



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

July 24, 2013
PR 13-15

Dr. Charles P. Shoemaker, MD

Re: **Shoemaker v. Rhode Island Department of Health**

Dear Dr. Shoemaker:

The investigation into your Access to Public Records Act ("APRA") complaint¹ filed against the Rhode Island Department of Health ("DOH") is complete. By correspondence dated April 23, 2013, you allege the DOH violated the APRA when it improperly denied your request for "the names, addresses, and phone numbers of kids living in the Newport area from Kids' Net."²

¹ Having reviewed the record we have serious concerns whether you made an APRA request. While this Department has never required magic or talismanic words to invoke the APRA, a review of your correspondences indicates that you seek access to the requested information in your official capacity, including but not limited to as Chairman of the Newport School Committee. Indeed, your May 23, 2013 correspondence indicates that "[i]f granted access to this information [you] hereby commit to only using it for the study and evaluation . . . [and n]o individual identifying information shall be published or released." This Department has no jurisdiction to determine whether you should be granted access to requested documents except through the APRA. See R.I. Gen. Laws § 38-2-8. Accordingly, although we question whether you have made an APRA request, we interpret your request as an APRA request for purposes of this finding since otherwise this Department would have no jurisdiction to review this matter. Since we review this matter under the APRA, however, our legal analysis must consider whether the requested records are available to anyone regardless of their official position. Under this analysis, and for the reasons discussed, our conclusion is rather straight-forward.

² Pursuant to this Department's request, you provided a copy of your request wherein you sought the names, addresses and dates of birth of children whose parents were/are residents of Newport or Middletown, Rhode Island, during the period November 1, 2000 through the present and the names and addresses of the parents of the children so identified. It does not appear you were

In response to your complaint, we received a substantive response from the DOH's legal counsel, Stephen Morris, Esquire. Attorney Morris states, in pertinent part:

“On or about March 20, 2013 I received a letter dated 3/11/2013 from [Dr.] Charlie Shoemaker, MD, immediate past president of Baby Steps, addressed to Dr. Fine, the Director of the Department of Health.

Said letter requested the names, addresses and dates of birth of children whose parents were residents of Newport or Middletown, Rhode Island during the period of November 1, 2000 to the present.

The letter also requested the names and addresses of the parents of the identified children. * * *

The Department of Health gathers this data into a confidential, computerized child health information system called KIDSNET, which serves families, pediatric providers and public health programs. * * *

After reviewing R.I.G.L. §§ 23-1-4[4], 5-37.3-4, 38-2-2(4), 38-2-3 I drafted a letter dated April 2, 2013, signed by Dr. Fine denying Dr. Shoemaker's request. The information requested by Dr. Shoemaker is not public under APRA in that it is personal individually-identifiable records deemed confidential by state law.

R.I.G.L. § 23-1-44 defines KIDSNET as a confidential, computerized child health information system and R.I.G.L. § 38-2-2(4)(b) defines personal individually-identifiable records deemed confidential by federal or state law to be not public. [] (Emphases in original).

The legal rationale for denying Dr. Shoemaker's request is the information requested is contained in KIDSNET which is deemed confidential under Rhode Island law and therefore not public under APRA.”

We acknowledge your reply dated May 23, 2013.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DOH violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

requesting telephone numbers. This point does not affect our analysis but was made to clarify the record.

The instant case implicates the amended R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts from public disclosure, in pertinent part:

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...*[.] (Emphasis added).

This Section is modeled after 5 U.S.C. § 552 (b)(6), which exempts from disclosure all “personnel and medical files and similar files...which would constitute a clearly unwarranted invasion of personal privacy.” We must apply a two-fold analysis to interpret R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). First, we must determine what constitutes “personnel and other personal individually-identifiable records.” The United States Supreme Court has interpreted the similar language of 5 U.S.C. § 552 (b)(6), “personnel and medical files and similar files,” to mean “all information which ‘applies to a particular individual[.]’” See Voinche v. Federal Bureau of Investigation, 940 F.Supp. 323, 329 (D.C. 1996)(quoting Department of State v. Washington Post Co., 456 U.S. 595 (1982)). Although the precise language of R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) has not yet been interpreted by the courts, this Department looks to the United States Supreme Court’s interpretation of the language contained within Exemption (b)(6) as guidance and considers “personnel and other personal individually-identifiable records” to include all information applying to a particular individual.

Second, we must determine what constitutes a “clearly unwarranted invasion of personal privacy.” The United States Supreme Court relied on House and Senate Reports to interpret this phrase. See Dep’t of Air Force v. Rose, 425 U.S. 352, 355-57 (1976). The House report stated that “[t]he limitation of a ‘clearly unwarranted invasion of 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.” See id. at 373. Similarly, with respect to a “clearly unwarranted invasion of privacy,” the Senate report weighed the “interests between the protection of an individual’s private affairs from unnecessary public scrutiny, and the preservation of the public’s right to governmental information.” See id. The Supreme Court thus determined that the legislative intent promulgated a balancing test between the individual’s privacy interests and the public’s right to disclosure.

In United States Department of Justice, et al. v. Reporters Committee for Freedom of the Press, et al., the United States Supreme Court held that a “rap sheet” of a private citizen within the Government’s possession was not public. The Supreme Court examined 5 U.S.C. § 552 (b)(7), which excludes records or information compiled for law enforcement purposes from disclosure only if production of such documents “could reasonably be expected to constitute *an unwarranted invasion of personal privacy.*” See 489 U.S. 749, 756 (1989) (emphasis added). Unlike the language contained in Exemption (b)(6) and R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), the word “clearly” is omitted in Exemption (b)(7). See id. at 756. The Supreme Court’s analysis, however, sheds light on what factors constitute an “unwarranted” invasion of personal privacy. See id. at 772. “[W]hether disclosure of a private document under Exemption 7(C) is warranted

must turn on the nature of the requested document and its relationship to ‘the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’” See id. The Supreme Court explained:

[w]hen the subject of such a rap sheet is a private citizen and when the information is in the Government’s control as a compilation, rather than as a record of ‘what the Government is up to,’ the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir...Accordingly, we hold as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, and that when the request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is ‘unwarranted.’

See id. at 780. Thus, because the “rap sheet” did not shed light on how the Government operates, the privacy interests of the individual outweighed the public’s interest in the citizen’s “rap sheet.” In Holland v. CIA, the United States District Court for the District of Columbia found that the CIA properly withheld the name, signature, initials, address and entire resume of an applicant. See Holland, 1992 WL 233820 at *4. The Court found that the applicant had “a substantial privacy interest” that trumped the “insubstantial” public interest purported by the requester and rejected the argument that the public has a right to know how the CIA chooses its employees through its selection process or “network”:

[w]hile the Court recognizes that revelation of this individual’s identity, or information that would lead to it, might in some fashion further illuminate this “network,” the Court finds on balance that disclosure of this identity under the circumstances of this case would work a clearly unwarranted invasion of personal privacy. See id. at *15 *citing* Core v. U.S. Postal Serv., 730 F.2d 946 (4th Cir. 1984).

The APRA’s stated purpose 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. Similarly, the United States Supreme Court has made clear that the federal Freedom of Information Act (“FOIA”):

“focuses on the citizens’ right to be informed about ‘what their government is up to.’ Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency’s own conduct.” U.S. Dep’t of Justice v. Reporters

Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481-82 (1989) (emphasis supplied).³

The Court further explained that:

“the FOIA’s central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.” Id. at 774-75, 109 S.Ct. at 1482 (emphases in original).

We now turn to the specifics of this case. Based on the federal court precedent explained above and the specific set of facts before us, the parents and minor children have a privacy interest in the non-disclosure of the requested records. Again, we emphasize that the specific purpose you seek the requested records is of no moment and we must consider whether the requested records are public to anyone upon request. Based upon the evidence presented, we also have been provided no information to indicate that disclosure would advance the “public interest.” We conclude the requested information is not a public record because the disclosure would constitute a “clearly unwarranted invasion of personal privacy. See R.I. Gen. Laws § 38-2-3(b). In this case, the DOH claims the requested information is exempt from public disclosure because the records are personal individually identifiable records. Based on the evidence submitted, we must conclude that the information you seek would “reveal[] little or nothing about [the DOH’s] own conduct.” See Reporters Comm., 489 U.S. at 749, 109 S.Ct. at 1481-82. Indeed, we have been provided no evidence or argument that the requested information would shed light on any government activity.

Additionally, although you may have a particular interest in the requested documents, we are cognizant that if the requested records are a public record in this situation, the requested records must be a public record in any situation regardless of the identity or the interest of the requester. In Bernard v. Vose, 730 A.2d 30 (R.I. 1999), the Rhode Island Supreme Court held that under the APRA, a requesting party did not have a right to review his own board files, which contained personal and sensitive information about him, because once the files were made public to him under the APRA, the files were then available for inspection by the general public. Id. at 31. Because the privacy interest of the individual outweighed the public’s interest in disclosure, the Rhode Island Supreme Court exempted the files from disclosure to the petitioner. See also Higginbotham v. Department of Public Safety, PR 09-15 (the Department of Public Safety did not violate the APRA when it denied access to an incident report filed against the complainant).

³ The Rhode Island Supreme Court has stated that “[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law.” Pawtucket Teacher’s Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

Indeed, if we determined that such records were available to you, under the APRA, as a matter of law, we would necessarily conclude that the same records are available to anyone upon request.

Rather than concerning the activities of the DOH, the evidence indicates that the information requested is information concerning private citizens “that happens to be in the warehouse of the Government.” See Reporters Comm., 489 U.S. at 774-75, 109 S.Ct. at 1482; see also Forest Guardians v. U.S. FEMA, 410 F.3d 1214, 1220-21 (10th Cir. 2005) (holding that information concerning participants in a federally subsidized flood insurance program requested pursuant to FOIA was rightfully withheld because individuals have a privacy interest in deciding to purchase insurance and the public interest in disclosure was “nonexistent”). Therefore, because there is little public interest in disclosing the name, address and date of birth (or even telephone numbers) relating to an identifiable private citizen, we conclude that the privacy interests outweigh the public interest and the requested records are exempt from disclosure. See Direct Action for Rights and Equality, 713 A.2d at 225. See also Fuka v. Rhode Island Department of Environmental Management, PC 07-1050 (Indeglia, J., April 17, 2007)(“the list of addresses of the licensees on file with the DEM will provide little or no insight into the performance of the DEM.”); Bibles v. Oregon Natural Desert Ass’n, 519 U.S. 356 (1997)(obtaining information for mailing list not consistent with FOIA purpose); Fazzio v. City of Providence, PR 10-20 (name and policy number of insurer exempt from disclosure); Couture v. Coventry Police Department, PR 04-05 (concluding that information contained in accident report regarding “the home street address, date of birth, and insurance policy number of individuals involved in or witness to the accident” may be redacted before disclosure of the accident report).

You further suggest that the information you seek is available through a DOH database called “KIDSNET.” The APRA mandates that all records maintained by a public body shall be public records unless otherwise exempt. See R.I. Gen. Laws § 38-2-2(4)(i). Among the exemptions is R.I. Gen. Laws § 38-2-2(4)(i)(S), which exempts from public disclosure “[r]ecords, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court.” Rhode Island General Laws § 23-1-44 entitled “Routine childhood and adult immunization vaccines” states, in pertinent part:

“The department of health shall include in the department’s immunization program those vaccines for routine childhood immunization as recommended by the advisory committee for immunization practices (ACIP) and the academy of pediatrics (AAP) * * * The childhood immunization program includes administrative and quality assurance services and KIDSNET, a confidential, computerized child health information system that is used to manage statewide immunizations, as well as other public health preventative services, for all children in Rhode Island from birth through age 18.” (Emphasis added).

These records also appear to be confidential by state law and are therefore exempt under to R.I. Gen. Laws § 38-2-2(4)(i)(S). Based upon the following, we opine that the names and addresses and dates of birth of children and the names and addresses of the parents of the identified children who were residents of Newport or Middletown, Rhode Island during the period of

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November 1, 2000 to the present are exempt from public disclosure pursuant to the APRA. For these reasons, we find no violation.

Although the Attorney General has found no violation and will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

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

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lisa Pinsonneault".

Lisa Pinsonneault

Special Assistant Attorney General

Extension 2297

LP/pl

Cc: Stephen Morris, Esquire