



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

August 27, 2014

PR 14-22

Mark McBurney, Esquire

Re: Sulser v. Department of Public Safety

Dear Mr. McBurney:

The investigation into the Access to Public Records Act (“APRA”) complaint filed against the Department of Public Safety (“DPS”) on behalf of your client, Mr. Craig Susler, is complete. You complain that the DPS violated the APRA when it denied a February 21, 2014 APRA request<sup>1</sup> seeking a Bureau of Criminal Identification (“BCI”) record for a particular individual. In its March 6, 2014 correspondence, the DPS denied the APRA request, citing, *inter alia*, R.I. Gen. Laws § 12-1-4.

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 DPS violated the APRA. See R.I. Gen. Laws § 38-2-7. In other words, we do not write on a blank slate.

Here, you claim that the BCI record requested for a particular individual is a public record, either in whole or in a redacted manner. Respectfully, we disagree.

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<sup>1</sup> In its response the DPS places the date of the APRA request at February 24, 2014, and the record evinces both a February 21, 2014 and a February 24, 2014 APRA request. Since both APRA requests seek the same BCI record concerning the same individual, this discrepancy is of little moment to us.

Rhode Island General Laws § 12-1-4 provides:

“[t]here shall be a division of criminal identification in the department of the attorney general to be in charge of a chief who shall be appointed by the attorney general to serve at the pleasure of the attorney general, and who shall devote all of his or her time to the duties of his or her office. \* \* \* In addition to availability of records to law enforcement agencies and officers, the records shall be made available to any attorney of record in any criminal action, and any officials of businesses which are required by federal or state law or regulation to effectuate a criminal background check of potential or prospective employees. The information shall be confidential and shall be used only by the employer for the employee's application of employment.” (Emphasis added).

To be sure, this Department’s prior findings, as well as the language of R.I. Gen. Laws § 12-1-4, make clear that BCI records for named individuals are “confidential.” In re Narragansett Police Department, ADV PR 00-03 (“If the General Assembly had intended to permit all members of the public access to the BCI database, it would have been superfluous for the General Assembly to enact specific provisions granting employers of identified professions access to this information.”).

Despite the foregoing provision, you raise several arguments in support of your position. Most notably, you argue that United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) requires disclosure and that “[t]o the extent that any [Rhode Island] statute contravenes Reporters Committee, the latter prevails.”

While Reporters Committee similarly considered (and exempted) the public disclosure of BCI records for a particular individual, as you observe in your complaint, the United States Supreme Court did so pursuant to a balancing test, which examined the public interest in disclosure. Most importantly for our present purposes, Reporters Committee did not examine any particular state statute that prohibited disclosure. Even though the Rhode Island Supreme Court has related that case law interpreting the Freedom of Information Act (“FOIA”) provides useful guidance when interpreting the APRA, see e.g., Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 558 n.4 (R.I. 1989), we know of no authority – and none has been presented for our consideration – to support your argument that Reporters Committee trumps the confidentiality provision detailed in R.I. Gen. Laws § 12-1-4, particularly in this case where the APRA request was made to a State – and not a federal – agency. Indeed, while Reporters Committee conducted a balancing test between the public interest and the privacy interest to conclude that the requested BCI record was exempt from disclosure, the Rhode Island Supreme Court has made clear that when a document falls within any enumerated APRA exemption, a public body may not conduct a balancing test and the document is exempt from public disclosure. See DARE v. Gannon, 713 A.2d 218, 225 (R.I. 1998)(“We also reject DARE’s contention that if any document falls within the APRA’s enumerated exemptions, the United States and Rhode Island Constitutions, as well as the terms of the APRA, require the administrative agency to demonstrate that the relevant privacy interests outweigh the public right to access the records.”). As a result of R.I. Gen. Laws

§ 12-1-4, the requested BCI record is exempt from public disclosure and accordingly, it is unnecessary to determine whether the requested BCI record would (or would not) be exempt pursuant to R.I. Gen. Laws § 38-2-2(4)(D)(c), the state equivalent of the FOIA provision examined in Reporters Committee. See R.I. Gen. Laws § 38-2-2(4)(S).

In a related argument you similarly claim that no privacy interests are at stake in this case because you only seek the date a BCI report was conducted on a particular individual and the DPS could redact all other information. As framed by you, the APRA request merely seeks the “existence” of a BCI report for a particular person and does not seek the “content” of a BCI report for a particular person. For this reason, you claim that the DPS violated R.I. Gen. Laws § 38-2-3(b) when it failed to provide a reasonable segregable BCI report. This argument misses two points.

First, since you have requested a BCI report for a particular individual, any redacted record would provide not only the date a BCI was conducted, but would also reveal whether a particular individual had a BCI report. Your complaint acknowledges this fact noting that since the “arrests/convictions would be completely stripped out a redacted BCI records [would] contain[] only a date and [the person’s] name.” See also Brady, 556 A.2d at 559 (“the report at issue in the present case specifically relates to the job performance of a single readily identifiable individual. Even if all references to proper names were deleted, the principal’s identity would still be abundantly clear from the entire context of the report.”). Second, and more importantly, nothing within R.I. Gen. Laws § 12-1-4 suggests that a law enforcement agency, such as the DPS, may provide a redacted BCI report. See id. Rather, R.I. Gen. Laws § 12-1-4 delineates those who may obtain a BCI record – “law enforcement agencies and officers \* \* \*[,] any attorney of record in any criminal action, and any officials of businesses which are required by federal or state law or regulation to effectuate a criminal background check of potential or prospective employees.”<sup>2</sup> Other than these situations, “[t]he information shall be confidential.” In re Narragansett Police Department, ADV PR 00-03. For this reason, we also conclude that the BCI record requested was not reasonable segregable, and therefore, the DPS did not violate the APRA when it did not provide you a redacted BCI report for a particular person.

Next, you contend that the DPS violated R.I. Gen. Laws § 38-2-3(b) when it exempted the entire BCI record from disclosure, yet failed to “state in writing that no portion of the document or record contains reasonable segregable information that is releasable.” R.I. Gen. Laws § 38-2-3(b). On this aspect of your complaint, we observe that the DPS’s March 6, 2014 denial letter provides, in part, “[a]s BCI information is not considered a public record and its release is prohibited by Rhode Island statutes and the United States Supreme Court, we will not disclose said information in its entirety or in a redacted format.” We find that such notification satisfies R.I. Gen. Laws § 38-2-3(b) and thus find no violation.

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<sup>2</sup> You claim that R.I. Gen. Laws § 12-1-4 pertains only to employees and not “appointees,” but a reading of the entirety of R.I. Gen. Laws § 12-1-4 fails to support this argument. Instead, as noted in the text, among those who may obtain a BCI record are “any officials of businesses which are required by federal or state law or regulation to effectuate a criminal background check of potential or prospective employees.”

You also contend that the DPS violated R.I. Gen Laws § 38-2-7(c), which provides that:

“[a] public body that receives a request to inspect or copy records that do not exist or are not within its custody or control, shall, in responding to the request in accordance with this chapter, state that it does not have or maintain the requested records.”

The foregoing provision was added to the APRA in 2012, and this Department has not previously had the opportunity to examine this provision. In your complaint, you reference 5 U.S.C. § 552(a)(6)(F), which you suggest raises the same issue and provides that:

“[i]n denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.”

Here, R.I. Gen. Laws § 38-2-7(c) was proposed as an APRA amendment by this Department to make clear that a public body must respond to an APRA request, even if the public body did not maintain any requested records. Indeed, in prior years, this Department had found various public bodies in violation of the APRA for failing to respond to an APRA request, even though the public body did not maintain any responsive records. See e.g., Howard v. DEM, PR 11-35 (“Under the APRA, however, even assuming the DEM may not possess the requested records or claims that the requested records were otherwise maintained by another public body, it was nevertheless required to respond, in writing, within ten (10) business days of your request.”); Bartash v. Town of Tiverton, PR 09-17 (finding that Town of Tiverton violated APRA by not responding to request within ten business days even though Town did not possess requested records).

In this case, however, the DPS did respond to the APRA request, indicating that the requested BCI record was exempt from public disclosure pursuant to, inter alia, R.I. Gen. Laws § 12-1-4. While the verbiage of R.I. Gen. Laws § 38-2-7(c) differs from the language set forth in 5 U.S.C. § 552(a)(6)(F), with respect to your argument that the FOIA “squarely addresses this issue,” we observe that the FOIA provides an exception where “providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.”<sup>3</sup> Since the DPS responded to the APRA request, and since the requested BCI record is exempt from public disclosure as discussed herein, we find that the DPS did not violate the APRA when it did not effectively confirm to you whether the DPS maintained a BCI record for a particular individual. Indeed, doing so would have confirmed (or refuted) that the particular individual whose BCI record you seek either does or does not have a BCI record, and accordingly, implicate the very interests protected by R.I. Gen. Laws § 12-1-4. See also R.I. Gen. Laws § 38-

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<sup>3</sup> Subsection (b) references the FOIA exemptions.

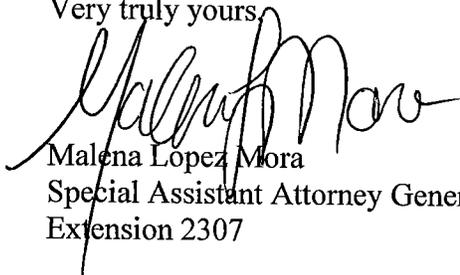
2-2(4)(S); D’Amario v. State, 686 A.2d 82 (R.I. 1996). In this respect it is our understanding that only persons who have been arrested (but not necessarily convicted) would have a BCI report, and thus, the existence of a BCI report for a particular person, even if redacted, signifies the existence of a prior arrest. Therefore, we find no violation.<sup>4</sup>

Finally, you allege that the DPS violated R.I. Gen. Laws § 38-2-3(j), which provides in relevant part that “[n]o public records shall be withheld based on the purpose for which the records are sought[.]” You provide no evidence that the DPS denied access to the requested BCI record “based on the purpose for which the records are sought,” and instead, the evidence reveals that the DPS’s denial was based upon, inter alia, R.I. Gen. Laws § 12-1-4.

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,



Malena Lopez Mora  
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Extension 2307

Cc: Ms. Lisa Holley, Esquire

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<sup>4</sup> In your rebuttal, you claim that the DPS “concedes” that it “does not have records responsive to the request.” While our above finding makes extended discussion unnecessary, we do not similarly read the DPS’s statement. Specifically, in its response, the DPS notes that “[a]lthough the [DPS] does not maintain BCI records, the [DPS] did not state that the records do not exist[.]” and instead, denied the APRA request for the reasons stated herein. (Emphasis added). As correctly noted by the DPS, the DPS does not “maintain BCI records,” rather, the Department of Attorney General maintains the electronic database. See R.I. Gen. Laws § 12-1-4. We do not read the DPS’s statement to address whether or not it maintains a BCI record for the individual whose record you seek.