



Bobby Jindal
GOVERNOR

State of Louisiana
Department of Health and Hospitals
Bureau of Legal Services

Kathy H. Kliebert
SECRETARY

September 5, 2014

SENT VIA US MAIL
Mr. Richard Mahoney
P.O. Box 80318
Baton Rouge, LA 70898

And EMAIL: ahmemorial@yahoo.com

Re: *Richard Mahoney v. Kathy Kliebert, Secretary of the Department of Health and Human Services of Louisiana*, No. 632197, Sec. 25, 19th Judicial District Court

Dear Mr. Mahoney,

Attached please find the opposition to your *Writ of Mandamus* which was today filed with the clerk of court. If you have any questions or concerns, please do not hesitate to call my office at (225) 342-9286. I can also be reached via email at Stephanie.Borghardt@la.gov.

Sincerely,

A handwritten signature in blue ink that reads "Stephanie M. Borghardt".

Stephanie-M. Borghardt
Staff Attorney, Department of Health and Hospitals

versus

DEPUTY CLERK OF COURT

KATHY KLIEBERT, SECRETARY
OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES OF
STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

OPPOSITION TO PETITIONER'S WRIT OF MANDAMUS

MAY IT PLEASE THE COURT:

Petitioner's *Petition for Writ of Mandamus* should be dismissed. Despite Mr. Mahoney's claims, The Department of Health and Hospitals, (Improperly named as the Department of Health and Human Services of Louisiana and hereinafter referred to as "DHH") responded to each of Mr. Mahoney's La. R.S. 44.1 *et seq.* requests for documents. In each response, DHH informed Mr. Mahoney that the information he sought was specifically exempted from disclosure under the Public Records Act pursuant to La.R.S. 44.4.1.

DHH directed Mr. Mahoney to its website, where the statistical data that is tabulated and made public could be found. DHH additionally informed Mr. Mahoney that, upon receipt of payment, eighty-eight (88) pages of responsive documents would be mailed to him. DHH sent its final response to Mr. Mahoney on May 7, 2013, and Mr. Mahoney did not contact DHH about this request again until the filing and service of his *Writ of Mandamus* over a year later.

FACTS AND PROCEDURAL BACKGROUND

On September 8, 2011, a "Request for Information" was sent by Anne Mahoney to the physical address for the Louisiana Office of Public Health in New Orleans.¹ This request was simply marked: "Attn: Custodian of Records." On October 19, 2011, Richard Mahoney sent an identical "Request for Information" to the State Center for Health Statistics division of the Office of Public Health at its New Orleans P.O. Box.² These identical requests sought information contained in Reports of Induced termination of Pregnancy.³ Neither request was submitted to the

¹ Please see "Attachment A"

² Please see "Attachment B"

³ This information included: the procedure that terminated the pregnancy, the type of termination procedure, the additional procedures used for the termination, complications from the pregnancy termination, the reason for the pregnancy termination, the type of procedure done after the abortion, the medical condition of the patient about to

custodian of records publicly designated by DHH on its website.

On October 31, 2011, DHH responded to the identical requests submitted by Ms. Mahoney and Mr. Mahoney.⁴ Those responses summarized the requested information and informed Ms. and Mr. Mahoney that such information did not exist or was exempt from the Public Records Act.⁵ The response directed Ms. and Mr. Mahoney to the DHH website, where the responsive tabulations being performed by DHH could be found. A subsequent letter was sent to Mr. Mahoney on November 29, 2011 informing him that 88 pages of responsive documents would be provided to him upon receipt of the cost of copying and postage.⁶

On December 8, 2011, Richard Mahoney contacted DHH via email to discuss its two responses. He received responses the next day.⁷ Mr. Mahoney then waited until January 30, 2013 to contact next DHH via an email sent directly to then Secretary Greenstein and two others.⁸ That email again sought “statistical data” as well as “criminal negligence by the abortionists.” DHH responded via letter to this renewed request on February 5, 2013.⁹ That letter specifically reviewed the requests made by Mr. Mahoney as well as the numerous DHH responses. It also reminded Mr. Mahoney that he had not provided payment in order to collect the documents DHH had indicated were responsive over a year ago.

Mr. Mahoney again contacted then Secretary Greenstein and other DHH staff via email on May 1, 2013.¹⁰ He stated that though he had not paid to receive the eighty-eight (88) pages of responsive documents, others had made payment, received the documents, and he had reviewed them and found in them information contained on the DHH website. He had been specifically directed to that website in a prior DHH response.

undergo the abortion, the type of contraceptive used at the time of pregnancy, the number of previous pregnancies, the number of previous live births, the number of other terminations, the results of pathological examination(s), the fetal length, weight, and gestational age, the fate of the last previous termination, the date of the last live birth, and the type of contraceptive used at the time of the pregnancy.

⁴ Please see “Attachment C”

⁵ It also informed Ms. and Mr. Mahoney that medical records and records of medical procedures are not public records.

⁶ Please see “Attachment D”

⁷ Please see “Attachment E”

⁸ Please see “Attachment F”

⁹ Please see “Attachment G”

¹⁰ Please see “Attachment H”

On May 7, 2013, DHH again responded to Mr. Mahoney's request again stating that the information Mr. Mahoney sought was specifically excluded from Public Records Requests and that DHH was "legally prohibited from providing you with copies of these reports in response to your records request."¹¹

LAW AND ARGUMENT

Louisiana Code of Civil Procedure Article 3861 defines a Mandamus action as "a writ directing a public officer or a corporation to an officer thereof to perform any of the duties set forth in Articles 3863 and 3864." Those duties include "the performance of a ministerial duty required by law."¹² There exists no law requiring DHH to provide the information sought by Mr. Mahoney. Instead, the law specifically makes confidential and prohibits the disclosure of that information sought in Mr. Mahoney's request and, by extension, his *Writ of Mandamus*.

In *Wiginton v. Tangipahoa Parish Council*¹³, the First Circuit stated that mandamus is "an extraordinary remedy which is used sparingly by the courts to compel something that is clearly provided by law, and only where it is the sole available remedy or where the delay occasioned by the use of any other remedy would cause an injustice."¹⁴ The *Wiginton* court further stated that, "It is clear that the mandamus lies only to compel performance of purely ministerial duties. Our jurisprudence is clear that such writ may not issue to compel performance of an act which contains any element of discretion, however slight."¹⁵

1. The Information Sought by Mr. Mahoney is Specifically Excluded from the Public Records Act

Louisiana Revised Statute Title 44, the Public Records and Records Act, governs the disclosure of public records in Louisiana. La.R.S.44:4.1 describes those documents that are exceptions to this act, specifically recognizing "that it is essential to the operation of a democratic government that the people be made aware of all exceptions, exemptions, and limitations to the laws pertaining to public records." La.R.S. 44:4.1(B) states that:

¹¹ Please see "Attachment H"

¹² La.C.C.P. Article 3863, emphasis added

¹³ *Wiginton v. Tangipahoa Parish Council*, 790 So. 2d 160 (La. App. 1s Cir. 06/29/01) (rehearing denied)

¹⁴ Citing *Webre v. Wilson*, 672 So.2d 1124, 1130 (La.App. 1st Cir. 4/4/96)

¹⁵ *Id. Emphasis Added.*

“The legislature further recognizes that there exist exceptions, exemptions, and limitations to laws pertaining to public records throughout the revised statute and code of this state. Therefore, the following exemptions, and limitations are hereby continued in effect by incorporation into this chapter by citation...(24)R.S. 40:3.1, 31.14, 31.27, 39.1, 41...1299.35.10....2854.1.”

In his records request, Mr. Mahoney specifically referred to information and data captured as part of the “Record of Induced Termination of Pregnancy” required by La.RS 1299.35.10. That statute specifically states that “The report shall be confidential and shall not contain the name or the address of the woman.” Such records are among those specifically excluded by La.R.S. 44:4.1, shown above.

La.R.S.1299.35.10(D) states that DHH “shall be responsible for collecting all abortion reports and complication reports and evaluating all data gathered therefrom, and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.” That information is made publicly available on the DHH website, and Mr. Mahoney was directed to that data. Such data was also amongst the eighty-eight (88) pages of responsive documents that Mr. Mahoney himself acknowledges he had seen and reviewed.¹⁶

CONCLUSION

Plaintiff’s *Petition for Writ of Mandamus* should be dismissed. Despite Mr. Mahoney’s claims, The Department of Health and Hospitals responded to each of Mr. Mahoney’s La. R.S. 44.1 *et seq.* requests for documents. In each response, DHH informed Mr. Mahoney that the information he sought was specifically exempted from disclosure under the Public Records Act pursuant to La.R.S. 44.4.1. As such, DHH has provided to Mr. Mahoney all documents in its possession that it is required to provide and maintain according to law.

Respectfully submitted,


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Department of Health and Hospitals

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¹⁶ Please see “Attachment H,” wherein Mr. Mahoney states that the eighty-eight (88) page report “were none other than that which was on the DHH website.”

PLEASE SERVE:

Mr. Richard Mahoney
1831 Old Plantation Lane
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