State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

November 6, 2014
PR 14-27

Paul Panichas, Esq.

Re: Pisaturo v. Rhode Island Department of Health

Dear Attorney Panichas:

Your Access to Public Records Act ("APRA") complaint filed against the Rhode Island Department of Health ("DOH") on behalf of your client Ms. Deborah L. Pisaturo is complete. By undated correspondence, but received in our office on July 10, 2014, you alleged that the DOH violated the APRA when it denied your request for records pertaining to the "investigation of complaint made by Deborah Pisaturo against Kent County Memorial Hospital." Based upon our review, it appears that your client is contemplating some sort of civil action against the Hospital, which seems to be the basis of the APRA request.

In response to your complaint, we received an Affidavit from legal counsel for DOH, Mr. Stephen Morris, Esquire. Attorney Morris states, in pertinent part:

> "3. [The APRA] request was for public records regarding an investigation of complaint made by Deborah Pisaturo against Kent County Memorial Hospital***.
>
> 5. Upon preliminary triage and review of the allegations of complaint, DOH determined the complaint was not an immediate jeopardy situation and was assigned to be investigated on-site at the next hospital complaint visit where complaints of this caliber (not immediate jeopardy) are collectively investigated during regularly scheduled on-site reviews.
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> 6. On or about June 20, 2014 I sent a letter and email to attorney Panichas denying his client's APRA request based on the exception to public records disclosure contained in RIGL § 38-2-2(4)(P).
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> ***"

DOH also provided this Department with, inter alia, copies of the un-redacted requested records that are the focus of this Complaint. You provided no rebuttal.

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 determine whether this Department believes that 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 DOH violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

In order to place this matter in its proper context, it is helpful to describe the relevant facts that led to the filing of this APRA complaint. On or about November 18, 2013, Ms. Pisaturo filed a complaint with DOH against Kent County Memorial Hospital. Through correspondence dated November 18, 2013, Chief of Facilities Regulation, Mr. Raymond Rusin, informed Ms. Pisaturo that an investigation had been authorized and "may happen shortly or may happen during a standard survey visit." Mr. Rusin also indicated that while the investigation was confidential, DOH would contact Ms. Pisaturo "to share the results of the final investigation report." Thereafter in June 2014, you submitted an APRA request, on behalf of Ms. Pisaturo, for records relating to Ms. Pisaturo's complaint against Kent County Memorial Hospital. DOH denied your request stating that all investigatory records, other than records of final action, are exempt from disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(P). Subsequently on June 30, 2014, you wrote to Dr. Michael Fine, Director of DOH, regarding the denial of your request. You state, in pertinent part:

> "As to why this matter is now claimed to still be under investigation, after almost a year and a half has elapsed, is somewhat disconcerting and, in the meanwhile, my clients [sic] rights to redress are being further eroded***.
>
> ***
>
> My client has a right to this evidence and her ability to seek redress for her violated rights are being hampered by the stance taking [sic] by your Department***.
>
> ***
>
> We are again requesting the investigative reports***.

In pertinent part, DOH responded that "the Office of Facilities Regulation completed a preliminary assessment and review of the allegations," and that "[a]ll allegations are triaged and

scheduled for investigation based on a review of all information available and/or preliminary information gathered." It further indicated that any reports, correspondence, and/or documents "collected by [DOH] in the course of an investigation are not 'public' in accordance with R.I.G.L. § 38-2-2(4)(P), however, they may be discoverable should you proceed to civil action in the future."[1] Consequently, you filed the instant complaint indicating that the matter "now is a civil case" and claiming that your "client's right to redress and access to the court for remedy and damages has been placed in jeopardy."

While we certainly understand your desire (and maybe need) to obtain the requested documents, it must be remembered that you seek these documents under the APRA. 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 himself, 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 31-32, ("The Access to Public Records Act [ ] opens public records to inspection by the general public [ ] regardless of 'the purpose for which the records are sought.'"). Because the privacy interest of the individual outweighed the public's interest in disclosure, the Rhode Island Supreme Court exempted the files from disclosure even though the requester was the subject of the records sought. Also relevant to our analysis is the holding in Hydron Laboratories, Inc. v. Department of Attorney General, 492 A.2d 135, 139 (R.I. 1985). There, the Court held that the "APRA was not designed to provide an alternative method of discovery for litigants," and that the APRA "was primarily designed to provide for production of documents by members of the public, including the press, who seek access to government documents that are not subject to one of the twenty-one exemptions under § 38-2-2(d)."[2] Id. Moreover, a document that a civil litigant may be entitled to through discovery may not be available to the same civil litigant through the APRA. Id.

In brief, the fact that these records are identifiable (and relate) to your client, or that the records are sought in furtherance of a civil lawsuit, is, respectfully, of no moment. This Department is not tasked with determining whether the requested records should be disclosed to your client, but instead whether the APRA requires the records at issue to be accessible to the public at large. Indeed, if we determined that these records were public under the APRA in this case, we must conclude that they are public under the APRA in all cases. Since every person is treated equally

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[1] It is unclear to us what you are referring to when you indicate this matter is now a "civil case." If a "civil case" has been filed in Superior Court, certainly the rules of discovery would dictate the exchange of relevant documents, but filing an APRA complaint with this Department does not provide for discovery.

[2] At the time the decision was published, there were only twenty-one listed exemptions. Rhode Island General Laws § 38-2-2(d) has since been codified as § 38-2-2(4).

under the APRA with respect to accessibility of disclosed documents, under the APRA, your client has no greater interest in gaining access to the requested records than any other member of the general public. Therefore, our focus is solely on whether the APRA requires the general public to be provided these documents upon request.

The APRA provides that all records maintained by public bodies are subject to public disclosure unless the document falls within one of the twenty-seven (27) enumerated exceptions. See R.I. Gen. Laws § 38-2-2(4)(A)-(AA). Among the categories exempt from public disclosure is "[a]ll investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, or regulation other than records of final actions taken provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public." See R.I. Gen. Laws § 38-2-2(4)(P).

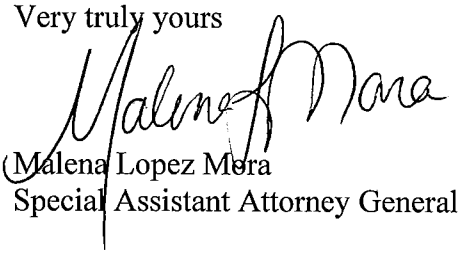
Respectfully, you have provided no evidence, nor has an argument been made, that the documents you seek are not exempt pursuant to the above-cited exemption. Rather, the only argument put forth as to why the records should be disclosed centers exclusively on the possible affects nondisclosure could have on your client's "right to redress and access to the court for remedy and damages." As explained above, pursuant to the APRA, this Department's focus is on whether the public at large should have access to the requested records, not whether a particular individual should have access. Based on the totality of the circumstances, which includes our independent *in camera* review, and based on our understanding that no final action has been taken on this matter, we find that the documents requested were properly exempted under R.I. Gen. Laws § 38-2-2(4)(P). Thus, we find no violation.

While, in the instant case, the APRA is not the appropriate means to access the requested records, our finding in no way prohibits you or another interested party from obtaining access to the requested documents through other non-APRA means. Additionally, nothing within the APRA prohibits an individual from obtaining legal counsel for the purposes of instituting injunctive or declaratory relief within the Superior Court.

Please be advised that we are closing your 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



Malena Lopez Mora
Special Assistant Attorney General

Cc: Stephen Morris, Esquire