



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

April 24, 2015

PR 15-15

Ms. Lynn Arditi

Re: The Providence Journal v. Rhode Island Department of Health

Dear Ms. Arditi:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Department of Health (“DOH”) is complete. By e-mail correspondence dated December 26, 2014, you alleged the DOH violated the APRA when it did not fully or completely respond to your APRA request dated December 2, 2014.

On December 2, 2014, you sent an e-mail to then-DOH Director Michael Fine, which in relevant part provided that the Providence Journal was seeking “the following data regarding accidental drug overdose deaths in Rhode Island pursuant to the Rhode Island Access to Public Records Act, § 38-2-2 et seq. (the ‘Act’):

- The number of overdose deaths, by city and town, for 2011;
- The number of overdose deaths, by city and town, for 2012;
- The number of overdose deaths, by city and town, for 2013;
- The number of suspected and/or confirmed overdose deaths, by city and town, to date for 2014.”

Your request also sought “how many of the overdoses in each of the city and town involved opioids.” Lastly, your request acknowledged that data relating to 2014 may be incomplete and requested that the DOH “provide any and all of the information requested that is currently available first – and then follow up with additional information as it becomes available.”¹

¹ It is our understanding that DOH recently provided you statistics for calendar year 2014. Nothing within the APRA requires a public body to provide the “follow up” you requested. See R.I. Gen. Laws § 38-2-3(h) (“Nothing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made except to the extent that

According to your December 26, 2014 complaint, you “filed an APRA request with Health Department Director Michael Fine for data about the exact number of opioid-related overdose deaths, by city and town, for 2011, 2012, 2013 and 2014,”² and in response, the DOH “supplied records that were not responsive to this request.” As related by you:

“[t]he [DOH’s] response provided no breakdown for any communities with ‘5 or less’ overdose deaths. And more than 40 overdose deaths were listed as having an ‘unknown location.’ The Department offered no reason about why it was not providing the requested breakdown.”

In response to your complaint, we received a substantive response from the DOH’s Chief Legal Counsel, Jane E. Morgan, Esquire, who also provided affidavits from the Division Chief of the Rhode Island Health Department’s Center for Health Data and Analysis, Ms. Samara Viner-Brown; the Department of Health’s Chief Medical Examiner, Christina Stanley, MD; and a program analyst, Ms. Maria Lena Wilson. Attorney Morgan states, in pertinent part:

“[t]he Department fully complied with all respects of the Access to Public Records Act in responding to the APRA request. The Department de-identified personal health care information in accordance with [R.I. Gen. Laws §] 38-2-2(4)(A)(I)(b) and did not include ‘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.’ * * *

[T]he Department did not have the records in the form and manner requested by the Providence Journal in December 2014. The Department in order to be responsive to the press and treating incidents of accidental drug overdose death in the same manner as any other public health epidemic created aggregate data reports from several different data sets in the Department. As with all other Department epidemiological reports the data reports were created and compiled based upon the Department’s data reporting guidelines and in consideration of the [Health Insurance Portability and Accountability Act (HIPPA)] Privacy rule requirements utilizing the Expert De-identification Methodology contained in United States Department of Health and Human Services (‘DHHS’), Office of Civil Rights’ Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability (HIPPA) Privacy Rule November 26, 2012 (‘Guidance’).”

such records are in an electronic format and the public body would not be unduly burdened in providing such data.”)(emphasis added).

² Your complaint does not precisely reflect your December 2, 2014 APRA request, which is set forth above.

Ms. Morgan's response details the HIPPA regulations, which DOH contends require de-identification and prohibits a more detailed response, and further observes that "[a]ll of the information requested by the Providence Journal was contained in various different data sets, had not been organized, aggregated and/or combined and/or had not been sufficiently analyzed or gathered so as to be contained in one single report." Despite the foregoing, DOH reports that:

"Department staff took the available data in both electronic and hard copy form and developed a report in response to the Providence Journal's APRA Request in accordance with the Department's data guidelines regarding the de-identification of data and the requirements of the [HIPPA].

On December 16, 2014, within the statutorily required ten (10) business days, the Department provided the Providence Journal with the [] report for 2011, 2012 and 2013 ('Report'). [] This Report is based on available Department aggregate data involving cases where the manner of death is not natural and the manner of death is by overdose from illicit drugs or prescribed medications. There was no way within the available data sets to identify whether the deaths were caused specifically by opioids as opposed to other prescribed or illicit drugs.

If the Department records did not specifically identify a City or Town as the location of an individual's death then the jurisdiction of the police department contained in the Department records was used as the death location. The Report clearly indicated that if the death location and/or incident city were missing from the Department records then the Report location of death would reflect the police department jurisdiction. In some incidents both the incident city and the police jurisdiction were missing. This category of decedent whose death location was not identified and/or there was no identified local police department was included in the Report as a death occurring in an 'Unknown Location.'" (Emphases added).

The affidavits support Ms. Morgan's response. You provided no rebuttal. Additional facts may be set forth below as needed.

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.

The APRA provides that unless exempt, "all records maintained or kept on file by any public body, whether or not those records are required by any law or by any rule or regulation, shall be public records and every person or entity shall have the right to inspect and/or copy those records at such reasonable time as may be determined by the custodian thereof." R.I. Gen. Laws § 38-2-

3(a). Notwithstanding the foregoing, the APRA also provides that “[n]othing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made except to the extent that such records are in an electronic format and the public body would not be unduly burdened in providing such data.” R.I. Gen. Laws § 38-2-3(h).

Here, on or about December 2, 2014, you sought:

- The number of overdose deaths, by city and town, for 2011;
- The number of overdose deaths, by city and town, for 2012;
- The number of overdose deaths, by city and town, for 2013;
- The number of suspected and/or confirmed overdose deaths, by city and town, to date for 2014.”

Your request also sought “how many of the overdoses in each of the city and town involved opioids.” Based upon the plain language of your request, it is clear that you sought the “number” or “how many” deaths were caused by overdose and/or opioids, as well as the city/town where the overdose death occurred.

The evidence demonstrates that the DOH responded to your APRA request, but rather than providing document(s) that the DOH maintained at the time your APRA request was made, see R.I. Gen. Laws § 38-2-3(h), the DOH created a Report from other documents and/or data that – at least in DOH’s view – was responsive to your request within the limitations imposed by HIPPA. This Report listed the city or town where a death occurred (if known) and the number of deaths reported in a city or town. If the number of deaths in a particular city or town was five (5) or less, the Report did not contain the precise number of overdose deaths, but instead simply related “5 or Less;” and if the location of death could not be ascertained, the Report indicated “Unknown Location” and listed the number of deaths that fell within this category. It should be noted that a Report is provided for 2011, 2012, and 2013, and on April 14, 2015, the DOH provided a report for calendar year 2014.³ The Reports contain data for “accidental drug overdose,” but does not identify the number of overdose deaths involving opioids. On this point, the evidence reveals that the DOH does not maintain records that breakdown the number of overdose deaths caused by opioids. It appears that the Reports for 2011, 2012, and 2013 were transmitted to you via e-mail. In its entirety this transmittal e-mail provided “Here is the info broken down by town from 2011-2013. We are accumulating the 2014 data and hope to have that to you soon.” Your complaint takes issue with the Report’s identification of “5 or less,” rather than the precise number of deaths, and the Report’s categorization of “unknown location.”

In Chase v. Department of Corrections, PR 11-05, we noted that Inmate Chase:

“complain[ed] that the Department of Corrections never provided [him] with ‘true copies’ of these records. Instead, the evidence reveals that the Department of Corrections provided [him] written responses to the information [he] sought.

³ It is our understanding that you also received the 2014 Report on or about this date.

Upon receipt of a records request, a public body is obligated to respond in some capacity within ten (10) business days, either by producing responsive documents, denying the request with a reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. Here, the Department of Corrections failed to do so. Instead, the Department of Corrections only provided [Chase] with written answers to [his] records requests. Although [the Department of Corrections] attests that [it] provided [Chase] with all three pieces of information that [he] requested, the evidence supports (as admitted by the Department of Corrections) that [Chase] requested documents and those documents were not provided to [him]. Accordingly, this Department finds that the Department of Corrections violated the APRA when it failed to provide [Chase] with documents responsive to [his] ‘request.’”

See also Smith v. Rhode Island Department of Education, PR 15-12 (violated APRA by providing aggregate data and not responsive source documents).

Here, we have been provided no evidence that the DOH maintained, at the time of your APRA request, a single document responsive to your request for the “number,” “how many,” and location of overdose and/or opioids deaths that occurred from 2011 to the time of your request. The evidence is uncontradicted. See Morgan letter dated March 27, 2015 (“the Department did not have the records in the form and manner requested by the Providence Journal in December 2014”); (“All of the information requested by the Providence Journal was contained in various different data sets, had not been organized, aggregated and/or combined and/or had not been sufficiently analyzed or gathered so as to be contained in one single report.”)

While the DOH arguably could have denied your APRA request because it did not maintain a single responsive document, see R.I. Gen. Laws § 38-2-3(h), the DOH took a different route and in response to your APRA request for the “number,” “how many,” and location of overdose and/or opioids overdose deaths, the DOH created a document that provided aggregate data. But see Smith, PR 15-12; Chase, PR 11-36. Unlike Smith and Chase, you take no issue with the fact that DOH created a document in response to your APRA request, however, you do object to the contents or the manner in which this document was created, specifically, categorizing the number of deaths as “5 or less” and as “unknown location.”

As noted above, “[n]othing in [the APRA] shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made except to the extent that such records are in an electronic format and the public body would not be unduly burdened in providing such data.” R.I. Gen. Laws § 38-2-3(h). Having created a document in order to (attempt) to fulfill your APRA request, we find nothing within the APRA – nor have you directed this Department to any authority – that a public body violates the APRA when the newly created document contains the type of broad categories that form the basis of this complaint. Stated differently, while the APRA surely provides a remedy to compel the disclosure of a public record maintained by a governmental entity at the time of the APRA request, in the context of this case, the APRA provides no right or remedy to compel the DOH to “reorganize, consolidate,

or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made[.]”⁴ R.I. Gen. Laws § 38-2-3(h). Additional support for our conclusion is found in the remedies provided by the APRA.

For instance, since the evidence demonstrates that DOH does not maintain a single document responsive to your December 2, 2014 APRA request, see supra, in essence, you ask this Department and/or the Superior Court to direct the DOH to create a more responsive document that details the precise number of overdose and/or opioids deaths per municipality and the location of the “unknown” deaths. But, as already discussed, the remedy you seek is not available pursuant to the APRA and neither this Department, nor the Superior Court, has the authority under the APRA to direct a public body to create, compile, or consolidate documents under the circumstances presented in this case. See R.I. Gen. Laws § 38-2-3(h).

While no evidence has been presented to suggest that the DOH maintains a single responsive document, an issue remains in our minds whether the DOH maintains various “source” documents from which responsive data can be gleaned. While we question whether these various “source” documents fall within the scope of your APRA request, in the interest of thoroughness, we address this issue and find that the DOH does maintain “source” documents from which, at least some of the requested information can be gleaned. See Morgan letter dated March 27, 2015 (“All of the information requested by the Providence Journal was contained in various different data sets, had not been organized, aggregated and/or combined and/or had not been sufficiently analyzed or gathered so as to be contained in one single report.”) For example, the DOH maintains autopsy reports, death certificates, toxicology reports, some police reports, and other documents that either DOH creates or receives that may lead to, or memorialize, on an individual basis a person’s cause and location of death. It is our understanding that it is these types of documents that encompass the electronic documents that are maintained (scanned) into the DOH database. None of these documents, however, even if redacted, are public records.

Rhode Island General Laws § 23-3-23 provides in relevant part, that “it shall be unlawful for any person to permit inspection of, or to disclose information contained in, vital records, or to copy, or issue a copy, of all or part of any vital record except as authorized by regulation.”⁵

⁴ Since the “source” documents in this case represent scanned hard copy documents of “vital records,” we question whether DOH maintains records in an “electronic format” as contemplated by R.I. Gen. Laws § 38-2-3(h). Ultimately, the resolution of this question is unnecessary. The Providence Journal does not raise this issue and does not suggest that the last clause within R.I. Gen. Laws § 38-2-3(h) has any applicability to this case. Moreover, seemingly, our discussion concerning Chapter 3 of Title 23, see infra, would apply to any argument that DOH was required to “reorganize, consolidate, or compile” any electronic “vital records” data into a new Report. In any event, it bears noting that with respect to the “unknown location” and the number of opioid-overdose deaths, the evidence reveals that this information could not be ascertained from any documents, and therefore, at least with respect to these two (2) categories, any further discussion/analysis concerning reorganization, consolidation, or compilation is without moment.

⁵ For the present purposes, the regulations are not material.

(Emphases added). Moreover, “vital records” is defined as “records of birth, death, fetal death, marriage, divorce, and data related to those records.” R.I. Gen. Laws § 23-3-1(18)(emphasis added). The plain language of these provisions make clear that DOH may not disclose “information contained” in “all or part of any vital record,” which includes records and data relating to death. As such, we find this language clear and unambiguous and that this language prohibits the dissemination of the “source” documents, in whole or in part, even if the identity of the decedent were redacted. While Chapter 3 of Title 23 would not necessarily exempt the police reports possessed by DOH, our review of a sample of these police reports finds that a cause of death was not memorialized in these police reports. Considering that these police reports were created prior to the medical examiner’s cause-of-death determination, this finding is hardly surprising. Accordingly, the police reports maintained by the DOH are not responsive to your APRA request.

Lastly, it is our understanding that Dr. Stanley maintains a worksheet of suspected overdose deaths. At the time of your APRA request, the 2014 worksheet was a work-in-progress and it is our understanding that no worksheets were maintained prior to 2014. Generally speaking, this worksheet contains various data on a particular decedent, which comes from the “source” documents described earlier. Since this worksheet consists of “information contain[ed] in” vital records, and in fact contains data derived from vital records, to the extent that it might be responsive to your request, it is also exempt from public disclosure pursuant to R.I. Gen. Laws § 23-3-23. See also R.I. Gen. Laws § 38-2-2(4)(K).

Although the Attorney General has found no violations, nothing within the APRA prohibits an individual 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 your 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,



Lisa Pinsonneault
Special Assistant Attorney General

Cc: Jane E. Morgan, Esq.