



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

June 12, 2015

PR 15-36

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. Department of Labor and Training

Dear Ms. Levin:

The investigation into your Access to Public Records Act (“APRA”) complaint filed on behalf of Access/Rhode Island against the Department of Labor and Training (“DLT”) is complete. You allege the DLT violated the APRA when it:

1. failed to provide certification that it had received APRA training pursuant to R.I. Gen. Laws § 38-2-3.16;
2. failed to timely respond to MuckRock’s APRA request for ‘Contracts of the ten (10) employees with the highest salaries’ (11 business days), see R.I. Gen. Laws § 38-2-3(e); and
3. failed to timely respond to MuckRock’s APRA request for a ‘spreadsheet, database or other summary indicating all employees who received payout upon leaving the agency in 2013, as well as what those payouts were’ (17 business days), see R.I. Gen. Laws § 38-2-3(e).

In response to your complaint, this Department received a substantive response from DLT Executive Counsel, Sean A. Fontes, Esquire, as well as an affidavit from DLT Senior Legal Counsel and APRA Compliance Officer, Valentino D. Lombardi, Esquire. With respect to your first allegation, Mr. Lombardi affirms that he “recall[s] having filed [his] last [APRA] certificate in August 2013 but does not have a copy of same.” Regarding the remaining two allegations, Mr. Lombardi adds:

“Shawn Musgrave representing MuckRock.com sent an APRA request for contracts for the ten (10) employees with the highest salaries which was faxed to the department’s Legal Division on April 29, 2014. On April 30, 2014, the request was forwarded to the Department of Administration (DOA) Human

Resources Office as the information requested is maintained there. I was informed by DOA on the same date that DOA Legal Counsel would handle the request. On May 9, 2014, I received a copy of an email from DOA Deputy Chief Legal Counsel indicating that he had responded to Mr. Musgrave's APRA request on that day. On May 14, 2014, I received a follow-up fax from Mr. Musgrave looking for the records noted in his April 29, 2014 fax. I immediately responded. I referred him [to] the DOA Deputy Chief Legal Counsel's response and since no contracts exist, the request was denied.

On June 24, 2014, the department's Legal Division received an APRA fax request from Mr. Musgrave seeking a spreadsheet, database or other summary of employee information for MuckRock.com. In his fax, Mr. Musgrave enclosed a copy of a prior fax dated June 9, 2014, which was never received by this division. As the information requested is maintained at the Department of Administration (DOA) Human Resources Office, an email dated June 25, 2014 was sent with the accompanying request. On June 30, 2014, I received a copy of an email from DOA Deputy Chief Legal Counsel indicating that he had responded to Mr. Musgrave's APRA request on June 23, 2014 noting that Mr. Musgrave had sent similar requests to all other agencies. On July 3, 2014, this office received another follow-up fax from Mr. Musgrave referring to the June 24, 2014 and June 9, 2014 faxes. On the same day, I responded to Mr. Musgrave indicating that his APRA request had already been answered by DOA Deputy Chief Legal Counsel and suggested he contact the legal counsel as noted in his response. I inadvertently noted June 9, 2014 in the email instead of the correct date of June 23, 2014."

Mr. Fontes' substantive response contains much of the same averments set forth in Mr. Lombardi's affidavit, but also raises Access/Rhode Island's standing to file this complaint.<sup>1</sup> With respect to your third allegation, Mr. Fontes also relates that although Access/Rhode Island "alleges that this request was faxed to DLT on June 9, 2014; \* \* \* a thorough review of the DLT Legal Division's records shows that the request was not received until June 24, 2014."

You filed a rebuttal dated January 30, 2015.

At the outset, we observe 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 a violation 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 DLT

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<sup>1</sup> Because we address the standing issue in Access/Rhode Island v. West Warwick School Department, PR 15-24, we need not re-examine this issue and instead reference and incorporate our prior discussion. As such, we review this complaint solely on the basis of this Department's independent statutory authority. R.I. Gen. Laws § 38-2-8(d).

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 § 38-2-3.16 provides that:

“[n]ot later than January 1, 2013, and annually thereafter, the chief administrator of each agency and each public body shall state in writing to the attorney general that all officers and employees who have the authority to grant or deny persons or entities access to records under this chapter have been provided orientation and training regarding this chapter.”

While Mr. Lombardi affirms that he “recall[s]” filing an APRA certificate in August 2013 and has “attended numerous Department of Attorney General Summits regarding this matter,” this Department has been provided no evidence that Mr. Lombardi, or anyone else from DLT, submitted an APRA certification to this Department for calendar year 2014 in accordance with R.I. Gen. Laws § 38-2-3.16, i.e., on or before January 1, 2014. Accordingly, we find that DLT violated the APRA.<sup>2</sup>

Next, we examine your second and third allegations that DLT responded to MuckRock’s APRA requests in an untimely manner. The APRA provides that:

“[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.” R.I. Gen. Laws § 38-2-3(e). See also R.I. Gen. Laws § 38-2-7.

With respect to your second allegation, the evidence demonstrates that MuckRock made an APRA request to the DLT on April 29, 2014. On May 14, 2014, eleven (11) business days after MuckRock’s APRA request, MuckRock sent a follow-up email, which DLT responded to on the same date indicating, in relevant part, that DLT had:

“forwarded your request to the Human Resources Division of the Department of Administration as if such records exist, they are maintained by that department. I

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<sup>2</sup> This Department’s records evidence that Mr. Lombardi attended the Attorney General’s Open Government Summit in August 2013. This program qualified as training pursuant to R.I. Gen. Laws § 38-2-3.16 for calendar year 2014. Nonetheless, no evidence has been presented that a certification form was filed as discussed above.

have been informed by DOA [D]eputy Chief Legal Counsel Peter Dennehy that he responded as follows: ‘The positions of most employees of the Department of Administration are in the classified service. A few positions are in the unclassified service. See chapter 36-4 of the RI General laws.’ The same would be true for the Department of Labor and Training. Since no contracts exist, your request is denied.”

While Mr. Lombardi contends that on April 30, 2014, he was informed by the Department of Administration that “DOA Legal Counsel would handle the request,” and that on May 9, 2014, he received a copy of an email from DOA Legal Counsel, “indicating that [DOA Legal Counsel] had responded to [MuckRock’s] APRA request on that day,” we have not been supplied with any evidence, *i.e.*, a copy of a correspondence, indicating that either DLT responded to MuckRock’s APRA request in a timely manner or that some other entity advised MuckRock that it was responding on behalf of DLT in a timely manner. Based upon the lack of evidence that the DLT, or some other entity on DLT’s behalf, provided a timely response, we must find that DLT violated the APRA when it responded on the eleventh (11<sup>th</sup>) business day.<sup>3</sup>

Lastly, you contend that the DLT violated the APRA when it failed to timely respond to MuckRock’s June 9, 2014 APRA request until July 3, 2014. In his affidavit, Mr. Lombardi affirms that MuckRock’s June 9, 2014 APRA request “was never received by this division” on June 9, 2014, and in his substantive response, Mr. Fontes represents that “a through review of the DLT Legal Division’s records shows that the request was not received until June 24, 2014.” Indeed, the evidence reveals that on June 25, 2014, Mr. Lombardi forwarded the APRA request to the Department of Administration “[s]ince it once again involves [Human Resources] records.” After receiving another follow-up e-mail dated July 3, 2014, Mr. Lombardi responded to MuckRock on July 3, 2014. Because the DLT claims that it did not receive MuckRock’s APRA request until June 24, 2014, and responded on July 3, 2014, DLT asserts that it responded within the ten (10) business days mandated by the APRA. See R.I. Gen. Laws § 38-2-3(e) (“A public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request”)(emphases added).

In support of your position, your January 30, 2015 rebuttal relates, in pertinent part:

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<sup>3</sup> It is our understanding that Mr. Dennehy retired from state service prior to the instant complaint being filed, which may explain the absence of DLT to provide the May 9, 2014 email from Mr. Dennehy to MuckRock. In your January 30, 2015 rebuttal, you indicate that although “Mr. Musgrave [of MuckRock] did receive an email from Peter Dennehy at the DOA that day [May 9, 2014,] nothing in the email indicated that it was on behalf of the DLT.” Your correspondence provides a copy of the May 9, 2014 e-mail and our review of this email provides no indication that the May 9, 2014 e-mail was sent on behalf of any other governmental entity, except the Department of Administration. In its entirety, this email provided “Shawn, the positions of most employees of the Department of Administration are in the classified service. A few are in the unclassified service. See chapter 36-4 of the RI General Laws. Peter [Dennehy].” There were some additional e-mails between Mr. Dennehy and MuckRock on May 9, 2014, but none of the e-mails are material to this discussion.

“[a]s for the third allegation, the [DLT] claims never to have received the original request for the records faxed to them on June 9, and only responded when a follow-up request was sent on June 24<sup>th</sup>. However, we have enclosed a copy of a document confirming that a fax was successfully transmitted on June 9<sup>th</sup> to the proper DLT fax number.”

Here, we find no violation. In particular, we have carefully reviewed the documents submitted with your January 30, 2015 rebuttal and find no document “confirming that a fax was successfully transmitted on June 9<sup>th</sup> to the proper DLT fax number.” Instead, our review finds only one document that appears to confirm the transmission of a facsimile, but this confirmation is dated April 29, 2014, not June 9, 2014. Additionally, this document indicates “Transmission: 29-Apr-2014 19:30:11 GMT” and contains the heading or subject-matter entitled “Confirm: Freedom of Information Request: Top-paid employee contracts.” We note that your second allegation pertained to an APRA request made on April 29, 2014 and contained a heading or subject-matter entitled “Freedom of Information Request: Top-paid employee contracts (Department of Labor and Training).” Your June 9, 2014 APRA request, however, contained the heading or subject-matter entitled “Freedom of Information Request: 2013 payout records (Department of Labor and Training).” Based upon the foregoing, the document referenced in your January 30, 2015 rebuttal does not “confirm[] that a fax was successfully transmitted on June 9<sup>th</sup> to the proper DLT fax number.” Accordingly, since no evidence has been presented to contradict Mr. Lombardi’s affidavit that MuckRock’s APRA request was not received until June 24, 2014, and since DLT responded on July 3, 2014, we find no violation. See Access/Rhode Island v. West Greenwich Police Department, PR 15-30; Eikland v. Bristol Police Department, PR 11-28.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). In this case, for the reasons discussed in West Warwick School Department, PR 15-24, we have reviewed this matter pursuant to the Attorney General’s independent statutory authority, and accordingly, any complaint or other action must be initiated on behalf of the public interest and not the Complainant. A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter\*\*\*.” See R.I. Gen. Laws § 38-2-9(d).

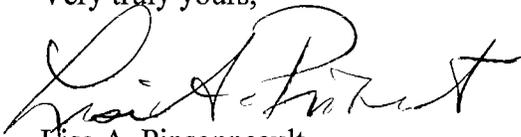
In this case, we find neither remedy is appropriate. The DLT submitted an APRA certification to this Department for calendar year 2014, and as discussed earlier, the evidence establishes that Mr. Lombardi had received APRA training during calendar year 2013 for calendar year 2014, yet had not submitted a certification form. Additionally, the DLT responded to MuckRock’s April 29, 2014 APRA request one (1) day late and based upon the evidence presented, this appears to be the result of a misunderstanding or as you phrase it, an “imprecise email sent by [the Department of Administration].” See January 30, 2015 rebuttal. The fact that Mr. Lombardi had received timely APRA training, yet had not submitted a certification form, and that the untimely

response of one (1) day appears to be the result of an “imprecise email” by another agency, supports our conclusion that no willful and knowing, or reckless, violation occurred. All of these factors distinguish this matter from East Providence City Council v. Department of Labor and Training, PR 02-09, where over a decade ago the Mercantile Division of the DLT responded to an APRA request in an untimely manner.

Although the Attorney General 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). Whether Access/Rhode Island would have standing to do so is, of course, a decision within the jurisdiction of the Superior Court and not this Department. This finding does serve as notice to the DLT that its omission violated the APRA and may serve as notice in a future similar situation of a willful and knowing, or reckless violation. We are closing this file as of the date of this correspondence.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lisa A. Pinsonneault".

Lisa A. Pinsonneault  
Special Assistant Attorney General

Cc: Sean M. Fontes, Esquire