



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

July 22, 2015

PR 15-42

Mark McBurney, Esquire

**Re: Clark v. Department of Health  
May 29, 2014 complaint**

Dear Attorney McBurney:

Your Access to Public Records Act (“APRA”) complaint filed on behalf of your client, Mr. Trevor Clark, against the Department of Health (“DOH”) is complete. By correspondence dated May 29, 2014, you alleged that DOH improperly withheld thirty-seven (37) documents responsive to your February 23, 2014 APRA request. Your complaint further alleged that DOH failed to timely respond to your May 7, 2014 APRA request. On June 20, 2014, you notified this Department that “DOH [ ] has informed [you] that the DOH has recovered additional responsive documents it intends to withhold.” Your June 20, 2014 correspondence did not indicate whether the additional withheld documents were in response to your February 23 or your May 7 APRA request. DOH submitted a total of forty-four (44) withheld documents for an in camera review. Accordingly, this finding will address whether DOH properly withheld the forty-four (44) documents and whether DOH violated the APRA by failing to timely respond to your May 7, 2014 APRA request.

Your February 23, 2014 APRA request sought access to the following documents:

“1. the entirety of the Department’s 2/20/98 Consent Decree; or, if necessary, that portion of this decree regarding whether [John Doe]<sup>1</sup> informed the Department of his past, or whether the Department discovered his criminal history on its own initiative,

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<sup>1</sup> We decline to identify the individual named in the records.

2. the entirety of the Department's 11/20/98 Amended Consent Decree (as a public document, I expect no redactions),
3. that portion of [John Doe's] license application(s) regarding arrests or convictions,
4. Department letters, memos or email sent to the WGFD or the RI State Fire Marshal, regarding [John Doe] and an arson conviction, or regarding either Consent Decree mentioned above."

Your May 7, 2014 APRA request sought access to the following documents:

- "1. All [John Doe's] license and re-licensing applications (including Nursing Assistant and EMT licenses), in their entirety, including particularly those pages (sometimes referred to as an 'Additional Information Page') where he explains his criminal history. If entire applications are missing, please so state. If pages are missing within any particular application, please so state. (Emphasis in original).
2. All 'statements concerning any history of criminal convictions' submitted by [John Doe] at each of his applications for license or re-licensing, as required by DoH's February 1996 'EMT Licensure Regulations Regarding Criminal Convictions.'
3. All 'certified copies of Judgments and Dispositions' submitted by [John Doe] at each of his applications for license or re-licensing, as required by DoH's February 1996 'EMT Licensure Regulations Regarding Criminal Convictions.'
4. From 7/24/95 to 2/20/98, all records showing that [John Doe] disclosed to DoH his arrest, charge, nolo plea and/or conviction for two counts of receiving stolen goods (convicted 7/24/95) before he signed the original [John Doe]-DoH Consent Agreement signed on 2/20/98.
5. All records, including a date, showing when [John Doe] first disclosed to DoH his arrest, charge, nolo plea and/or conviction for assault and disorderly conduct (dated 11/17/05).
6. Records showing [John Doe] notified DoH of his work with the State Fire Marshal, Warren Fire District, or the Chepachet Fire District, as required by his Amended Consent Agreement.
7. Records showing the DoH received quarterly letters from [John Doe's] supervisors at the State Fire Marshal Office, West Gloucester Fire District, Warren Fire District, Chepachet Fire District or Potterville Fire District, as required by his Amended Consent Agreement.

8. Any record showing the DoH sent [John Doe's] Amended Consent Agreement to the State Fire Marshal, West Glocester Fire District, Warren Fire District, Chepachet Fire District or Potterville Fire District, as required by his Amended Consent Agreement.

9. Any record showing [a third person] had any involvement in approving any of [John Doe's] licenses, and if so, Departmental policy on recusals where a DoH employee in a position to approve a license application has a personal relationship with the license applicant.

10. The 'reports' reviewed by the DoH and [John Doe] on 11/13/98 (referenced on the first page of the DoH-[Doe] 11/20/98 Amended Consent Agreement), any record showing if [John Doe] was the source of those reports, and any record of the conversation on 11/13/98.

11. All BCI checks or records received by the DoH regarding [John Doe], with all information redacted except the date of the record." (Emphasis in original).

In response to your complaint, legal counsel for DOH, Mr. Thomas Corrigan, Esquire, provided two (2) substantive responses. One response was provided to you and the other response was attached to the forty-four (44) withheld documents DOH submitted for an in camera review. In addition, DOH submitted various email communications between you and Attorney Corrigan pertaining to both your February 23 and May 7 APRA requests. In relevant part, DOH's substantive response states:

"I provided Mr. McBurney with numerous responsive documents on April 22, April 29, and May 7, 2014. I explained to him that I withheld [44] documents. He waived his interest in any documents concerning test scores or personal health information, so not all [44] documents are of interest to him. There is a reason under APRA that does not allow me to disclose certain records in my agency's possession... Under separate cover as part of that in camera review, I will explain my rationale for withholding some of the [44] documents, the remainder of which are protected as revealing test scores or personal healthcare information."

You provided no rebuttal.

At the outset, we note that in examining whether an APRA violation 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 § 38-2-7. In other words, we do not write on a blank slate.

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As a preliminary matter, we note the challenges encountered while trying to resolve this complaint. To begin, the allegation pertaining to your February 23 APRA request is vague and ill-defined. Specifically, you state “[p]lease accept this as a RIGL 38-2-7 APRA complaint for the DOH’s withholding of the...37 pages of documents,” and provide no guidance as to what aspect of R.I. Gen. Laws § 38-2-7 is implicated. We may very well have been justified to deny your complaint on this basis. In addition, DOH did little to shed light on your unspecified complaint. Indeed, at no moment does DOH (or you) identify what documents you were provided, which of the forty-four (44) documents withheld relate to which one of the fourteen (14) categories listed in both your APRA requests, or indicate what specific documents were withheld under the exemptions cited. Instead, DOH provided this Department with fifty-seven (57) pages, some duplicative, of email communications between you and Attorney Corrigan (dating from May 7 through June 3, 2014), which only added to the disorder. Moreover, our in camera review of the records provided shows that forty-two (42) of the forty-four (44) withheld documents are not responsive to either your February 23 or your May 7, 2014 APRA requests. As such, only the two (2) responsive documents will be considered in our analysis.

Under the APRA, a public body has ten (10) business days to respond to a request for documents. See R.I. Gen. Laws § 38-2-7. If the public body denies the request, a written response detailing the specific reasons for the denial shall be sent within those ten (10) business days to the person or entity making the request. See R.I. Gen. Laws § 38-2-7(a). If no response is sent within ten (10) business days, the lack of response will be deemed a denial. See R.I. Gen. Laws § 38-2-7(b). If, for good cause, the public body cannot comply with a records request within ten (10) business days, then the public body may extend the period an additional twenty (20) business days, for a total of thirty (30) business days. See id.; see also R.I. Gen. Laws § 38-2-3(e).

Here, while the two (2) documents at issue are responsive to one (1) of the categories listed in your February 23 and/or May 7 APRA requests, we conclude that they are not public records and were properly withheld. Furthermore, our review finds that the two (2) documents are protected by both the APRA and other Rhode Island General Laws. Therefore, acknowledging the existence and/or exemption would jeopardize the interest properly deemed exempt. See Clark v. Department of Public Safety, PR 14-23. Accordingly, we find that DOH did not violate the APRA when it properly withheld from disclosure these (2) documents that were responsive, yet non-public records.

Finally, with respect to your allegation that DOH failed to respond to your May 7, 2014 APRA request in a timely manner, we also find no violation. In pertinent part, DOH responds that:

“Mr. McBurney was asking for documents that I already had provided in the first round of responsive documents [to the February 23, 2014 APRA request], so I emailed him to say that he could consider his request denied and could appeal that.

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Mr. McBurney's May 7 request was largely redundant with what I had just provided to him that day and on two previous dates in April, but he also included on May 7 a request for [Mr. Doe's] nursing assistant license applications. At one point, I told Mr. McBurney that I would get [these documents], but I failed to do so in the timeframe I was supposed to. This was unintentional, and I simply forgot in the back and forth of our further emails and in the press of other duties... I eventually provided redacted copies of the nursing assistant license applications to Mr. McBurney." (Emphasis added).

In support of its argument, DOH provided the email referenced above evidencing that on May 14, within the mandated ten (10) business day timeframe, DOH denied your May 7 APRA request. Specifically the May 14 email stated, "[y]ou have already asked for these things, and I provided a final answer, so consider this a second final answer to your APRA request. You have the right to appeal to the Attorney General as noted in my last letter to you on this same subject." In fact, it appears that May 14 was the second time DOH denied your May 7 request, and, on this basis, it appears DOH replied to your May 7, 2014 APRA request in a timely manner.

Ultimately it is unnecessary to resolve this precise issue because, with respect to DOH's indication that it failed to provide you with Mr. Doe's nursing assistant license applications "in the timeframe [DOH] was supposed to," it is not clear if DOH "told [you] that [DOH] would get [the applications]" prior to its May 14 denial email. Regardless, based on the evidence presented, to which you provided no rebuttal, we note that on May 8, 2014, DOH emailed you regarding your May 7, 2014 APRA request. In relevant part, DOH wrote:

"This time, [DOH] will have to charge you for retrieval, copying and redacting. What you have currently requested has taken a great deal of time that [DOH] has not charged you for. [DOH] does not ask what purpose you need public records for, and we reply regardless of your reason...I say this to explain why we will have to charge you fees, not to suggest that we will not gladly continue to answer your APRA requests as fully and promptly as we are able."

In reply, you indicate that:

"I appreciate what you have done so far on my first APRA request, and that it has taken a great deal of time. Given that DOH missed its APRA timeliness obligation, I think I would have had some of those documents gratis anyway. My oral declaration to you (in, I think, our first telephone conversation) that I would not file a complaint over timeliness, I believed, established co-operative parameters for both of us." (Emphasis added).

Your representation that "my oral declaration to you (in, I think, our first telephone conversation) that I would not file a complaint over timeliness, I believed, established co-operative parameters for both of us," represents a waiver of the timeframe set forth in R.I. Gen. Laws § 38-2-7. See Gallucci v. Brindamour, 477 A.2d 617, 618 (R.I. 1984)("Generally, a party or parties for whose

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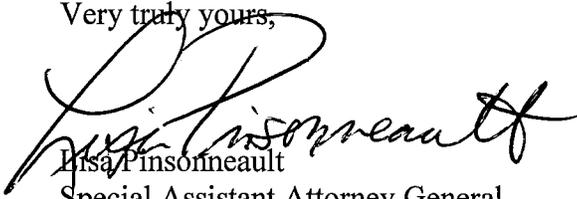
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benefit a right is provided by constitution, by statute, or by principles of common law may waive such right, regardless of the plain and unambiguous terms by which such right is expressed.”). See also Access/Rhode Island v. West Greenwich Police Department, PR 15-25. Therefore, even if, for the sake of argument, DOH failed to provide you with the requested records in a manner consistent with the timeframe set forth in the APRA, consistent with our discussion supra and our finding in Access/Rhode Island, PR 15-25, we find that you waived the timeframe indicated in R.I. Gen. Laws § 38-2-7, and therefore, we find no violation.

Although the Attorney General has found no violations 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). We are closing this file as of the date of this correspondence.

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

Very truly yours,



Lisa P. Inosmeault  
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LP/pl

Cc: Thomas Corrigan, Esquire.