attorney general or to a court of competent jurisdiction, and may be released, upon written request and with the approval of the director or his or her designee, to the patient or resident, counsel, the reporting person or agency, the appropriate review board, or a social worker assigned to the case.”

Dissatisfied with RIDOH’s response, Complainant filed a complaint with this Office alleging RIDOH violated the APRA when it failed to timely respond to her request, thereby waiving any right to deny the records. Complainant also maintains RIDOH improperly withheld responsive documents in their entirety, rather than redacting any exempt information, and failed to state that no reasonably segregable portion of the documents could be released. Complainant maintains that RIDOH is not prohibited from disclosing the information in the responsive documents “so long as it does so in a manner that does not identify the individuals in those documents.”

RIDOH submitted a substantive response in affidavit form through Attorney Flax, providing over 500 pages of withheld documents for this Office’s *in camera* review. RIDOH contends that pursuant to R.I. Gen. Laws § 23-17.8-9(7), any written report generated pursuant to R.I. Gen. Laws §§ 23-17.8-3.1 and 28-17.8-3.2 is “confidential and non-public.” RIDOH also argues that it was not required to respond to the request within any certain number of days because R.I. Gen. Laws § 38-2-4(c) states “copies of documents shall be provided and the search and retrieval of documents accomplished within a *reasonable time* after a request.” (emphasis in original).

We acknowledge Complainant’s rebuttal.

Relevant Law and Findings

When we examine an APRA complaint, our authority is to determine whether a violation of the APRA has occurred. *See* R.I. Gen. Laws § 38-2-8. In doing so, we must begin with the plain language of the APRA and relevant caselaw interpreting this statute.

Pursuant to the APRA, “a public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request.” R.I. Gen. Laws § 38-2-3(e). Additionally, “a public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate” that additional time is necessary. *Id.*

¹ These statutes impose requirements on certain healthcare professionals and facilities to file a report with RIDOH regarding any potential patient harm or abuse.

It is undisputed that Complainant submitted her APRA request to RIDOH on January 3, 2019. On January 17, 2019, the tenth business day following her request, RIDOH requested prepayment, which was received by RIDOH on January 23, 2019. RIDOH also indicated on January 17 that it would need more than ten (10) business days to complete the request, but did not explicitly invoke the twenty (20) business day extension permitted under the APRA. *See* R.I. Gen. Laws § 38-2-3(e). Even assuming (as Complainant seems to) that RIDOH properly invoked the twenty (20) business day extension and the time began to run on January 23, 2019 when prepayment was received, RIDOH's response would have been due on or before February 21, 2019.² RIDOH did not provide its response to the Complainant until March 5, 2019.

RIDOH points to R.I. Gen. Laws § 38-2-4(c), which pertains to "Costs" and states in relevant part that "[c]opies of documents shall be provided and the search and retrieval of documents accomplished within a reasonable time after a request." RIDOH interprets this to mean that it was not bound by the specific response timeframes set forth in the APRA, and instead could substantively respond to a request within a "reasonable time" after receiving prepayment.

We find this argument fails in light of the clear time limitations set forth in R.I. Gen. Laws § 38-2-7(b), which states that "[f]ailure to comply with a request to inspect or copy the public record within the ten (10) business day period shall be deemed to be a denial. Except that for good cause, this limit may be extended in accordance with the provisions of subsection 38-2-3(e) of this chapter." By the plain language of the APRA, a public body must permit or deny the inspection of records within ten (10) business days of when the request was made, or within thirty (30) business days of the request if the timeframe is extended.³ We also note that another provision within the "Costs" section, § 38-2-4(a), specifically provides that a public body must "provide copies of public records" "[s]ubject to the provisions of section 38-2-3" (emphasis added). Section 38-2-3 includes R.I. Gen. Laws § 38-2-3(e), which requires that a public body must permit inspection of records within ten (10) business days, subject to a twenty (20) business day extension.

The general statement in § 38-2-4(c) that responses must be provided within a "reasonable" time after a request must be read in the context of these more specific timeframes explicitly set forth in other parts of the APRA. *See State v. Dussault*, 403 A.2d 244, 246 (1979) ("As a general rule of statutory construction, when a statute contains specific terms and is followed by a general catchall phrase, the general term is construed by reference to the specific terms."); *see also Park v. Ford Motor Co.*, 844 A.2d 687, 694 (R.I. 2004) (when two statutory provisions seem to conflict, "[e]very attempt should be made to construe and apply them so as to avoid the inconsistency" and the more specific provision prevails). Here, the specific timeframe set forth in §§ 38-2-3(e) and 38-2-7(b) applies, but a public body must still accomplish the search and retrieval "within a

² The submissions are inconsistent regarding whether the twenty (20) business days would have expired on February 20 or 21, but for purposes of this finding we will assume February 21 since the resolution of that question is immaterial to our finding and we do not find it necessary to determine whether President's Day constituted a business day.

³ Additionally, the timeframe is also subject to tolling if awaiting prepayment. *See* R.I. Gen. Laws § 38-2-7(b). The tolling provision is not relevant to this matter since it is undisputed that payment was received by January 23, 2019.

reasonable time after a request.” R.I. Gen. Laws § 38-2-4(c). The RIDOH’s failure to comply with these timeframes violated the APRA.

Next, Complainant argues that any exemption RIDOH could have invoked for denying records is deemed waived by its failure to timely respond. Under R.I. Gen. Laws § 38-2-7(b), “[f]ailure to comply with a request to inspect or copy the public record within the ten (10) business day period shall be deemed to be a denial.” The APRA further provides that “any reason [for denial of records] not specifically set forth in the denial shall be deemed waived” absent a showing of “good cause.” R.I. Gen. Laws § 38-2-7(a).

Although RIDOH did not identify any “good cause” that would warrant not waiving Exemption (S) as a result of its failure to timely respond, we nonetheless discern good cause to analyze whether the requested records are required to be kept confidential by R.I. Gen. Laws § 23-17.8-9(7). We reach this conclusion because the records at issue contain confidential healthcare information regarding third parties and records prepared pursuant to R.I. Gen. Laws §§ 23-17.8-2 and 23-17.8- 3.1. We do not conclude that RIDOH’s failure to timely respond should result in these statutes not being considered or the confidential healthcare information of third parties being disclosed. *See Scripps News v. Rhode Island Dept. of Bus. Regs.*, PR 14-07 (“We have great difficulty accepting the argument that documents maintained by DBR relating to third parties should be disclosed because of an untimely response.”). Among the categories of documents exempt from public disclosure pursuant to the APRA are records, reports, or information “required to be kept confidential by federal law or regulation or state law, or rule of court.” R.I. Gen. Laws § 38-2-2(4)(S).

Complainant does not dispute RIDOH’s representation that all responsive records it maintains constitute reports generated pursuant to R.I. Gen. Laws §§ 23-17.8-2 and 23-17.8- 3.1, and we find that RIDOH’s conclusion is consistent with our *in camera* review. However, Complainant argues that the documents can still be disclosed if RIDOH redacts “information about individuals that would constitute an unwarranted invasion of personal privacy.”⁴ We conclude that the language employed in R.I. Gen. Laws § 23-17.8-9 clearly provides that *the written reports* prepared and maintained pursuant to Chapter 23-17.8 are required to be kept confidential. *See* R.I. Gen. Laws § 23-17.8-9(7) (“The written reports *shall* be confidential.”) (emphasis added); *see also Town of Warren, et al. v. Bristol Warren Regional School District*, 159 A.3d 1029, 1039 (R.I. 2017) (“When a statute is clear and unambiguous we are bound to ascribe the plain and ordinary meaning of the words of the statute and our inquiry is at an end.”). The Legislature did not include any exception for the public release of such records in redacted form, but rather simply provided that

⁴ The Complainant contends that because RIDOH’s prepayment estimate included time for “review and redaction,” the records should be provided in redacted form; however RIDOH’s prepayment letter also explicitly advised Complainant that providing prepayment “does not guarantee that the records you have requested constitute public records (in whole or in part, i.e. redacted), but only authorizes this Department to conduct its search and retrieval to determine if responsive records exist, and if so, whether they constitute public records.”

the records are “confidential.”⁵ Accordingly, we find “good cause” and conclude that the requested records are exempt from public disclosure in their entirety. *See* R.I. Gen. Laws § 38-2-2(4)(S).

Finally, we turn to Complainant’s allegation that the APRA response failed to state in writing that no reasonably segregable portion of the documents was releasable. Rhode Island General Laws § 38-2-3(b) provides, in relevant part:

“If an entire document or record is deemed non-public, the public body shall state in writing that no portion of the document or record contains reasonable segregable information that is releasable.”

We find that RIDOH violated the APRA by withholding the responsive documents in full and not including in its denial the statement required by R.I. Gen. Laws § 38-2-3(b). However, as discussed above, R.I. Gen. Laws § 23-17.8-9 provides that these reports shall be treated as confidential and accordingly we do not find that any reasonably segregable portion of the records is public.

Conclusion

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” *See* R.I. Gen. Laws § 38-2-8(b). A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***.” *See* R.I. Gen. Laws § 38-2-9(d).

For the reasons already stated, the requested documents cannot be produced. Nonetheless, since we have determined that RIDOH failed to timely respond to the request, all search and retrieval fees are deemed waived. *See* R.I. Gen. Laws § 38-2-7(b) (“[a]ll copying and search and retrieval fees shall be waived if a public body fails to produce requested records in a timely manner”). Here, there is no question that RIDOH did not produce or deny the instant APRA request in a timely manner. Although injunctive relief may be appropriate, we will permit RIDOH the opportunity to reimburse Complainant for the \$397.40 prepayment fee within thirty (30) business days of the date of this finding. If Complainant does not receive the reimbursement from RIDOH, she should inform this Office within five (5) business days of the date reimbursement was due.

⁵ The Complainant alleges that there is a public interest in the release of these documents and that private information can be protected by redaction. However, any balancing of the public and privacy interests is inapplicable where a statute requires the records to be kept confidential. *See Direct Action for Rights and Equality v. Gannon*, 713 A.2d 218, 225 (R.I. 1998). Additionally, to the extent Complainant argues that disclosure would promote oversight and accountability, we observe that the statute provides a mechanism whereby such records can be released to certain specified individuals, such as the patient or resident, counsel, the reporting person or agency, the appropriate review board, or a social worker assigned to the case. *See* R.I. Gen. Laws § 23-17.8-9. The Complainant does not assert that she falls into any of those categories, and in any event, our analysis under the APRA pertains to whether the records are public to all.

We have also not been presented with evidence of a willful and knowing or reckless violation, nor are we aware of any recent similar violations against RIDOH. However, this finding serves as notice to RIDOH that its conduct violated the APRA and may serve as evidence of a willful and knowing, or reckless, violation in a future similar situation.

Although the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual from instituting an action for injunctive or declaratory relief in Superior Court. *See* R.I. Gen Laws § 38-2-8(b). Please be advised that this file will remain open pending RIDOH taking action consistent with this finding.

We thank you for your interest in keeping government open and accountable to the public.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla E. O'Rourke
Kayla E. O'Rourke
Special Assistant Attorney General