



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400 - TDD (401) 453-0410

*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

April 30, 2015  
PR 15-16

Gretchen Bath, Esquire

**Re: Bath v. Rhode Island Office of Health and Human Services**

Dear Attorney Bath:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Office of Health and Human Services (“EOHHS”) is complete.

On December 5, 2014, you made an APRA request to EOHHS seeking:

“All public records addressing Medicaid coverage of Sovaldi, whether thru fee-for-service Medicaid or through managed care organizations.

The records should be specific to Sovadli. I do not seek general pharmacy coverage records.

I do not need copies of the minutes of the Drug Utilization Board for the period 6/3/14 or before.”<sup>1</sup>

While your December 5, 2014 APRA request was still pending, on December 10, 2014, you made a second APRA request to EOHHS seeking:

“1. Records of memoranda and other instructions issued by EOHHS to UHC and/or NHPRI regarding coverage of transsexual surgery and/or gender dysphoria, subsequent to the attached 8/8/14 Memo from Deborah Florio.

---

<sup>1</sup> We are advised that by email dated December 18, 2014 you apparently sought to narrow or clarify the scope of this APRA request. It is unclear to us what effect, if any, this email had on EOHHS’ search, retrieval, and production.

2. Records dated on or about 8/8/14 which address the circumstances under which the above conditions are covered by FFS Medicaid.”

By letter dated December 18, 2014, EOHHS referenced the two (2) pending APRA requests and indicated, in relevant part:

“OHHS is extending the time limit allowed to respond to your request to thirty (30) business days from the date of receipt of the request for good cause. OHHS extends the time to respond in order to allow the staff the time necessary to compile the data. However, we will make every effort to respond to your request as quickly as possible.”

You filed the instant APRA complaint “concerning EOHHS’ alleged ‘good cause’ explanation for extending the time to respond to two separate APRA requests [you] made[.]” In particular, you claim that EOHHS’ response was not “particularized to the specific request made” and merely provided a “generic” explanation for extending the time to respond to both pending APRA requests. You also relate that with respect to the December 10, 2014 APRA request, you “do not believe that EOHHS can demonstrate that additional time is necessary to avoid undue burden.” According to your complaint, the December 10, 2014 APRA request concerned “a very narrow topic and seeks records produced in a very recent time-frame,” are “not voluminous,” and should be “readily available.” You also point out that the documents responsive to your December 10, 2014 APRA request were “in part” the subject of another APRA request, which EOHHS responded to in mid-October 2014 “without needing an extension.” Based on the foregoing, you claim that EOHHS failed to comply with R.I. Gen. Laws § 38-2-3(e) when it extended the time to respond to the two (2) APRA requests without providing a “particularized” explanation, and that EOHSS did not have “good cause” to extend the time to respond to your December 10, 2014 APRA request.

In response to your complaint, this Department received an affidavit from Deborah A. George, Esquire, Acting Administrative and Legal Support Services Administrator for EOHHS. As explained by Ms. George, in relevant part:

“Upon receipt of these requests for public records regarding Sovaldi and gender dysphoria, [EOHSS] requested staff check their files for paper documents and email for any records responsive to these public records requests. Nine EOHHS staff were asked to search for records/email responsive to the APRA requests.

Once the staff compiled their documents/email, three file boxes of responsive records were retrieved. [EOHSS staff] reviewed all of the documents for responsiveness to the request and whether they were not public due to one of the exceptions set forth in RIGL 38-2-2(4)(A)-(AA).”

Ms. George also relates that on January 20, 2015, EOHHS sent you a letter advising that the documents relating to your December 5 and December 10, 2014 APRA requests were ready for your inspection, and that:

“[f]or both requests, compliance with the ten day period placed an undue burden on EOHHS staff that required additional search and retrieval time. Both requests were broad in that they required nine staff members, including senior staff members, to perform detailed searches of electronic and paper records. The staff constraints were compounded by the timing of the request, i.e., the holiday season and staff vacations. Both the Sovaldi and transgender requests each produced hundreds of pages of responsive documents. EOHHS designated specific staff persons to coordinate the search and retrieval process. Those staff members held meetings to map out a strategy for coordinating the response. Staff persons drafted instructions for persons they believed might be in possession of requested documents. As part of that coordination effort, staff persons were designated to supervise and coordinate the execution of the search and retrieval process. Legal and other staff persons then reviewed hundreds of pages of documents to protect Medicaid member confidentiality, attorney client privilege and insure that only ‘public records’ were released. Staff persons were then required to organize the documents and present the documents to [you] for inspection.”

By letter dated February 2, 2015, you filed a rebuttal, claiming that EOHHS “failed \* \* \*to treat each APRA request individually with regard to the reason for the need for additional time and to provide explanations ‘particularized to the specific request made.’” You assert that EOHHS’ “explanation was generic, and improperly treated two very distinct requests without differentiation.” Your rebuttal also provides that:

“[w]hile EOHHS now claims it had good reasons for requesting an extension (the requests were broad, there were staff constraints, the timing was near the holidays, staff vacations, etc.), such post-hoc rationales should be rejected. The time and place for explaining the need for additional time was in the 12/18 letter.”

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 EOHHS violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

Rhode Island General Laws § 38-2-3(e) provides in full:

“[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request. If the inspection or copying is not permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request. Any such explanation must be particularized to the specific request made. In such cases the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body.” (Emphasis added).

See also R.I. Gen. Laws § 38-2-7 (“for good cause, this [ten (10) business day time limit] may be extended in accordance with the provisions of subsection 38-2-3(e)”).

Here, we find no violations. While EOHHS’ December 18, 2014 letter extending the time to respond could have explained the extensions in a more “particularized” manner, we are hard pressed to find that the December 18, 2014 correspondence violated the APRA. On this note, while not determinative, there is no dispute that the December 18, 2014 correspondence did reference the subject-matter of the December 5, 2014 and December 10, 2014 APRA requests, and indicated additional time was required to allow staff to complete its search, retrieval, and production. Considering the volume, breadth, and sequence of your APRA requests, see infra, we have no doubt that this extension fell within the scope of the APRA. See R.I. Gen. Laws § 38-2-3(e).

We also conclude that EOHHS had “good cause” to extend the time to respond to your December 10, 2014 APRA request. While you characterize this APRA request as generally narrow and limited in scope, it is significant that the December 10, 2014 APRA request was subsequent to your December 5, 2014 APRA request.<sup>2</sup> As such, your claim that EOHHS lacked good cause to extend the time to respond to your December 10, 2014 APRA request ignores the fact that at the time of your December 10, 2014 APRA request, your December 5, 2014 APRA request was already pending. With respect to the December 5, 2014 APRA request, the evidence reveals that EOHHS retrieved two (2) boxes of responsive documents for your inspection and the fact that the EOHHS was already searching and retrieving documents responsive to your December 5, 2014 APRA request, combined with the other factors set forth in Ms. George’s affidavit, satisfies EOHHS’ burden to demonstrate that an extension of time was necessary to avoid imposing an undue burden on the public body with respect to your December 10, 2014 APRA request. Id. Lastly, while perhaps not relevant to our instant consideration, it is

---

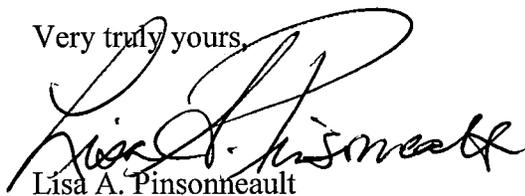
<sup>2</sup> You take no issue of EOHHS’ extension of time regarding your December 5, 2014 APRA request.

also not lost upon this Department that in response to a September 2014 APRA request, EOHHS responded to your request without extending the response time.

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 black ink, appearing to read "Lisa A. Pinsonneault", written over a printed name.

Lisa A. Pinsonneault  
Special Assistant Attorney General

LP/pl

Cc: Deborah A. George, Esq.