

June 4, 2013

VIA ELECTRONIC AND REGULAR MAIL

Dr. Joshua M. Sharfstein
Secretary, Maryland Department of Health and Mental Hygiene
201 W. Preston Street
Baltimore, Maryland 21201

**Re: Administrative Review Of The Department's Denial of
Irvin Muchnick's Public Information Request**

Dear Secretary Sharfstein:

This firm represents Irvin Muchnick, a journalist and author who propounded a public records request to the Department of Health and Mental Hygiene on February 13, 2013. The record, an incident report of a drowning at a public pool, was provided but heavily redacted.

As set forth in the enclosed Memorandum, Mr. Muchnick was not given a particularized explanation for the Department's redactions, as is required by the Maryland Public Information Act. He was provided only with the conclusory assertion that the redacted information "qualifies as a medical record."

Moreover, the redacted information plainly does not qualify as a medical record. Indeed, the agency has offered no explanation as to how the redacted information might satisfy the statutory definition of that term. To the contrary, as is set forth in more detail in the enclosed correspondence, the Attorney General has already rendered a formal Opinion on this very subject, concluding that event reports like the one Mr. Muchnick seeks are *not* medical records.

Accordingly, to vindicate his right to public information and the procedural safeguards that protect it, Mr. Muchnick hereby requests administrative review pursuant to the Public Information Act, SG § 10-622(b), and submits the enclosed correspondence and Exhibits in

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support. Please direct any communications regarding his appeal to this firm, and advise us of any Department-specific procedures that may apply to it.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: Patrick S. Kabat
Patrick Kabat

cc: Patricia O'Connor, Esq.
Dr. Clifford Mitchell

May 29, 2013

BY ELECTRONIC AND FIRST CLASS MAIL

Patricia O'Connor, Esq.
Office of the Attorney General
Maryland Department of Health and Mental Hygiene
300 West Preston Street, Room 302
Baltimore, Maryland 21201
Patricia.O'Connor@maryland.gov

Dear Ms. O'Connor:

As you know, this firm represents journalist Irvin Muchnick in connection with his request, made pursuant to the Maryland Public Information Act ("MPIA"), for an incident report submitted by the operator of a public pool to the Maryland Department of Health and Mental Hygiene ("DHMH"). As you also know, DHMH produced to Mr. Muchnick a heavily redacted copy of the report he requested, asserting that it was obliged to make those redactions by the Maryland Confidentiality of Medical Records Act ("MRA").

On May 13, 2013, I discussed with you why the MRA is inapplicable to incident reports requested pursuant to the MPIA and pointed you specifically to your Office's formal Opinion so stating.¹ As I explained, under the plain text of the MRA, an incident report does not constitute a "medical record" within the meaning of that statute. Accordingly, its provisions requiring releases from "persons in interest" are inapplicable. In short, whether Muchnick would require a release if he sought the deceased swimmer's medical records from a treating hospital is irrelevant to his entitlement to the incident report prepared by a licensed public pool, even if portions of that incident report were to reflect his medical condition.

During our discussion on May 13, you asserted that, in responding to Mr. Muchnick's MPIA request, the agency's primary duty is to protect privacy and to err on the side of nondisclosure. In fact, the MPIA establishes the opposite presumption, placing an affirmative duty on the DHMH to permit public inspection of records subject *only* to specific statutory exemptions—exemptions that must be construed narrowly and in favor of disclosure. *See, e.g., Kirwan v. The Diamondback*, 352 Md. 74, 80-81, 721 A.D.2d 196, 199 (1998)) (quoting MPIA § 10-612(b)). Indeed, although agencies are obligated to provide *particularized* reasons for any redactions, in this case Mr. Muchnick has been provided with no such explanation apart from the

¹ See 90 Opinions of the Attorney General 45, 52 (2005), available at <http://www.oag.state.md.us/Opinions/2005/90oag45.pdf>.

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conclusory (and incorrect) assertion that the incident report he seeks constitutes a “medical record.”

I have heard nothing from you since May 13. If the agency is now prepared to provide Mr. Muchnick with an un- or less-redacted version of the incident report, please let me know promptly. If it continues to take the position that the incident report at issue is a medical record requiring waiver by a “person in interest,” Mr. Muchnick will seek administrative review by the DHMH pursuant to MPIA § 10-622(b). In that regard, please treat this letter as notice of a formal request for such review. A copy of this request will be transmitted to the Secretary of the Department of Health and Mental Hygiene under separate cover. We set forth below the grounds upon which Mr. Muchnick seeks administrative review.

The MPIA “establishes a public policy and a general presumption in favor of disclosure of government or public documents. . . . [and] ‘shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.’” *Kirwan*, 352 Md. at 80-81, 721 A.D.2d at 199 (quoting MPIA § 10-612(b)). This presumption of public access is subject only to such specific exemptions as are provided by statute, which must themselves be narrowly construed in favor of disclosure. *Fioretti v. Maryland State Bd. Of Dental Examiners*, 351 Md. 66, 77, 716 A.2d 258 (1998). The MPIA does not permit an agency to determine on an *ad hoc* basis that certain records should not be disclosed based on generalized concerns about the sensitivity of the information they contain. However well-intended those concerns may be, public records simply cannot be withheld unless the legislature has specifically exempted them from the statute’s reach.

As you know, on February 13, 2013, Mr. Muchnick submitted a public records request seeking, among other things, the incident report of a drowning at the Meadowbrook Aquatic and Fitness Center in Baltimore. The DHMH provided Mr. Muchnick with a redacted version of the incident report on February 18, redacting both the questions and answers to Items 6-10 on the incident report, and part of Item 4. Ex. B. Upon Mr. Muchnick’s request, the DHMH subsequently provided to him a blank incident report form so that he could see what information was sought by Items 6-10. That form revealed that, in addition to all of the questions, responses to such medically irrelevant prompts as “Identify Each Emergency Response Unit (EMS, Police, or Fire) and Provide Report #” had been redacted. Ex. C. In addition, the DHMH did not issue particularized justifications until April 12, 2013, when it stated that answers to questions 4 and 6-10 were redacted because the information “qualifies as a medical record under Md. Health-General Code Ann. § 4-301(i)(2)(iii)(1).” Ex. A.

It does not. The DHMH has purported to invoke the MRA through a provision of the MPIA that requires an agency to permit inspection of documents “unless otherwise provided by law,” MPIA § 10-613(a)(1), and referred to Section 4-301 of the MRA, which provides for the confidentiality of specifically defined “medical records.” Under the plain language of that statute, however, the incident report Mr. Muchnick has requested simply does not satisfy the definition of a medical record for purposes of the confidentiality provisions of the MRA.

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In order to meet the MRA's definition, a "medical record" must satisfy three separate criteria:

- (1) it must be "entered in the record of a patient or recipient,"
- (2) it must be information that "identifies or can readily be associated with the identity of a patient or recipient," and
- (3) it must "relate[] to the health care of the patient or recipient."

HG § 4-301(i). The information concealed by the DHMH's redactions fails each of these requirements.

First, though the DHMH bears the burden to provide particularized justifications for withholding any information, MPIA § 10-614(b)(3); *Fioretti*, 351 Md. at 78, 716 A.D.2d at 264, it has not stated that the incident report was entered into any "patient" file, nor even that any such file exists. The incident report fails to qualify as a "medical record" on that ground alone.

Further, even if the deceased swimmer had been a cognizable patient, and even if the incident report had been entered into a patient file in the medical records of the receiving hospital, the information could not properly be withheld under the MRA because its confidentiality provisions "do[] not apply to information that is not kept in the medical record of a patient or recipient that is related to the administration of a health care facility, including: (i) Risk management [and] (ii) quality assurance." HG § 4-302(b)(1). The mandatory incident report is a quintessential risk management document, submitted to a regulator to aid it in its supervision of public pool licensees.

Second, the redacted information neither identifies, nor can be readily associated with the identity of the deceased swimmer. Indeed, as far as can be ascertained from the unredacted portion, the incident report only identifies the deceased as "swimmer," and the DHMH has neither suggested there are any uniquely specific references to the swimmer's identity in the redacted portion nor provided any basis for withholding any such details.

Even if the DHMH had made some showing that the redactions were necessary to conceal identifying details, they were nevertheless improper because the MRA's confidentiality provisions *by the statute's own terms* do not apply to information about "the presence and general health condition of the patient." HG § 4-301(b)(1); § 4-302(c). This, also, is a position your Office has formally recognized. 94 Md. Op. Atty. Gen. 44, 49 (2009) ("A health care provider may disclose 'directory information' concerning a patient - defined as information concerning the presence and general health condition of the patient - without the authorization of a person in interest, unless the patient expressly directs otherwise in writing."). In short, it is improper to redact a requested document based on the absence of a release from a "person in

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interest” where there is every indication that the redactions merely conceal “directory information.” HG § 4-302(d)(4).

Finally, several redacted answers simply cannot relate to the deceased swimmer at all. For example, Item 6 asks who treated the victim, and Item 10 requires the identification of the emergency response unit involved. Ex. B. That information cannot identify or be readily associated with the deceased swimmer’s identity and was improperly redacted on this ground alone.

Third, much of the redacted information does not relate to the provision of health care at all. To begin with, the operator of a public pool is not a “provider of health care.” HG § 4-301(g); *see* 94 Md. Op. Atty. Gen. at 48-49 (2009) (“Under the statute, the phrase “health care provider” includes licensed health care professionals, health care facilities such as hospitals, clinics, and medical laboratories, health maintenance organizations, and the agents and employees of those individuals and entities.”). And even when the MRA is properly invoked by a “patient” in the care of a “health care provider” in whose patient file a particular record is contained, the third requirement narrows the exemption’s scope to those records in which the patient might have a colorable privacy interest. Accordingly, with the possible exception of Items 4 and 7, the redactions at issue are unjustifiably overbroad because responses to those questions cannot relate to the provision of health care. Moreover, even as to those Items, information about the general condition of a cognizable patient requires no release, HG § 4-302(c), and the DHMH has not made a particularized showing that any of the redacted information constitutes anything other than nonconfidential “directory information.” This omission is particularly significant because the DHMH has already disclosed—as it must²—the deceased swimmer’s autopsy report.

The foregoing analysis is consistent with your Office’s formal position on medical records. It was for precisely these reasons that the Office of the Attorney General deemed “event reports” created by the Baltimore County Fire Department recording the dispatch of ambulances ineligible for withholding under the MRA. Addressing Baltimore County’s request for guidance, the Attorney General concluded that this type of information, notwithstanding that it may refer to injuries, treatment, or medical conditions, is *not* a medical record and is *not* subject to the confidentiality shield of the Medical Records Act. 90 Opinions of the Attorney General 45, 52 (2005).

For all of these reasons, whether or not Mr. Muchnick is a “person in interest” to whom medical records may properly be released is simply irrelevant for purposes of the MPIA; the

² The MPIA itself specifically exempts “an autopsy report of a medical examiner” from the category of “required denials.” MPIA § 10-617(b)(2)(i). The autopsy report provides extensive and graphic details about medical treatment, physical condition, and organ harvesting. There is no suggestion that any information concealed by redaction provides anything more than generalities, let alone the type of detailed information contained in the autopsy.

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incident report, and the information contained in it, are not a medical record.³ Simply put, the redacted information is *not* “privileged and confidential under Maryland’s medical records law,” which, per a formal Opinion of the Attorney General and a plain reading of the Medical Records Act, does *not* “requir[e] DHMH’s nondisclosure under Md. State Government Code Ann. § 10-615.” Ex. A.

If, in light of the foregoing, the DHMH is prepared to reconsider its position and produce additional, unredacted portions of the incident report at issue, please let me know promptly. Otherwise, we will assume that we have reached an impasse and will pursue administrative review. In that regard, we will include you by copy when we transmit this letter to the Secretary of the DHMH. Please direct all correspondence and notices relating to Mr. Muchnick’s request for an unredacted copy of the incident report to this firm at the address below.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 
Patrick Kabat

cc: Clifford S. Mitchell, MS, MD, MPH

³ During our conversation, you referred to the “person in interest” definition in the MPIA itself. State Government Code § 10-611(f). That provision is irrelevant to Mr. Muchnick’s record request and your denial of it under the MRA. It applies only under specifically delineated contexts, restricting access to retirement records, SG § 10-616(g), personnel records, SG § 10-616(g), and subjects of law enforcement investigations, *e.g. City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 841 A.2d 10 (Ct. Sp. App. 2004), but does not restrict information about incident reports like the one at issue here.

Exhibit A



STATE OF MARYLAND

DHMH

Maryland Department of Health and Mental Hygiene

Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein M.D., Secretary

Prevention and Health Promotion Administration

Michelle Spencer, MS, Director

Donna Gugel, MHS, Deputy Director

Ilise D. Marrazzo, RN, BSN, MPH, Acting Director, Maternal and Child Health Bureau
Deborah B. McGruder, MPH, PMP, Director, Infectious Disease Bureau
Clifford S. Mitchell, MS, MD, MPH, Director, Environmental Health Bureau
Donald Shell, MD, MA, Director, Cancer and Chronic Disease Bureau

Mr. Irvin Muchnick
P.O. Box 9629
Berkeley, CA 94709

Dear Mr. Muchnick:

Thank you for your email message of April 7, 2013. In response to your inquiries, DHMH and the Baltimore City Health Department respond as follows:

- 1. Will either of your agencies consider releasing an unredacted, or less-redacted, version of Meadowbrook Aquatic Center's incident report in last October's drowning death of Louis Lowenthal? I am not persuaded by the explanation I was given for many, or perhaps all, of the redactions, and I contemplate pursuing an appeal under public information law if the current level of release stands and the reasons for redactions are not more compellingly justified.*

DHMH is legally prohibited from providing what you are requesting because you are not the subject of any of the records you seek. For the purpose of Maryland's statutory schemes governing the disclosure of medical records and personal information in the setting of public records, the subject of the record is called the person in interest. You are not a person in interest of any of the records at issue and you have not provided DHMH authorizations to release the records signed by the persons in interest. Consequently, DHMH may produce to you only the information previously provided.

The first section of redacted information qualifies as a medical record under Md. Health-General Code Ann. § 4-301(i)(2)(iii)(1). The redacted portion of the record is privileged and confidential under Maryland's medical records law, requiring DHMH's nondisclosure under Md. State Government Code Ann. § 10-615. The second section of redacted information is unrelated information resulting from recycling used paper in the fax machine. DHMH is prohibited by Md. State Government Code Ann. §§ 10-624 and 10-626 from disclosing the names and other notations in that section, and the personal identifying information contained in the third redacted section, the driver's license.

- 2. Any suggestion that health agencies, whether state or local, are not empowered to follow up with Meadowbrook in the matter of a death incident report is nonsense. My crude research shows that "an inadequately protected swimming pool" is the first in a list of 14 examples of a public health "nuisance" under § 20-301 of the Maryland code. Though it is true that the bulk of the following statutory language deals with sanitation, there is no question that the Secretary of Health has the authority, in appropriate circumstances, to inspect, investigate, serve written notice on the perpetrator of a nuisance, or even file a*

201 W. Preston Street, Baltimore, Maryland 21201
410-767-6742 • Fax 410-333-5995

Office of Environmental Health and Food Protection
6 St. Paul Street, Suite 1301, Baltimore, Maryland 21202
410-767-8400 • Fax 410-333-8931

Toll Free 1-877-4MD-DHMH
TTY for Disabled Maryland Relay Service 1-800-735-2258
Web Site: <http://phpa.dhmh.maryland.gov>

complaint with the county circuit court to seek fines or other relief. The state and local health authorities have chosen not to do so in the Lowenthal/Meadowbrook matter. On what basis was that choice made?

As I previously explained, this matter was within the jurisdiction of the Baltimore City Health Department (BCHD), to whom the pool regulatory program has been delegated, including investigatory duties relating to incidents like this incident. In a case of this type, the environmental health program of the Baltimore City Health Department as the delegated authority would investigate licensing, structural and functional conditions as appropriate.

Related to policy issues, unexpected deaths in children are referred to a Child Fatality Review, which makes recommendations for changes in policy and legislation based on tragedies such as this. Although the discussions, deliberations, and details of individual child fatality cases are confidential, the Child Fatality Review process culminates in an annual report, which provides recommendations to the Governor, General Assembly, and the public on changes to law, policy, and practice to prevent child death. You can find information about the Child Fatality Review teams at: <http://phpa.dhmh.maryland.gov/mch/SitePages/cfr-home.aspx>.

Sincerely,



Clifford S. Mitchell, MS, MD, MPH
Director, Environmental Health Bureau

Cc: Joshua M. Sharfstein, MD, Secretary
Maryland Department of Health and Mental Hygiene

Oxiris Barbot, MD, Commissioner, Baltimore City Health Department
Mary Beth Haller, Esq., Assistant Commissioner Baltimore City Health Department Bureau of
Environmental Health

Exhibit B



State of Maryland
Department of Health and Mental Hygiene
Division of Community Services
6 St. Paul Street, Suite 1301
Baltimore MD 21202-1608

Phone (410) 787-8417, Fax (410) 333-8926, Toll Free 1-877-4MD-DHMH ext. 78417

PUBLIC POOL AND SPA INJURY AND ILLNESS REPORT FORM

Maryland Public Pools and Spas regulations (COMAR 10.17.01.51) require a public pool or spa owner to report to the Department of Health and Mental Hygiene (DHMH):

- Within 24 hours of the incident, an injury, drowning, near drowning, or suction entrapment occurring at a pool or spa that results in death or requires resuscitation or admission to a hospital,
• Within 24 hours of the owner's/operator's knowledge of the incident, a waterborne illness contracted at a pool or spa, and
• Every 3 months during operation or at the facility's seasonal closure, a water rescue by aquatic safety personnel.
If a reportable incident occurs, complete the form, attached all required documentation, and submit to the local health department as stipulated.

1. Facility Name MEADOWBROOK AQUATIC & FITNESS CENTER.
2. Facility Address 5700 COTTONWORTH AVENUE County BALTIMORE CITY
BALTIMORE MARYLAND : 21204 Phone 410 433-8300
3. Owner's Name AQUATIC VENTURES LLC (LEASED BY)
4. Owner's Address 5700 COTTONWORTH AVENUE Phone 410 433-8300
5. Pool Management Company Name X NA Phone
6. Facility Type (i.e. community pool, school, hotel, condominium, health club) HEALTH CLUB
7. Pool or Spa Use (i.e. adult, general, residents or members only) MEMBERS ONLY.

1. Date of Injury or Illness 10 12 2012 2. Time 10 (a.m.) P.M. 3. Type of Injury or Illness, Specify below.
Active Drowning Passive Drowning Near-Drowning Water Rescue Suction Entrapment
Injury, Specify
Waterborne Illness, Specify X Other, Specify SEE BELOW.

4. Describe the injury or illness, attach addition page(s) if necessary. SWIMMER WHO HAD BEEN ATTENDING SWIM PRACTICE APPARENTLY REMAINED IN THE POOL AREA AS PRACTICE WAS ENDING. WHAT HAPPENED NEXT IS UNKNOWN AT THIS TIME. STAFF WAS ALERTED A SHORT TIME LATER THAT SWIMMER WAS AT THE BOTTOM OF THE POOL. SWIMMER WAS PULLED FROM THE POOL.

Table with 9 columns: Outdoor Facility, Indoor Facility, Main Pool, Wading Pool, Therapy Pool, Spray Pool, Spa, Swim Spa, Water Recreation Feature, Specify. Row 1: Outdoor Facility checked.

6. [Redacted]
7. [Redacted]
8. [Redacted]
9. [Redacted]
10. [Redacted]

11. Was a Certified Pool Operator Present No Yes-Attach Pool Operator's Certification
12. Was a Lifeguard Present No Yes-Indicate Number of Lifeguards Present 3 -Identify the lifeguard and victim location on a pool diagram, Submit with report-diagram, facility supervision plan, house rules, pool emergency plan, and lifeguard(s) certification.
13. Local and/or State Agencies Notified, Name and Date 911

1. Owner/Operator's Signature [Signature] Date 10-29-2012.
2. Print Name/Title JOHN CADIGAN GEN'L MANAGER Phone 410 433-8300
3. E-Mail jcadigan@hotmail.com Fax 410 433-0953

Exhibit C

