



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

August 29, 2016

PR16-34

Mr. Mike Piskunov

**Re: Piskunov v. Town of New Shoreham**

Dear Mr. Piskunov:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Town of New Shoreham (“Town”) is complete. By email correspondence dated May 14, 2016, you alleged that the Town violated the APRA based on its response to your February 13, 2016 APRA request, which asserted that the records you requested do not exist. Specifically, by email dated February 13, 2016, you sought from the Town “the last 10 completed Internal Affairs reports.” Later, by email dated March 15, 2016, you clarified with the Town that you were “looking for the last 10 Internally investigated complaints resulting from citizen generated complaints.” In your May 14, 2016 complaint with this Department, you provided a link to a 2003 newspaper article, which you claim evidences that an internal affairs investigation was initiated in 2003.

In response to your complaint, this Department received an affidavit from Town Solicitor, Katherine A. Merolla, Esquire. In its response, the Town states that it:

has made inquiry of the Town Clerk, the Town Manager and the Town Police Chief. All of such officials have advised the undersigned [i.e., Ms. Merolla] that they have reviewed their files and that no such records exist. This representation should be enough to respond to the complaint, however, the Town adds the following information:

1. The Police Department Records Retention Schedule as issued by the Office of the Secretary of State Rhode Island State Archives & Public Records Administration provides that reports of Internal Affairs Investigations shall be retained for a period of seven years. The article to which the complainant sites [sic] refers to an incident which happened in 2003, over thirteen years ago.

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2. The undersigned has made inquiry of the current New Shoreham Police Chief Vincent Carlone who was a member of the Town's police force in 2003. Chief Carlone stated that to the best of his knowledge, information and belief there was no Internal Affairs Investigation report generated as a result of the 2003 incident involving [the probationary officer discussed in the article] because no formal complaint was made and [the probationary officer] resigned.
3. New Shoreham is a small community with only a few police officers. The police chief often resolves issues which may arise informally by speaking to the parties involved.

You did not provide a rebuttal.

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

Unless exempt, the APRA provides "[a]ll 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)(emphasis added). The APRA also provides that nothing within 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).

Here, we find no violation. The Town clearly stated that it did not maintain any responsive records and the only suggestion that has been offered to contradict the Town's position is a 2003 article. Construed most favorably in support of your position, the 2003 article relates that "none of the parties involved have lodged a formal complaint stemming from the fight," and that the Police Department "immediately launched an internal investigation." Respectfully, even assuming that the Police Department "immediately launched an internal investigation," in no way does this announcement ipso facto demonstrate that written documents were created and still maintained at the time of your request. See R.I. Gen. Laws § 38-2-3(h). This is particularly the case considering both the 2003 article and the Town's response indicate that the probationary officer resigned soon after the incident, and even more to the point, the Town's uncontradicted representation that its

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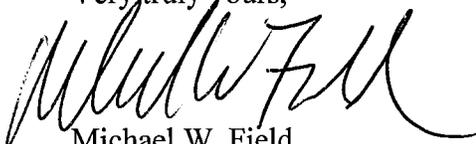
retention policy dictates that records pertaining to internal affairs investigations shall be retained for a period of seven years, or in this case, approximately 2010.

This Department has held on numerous occasions that the failure of a public body to produce records that do not exist does not violate the APRA. See Murphy v. City of Providence, PR 15-07, O'Rourke v. Bradford Fire District PR 13-11; Tetreault v. Lincoln School Committee and Superintendent of Schools, PR 99-14, Finnegan v. Town of Scituate, PR 97-02; Carrellas v. Portsmouth Police Department, PR 99-12. See also 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"). Since no evidence exists that such records existed at the time of your request, we find no violation.

While the Attorney General has found no violation, 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,



Michael W. Field  
Assistant Attorney General

MWF/kr

Cc: Katherine Merolla, Esq.