



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 15-27

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. Department of Corrections

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 Corrections ('DOC') is complete. You allege the DOC 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 written procedures (27 business days), *see* R.I. Gen. Laws § 38-2-3(e); and
3. failed to timely respond to MuckRock's APRA request for the ten (10) employees with the highest salaries (11 business days), *see* R.I. Gen. Laws § 38-2-3(e).

In response to your complaint, we received an affidavit from DOC's Chief Legal Counsel, Kathleen Kelly, Esquire. In relevant part, Ms. Kelly affirms:

'On May 7, 2014, I reviewed an email sent on May 6, 2014 at 2:39 p.m. This email was sent from Shawn Musgrave of MuckRock.com. Mr. Musgrave requested confirmation of receipt of the May 6, 2014 email and an update on the request. This request was sent to me at Kathleen.Kelly@doc.ri.gov, as well as Susan.Lamkins@doc.ri.gov and doc.legal@doc.ri.gov. (See attached Exhibit #1).

The email of May 6, 2014 at 2:39 p.m was the first email I received regarding this request.

The email from Mr. Musgrave stated he had sent previous requests for this information to legal@doc.ri.gov. (See Exhibit #1).

Legal Assistant Leann Anderson, who has access to my emails, became aware of Mr. Musgrave's email on May 6, 2014 and on May 6, 2014 at 3:37 p.m. ran a 'test' email from her email address to doc.legal@doc.ri.gov. The 'test' email did not appear in the mailbox at doc.legal@doc.ri.gov. (See Exhibit #2).

On May 6, 2014 at 3:47 p.m. Ms. Anderson sent an email to ent.servicedesk@ri.gov the 'help desk' at the RI Division of Information Technology stating there appeared to be a problem with the DOC's external email, that it seemed messages were not appearing in the box, and requested assistance. (See Exhibit #3).

Ms. Anderson also indicated that she checked the external email address on a daily basis but there had been no messages contained in the box. (See Exhibit #3).

On May 6, 2014 at 3:48 p.m. Ms. Anderson received a response from Ramon Fernandez of the Department of Administration's Information Technology Unit indicating that due to statewide system changes mandated by the Department of Administration email addresses were changed. He further indicated these changes should not affect someone's ability to send and email to either address. Mr. Fernandez requested the email address of Muckrock.com. (See Exhibit #5).

On May 7, 2014 at 9:01 a.m. Ms. Anderson provided that information to Mr. Fernandez. (See Exhibit #6).

On May 7, 2014 at 9:28 a.m. Ms. Anderson received an email from the Department of Administration's Information Technology Unit that the matter was resolved. The email stated the addresses were in the system but Ms. Anderson no longer had the proper permissions to view the folder. (See Exhibit #7).

As previously indicated, I first received Mr. Musgrave's request on May 7, 2014. I responded to his request on the same day, May 7, 2014 at 4:31 pm. (Exhibit #8).

In my response I provided Mr. Musgrave with the requested documents and apologized for not responding sooner, indicating this was the first time I was aware of his request. No records requested were denied and no fees charged. (Exhibit #8).

As to the documents Mr. Musgrave requested (written procedures for requesting public records) those documents are accessible at any time on the Rhode Island Department of Corrections' public website.

On May 7, 2014 at 4:57 p.m. Mr. Musgrave sent another email to me at Kathleen.kelly@doc.ri.gov indicating he had sent a separate request on April 29, 2014 and inquired if I had received that request for information. (See Exhibit #9).

I immediately responded that I had not previously received this request and upon review asked for clarification regarding the request. (Exhibit #10).

On May 8, 2014 at 4:59 p.m. Mr. Musgrave responded that 'if no staff of Department of Corrections is under contract then you can consider this matter closed'. (Exhibit #10).

Based on Mr. Musgrave's response I considered the matter closed; however, per his request I confirmed this information via email on May 14, 2014 at 1:08 pm (See Exhibit #11).

One day past [sic] from the time of receiving the second request to Mr. Musgrave's response to consider the matter closed.

Six business days past [sic] from the time of receiving the second request to my follow-up confirmation on May 14, 2014.

Complainant alleges that the DOC failed to timely respond to the two public record requests indicated in his affidavit. On behalf of the DOC, I assert this is not the case. Upon receiving these public records requests via email on May 7, 2014 I responded well within the 10 day timeframe.

Prior to May 7, 2014 the requests from MurkRock.com [sic] appear to not have been received either due to the email address being disabled or prior access to the email being removed without the knowledge of the DOC."

Ms. Kelly also challenges Access/Rhode Island's standing to file this complaint.¹ By letter dated January 15, 2015, you filed a rebuttal.

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 DOC

¹ With respect to Ms. Kelly's argument that Access/Rhode Island lacks standing to file the instant complaint, we addressed this issue in a related complaint and our conclusion applies equally to this case. See Access/Rhode Island v. West Warwick School Department, PR 15-24. 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.’

Here, DOC presents no evidence that it 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. In the absence of this evidence, we find that DOC violated the APRA.²

Next, we examine your second and third allegations that DOC 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.

Here, we find that the DOC violated the APRA when it failed to respond in a timely manner to MuckRock’s APRA request dated March 31, 2014. Significantly, although Ms. Kelly asserts that she (and presumably other DOC officials) were not aware of the March 31, 2014 APRA request because the person who monitored the DOC legal e-mail box unknowingly had been denied access to this e-mail box, this Department has been presented with no evidence that the March 31, 2014 APRA request had been improperly addressed or made contrary to DOC’s APRA policies. Indeed, the evidence suggests that the March 31, 2014 APRA request had been received by DOC, although admittedly not able to be accessed by DOC. In the absence of the aforementioned circumstances, or perhaps other factors not readily apparent in this case, we conclude that this Department must find that DOC’s failure to timely respond violated the APRA. As framed by Access/Rhode Island in its January 30, 2015 rebuttal, “[a]lthough the [DOC’s]

² This Department’s records evidence that Ms. Kelly, as well as at least one other DOC attorney, 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.

explanation for why it did not receive the APRA requests may be a factor to consider at the next step in determining appropriate remedies, it is irrelevant for purposes of determining whether a violation took place.” In the context of these facts and this case, we agree.

Lastly, we consider your allegation that the DOC violated the APRA when it failed to respond within ten (10) business days to MuckRock’s April 29, 2014 APRA request. As framed in your complaint, DOC’s response “that no such documents exist, took 11 business days [and] violated § 38-2-3(e).” We find no violation.

Specifically, the evidence demonstrates that on April 29, 2014, MuckRock sent DOC an APRA request seeking the “[c]ontracts for the ten (10) employees with the highest salaries.” While DOC contends that it did not receive this APRA request for the reason discussed above, this argument is immaterial because on May 7, 2014, MuckRock sent a follow-up email to Ms. Kelly and there is no dispute that Ms. Kelly received this email on May 7, 2014. On this same day, May 7, 2014, Ms. Kelly responded to MuckRock and after apologizing for not receiving the April 29, 2014 APRA request, Ms. Kelly responded to MuckRock’s APRA request for the “[c]ontracts for the ten (10) employees with the highest salaries” by indicating, in relevant part:

‘Staff is not hired under a contract agreement. * * *

We do have some contracts for people to perform services for the DOC but they are not ‘employees of the department. For instance, we have a contract with LifeSpan (RI’s largest hospital group) for the psychiatrists that treat our offenders. They are employees of LifeSpan and we pay a rate per the contract for the doctors to treat here.

Let me know what information you want and I’ll gather up what we have that is public.”

The following day, MuckRock responded to Ms. Kelly:

“Thank you for your response. If no staff of Department of Corrections is under contract, then you can consider this request closed.

Please confirm that this is the case?” (Emphasis added).

Here, even assuming that the DOC received MuckRock’s APRA request on April 29, 2014, the evidence is undisputed that within five (5) business days (May 7, 2014), the DOC responded to MuckRock’s APRA request seeking “[c]ontracts for the ten (10) employees with the highest salaries” by indicating, inter alia, that “[s]taff is not hired under a contract agreement.” The following day, MuckRock responded by thanking Ms. Kelly for her response and relating that “[i]f no staff of Department of Corrections is under contract, then you can consider this request closed.” While MuckRock did seek confirmation of this situation, as of May 7, 2014, we find the evidence establishes that the DOC had responded to MuckRock’s April 29, 2014 APRA request and indicated it had no responsive documents since its “[s]taff is not hired under a contract

agreement.” Even as of May 8, 2014, MuckRock had related to DOC that “[i]f no staff of Department of Corrections is under contract, then you can consider this request closed.” All of these events occurred within ten (10) business days of MuckRock’s April 29, 2014 APRA request. The fact that MuckRock had sought confirmation that the DOC did not maintain any contracts for DOC employees—a matter that the DOC had already related on May 7, 2014—does not alter the legal analysis. Accordingly, we find no violation.

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 DOC has submitted its APRA certification to this Department, and as discussed earlier, the evidence establishes that DOC employees had received APRA training during calendar year 2013, yet had not submitted its certification. Additionally, with respect to the DOC’s failure to timely respond to MuckRock’s March 31, 2014 APRA request, the evidence establishes that DOC did provide the requested documents and that the untimely response was apparently the product of a DOC employee unknowingly being denied access to the DOC e-mail inbox. Even your January 30, 2015 rebuttal relates that “the Department’s explanation for why it did not receive the APRA requests may be a factor to consider at the next step in determining appropriate remedies.” We agree and based on the totality of circumstances, we find insufficient evidence to support a willful and knowing, or reckless, violation.³

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

³ Arguably, Chase v. Department of Corrections, PR 11-36, presented a “similar” situation, where the DOC failed to respond timely to an appeal petition. This case, of course, concerns the failure to respond timely to an APRA request. Considering the facts discussed herein, i.e., an employee unknowingly being locked-out of the DOC e-mail in-box, the evidence simply does not support a willful and knowing, or reckless, violation.

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the DOC that its omissions violated the APRA and may serve as evidence 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 black ink, appearing to read "Lisa Pinsonneault". The signature is fluid and cursive, with a large initial "L" and "P".

Lisa Pinsonneault

Special Assistant Attorney General

Cc: Kathleen M. Kelly, Esquire