



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 15-31

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. East Greenwich School Department

Dear Ms. Levin:

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

1. failed to provide certification that it 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 (41 business days), see R.I. Gen. Laws § 38-2-3(e);
3. failed to post APRA procedures on its website, see R.I. Gen. Laws § 38-2-3(d); and
4. failed to timely respond to MuckRock’s APRA request for a “full list of the teachers who have received layoff letters for the 2014-2015 school year, as well as the full list of teachers’ names submitted to the Rhode Island Department of Education for possible layoff for the 2014-2015 school year” (no response), see R.I. Gen. Laws § 38-2-3(e).

In response to your complaint, this Department received a substantive response from the School Department’s legal counsel, Raymond A. Marcaccio, Esquire. With respect to your substantive allegations, Mr. Marcaccio indicates that the School Department did not submit an APRA training certificate until September 2014 and acknowledges that its APRA procedures were not available on its website until October 20, 2014. Mr. Marcaccio also addresses the two (2) APRA requests made by MuckRock, indicating that the March 31, 2014 APRA request (allegation no. 2):

“was emailed from Mr. Musgrave to Victor Mercurio, Superintendent of the School Department seeking written procedures for making APRA requests. The next day, April 1, 2014, Ms. DiMeglio provided Mr. Musgrave a ten-page

document that set forth the School Department's policies and guidelines pertaining to open meetings and public records requests, adopted on October 4, 2011. \* \* \* Thereafter, on June 23, 2014, Mr. Musgrave sent a follow-up email to Ms. DiMeglio asking whether the School Department had any written procedures for APRA requests. Unknown to Mr. Musgrave was the fact that Ms. DiMeglio's earlier response had produced all written policies pertaining to APRA that were in existence. Thereafter, due to an oversight, Mr. Musgrave's follow-up question was not answered until August 20, 2014, when Ms. DiMeglio informed him that the School Department did not have any additional written procedures. \* \* \* Although the School Department admits its response to Mr. Musgrave's follow-up was overdue, it did not withhold public records from him, as there were no documents to withhold."

With respect to MuckRock's June 27, 2014 APRA request (allegation no. 4), Mr. Marcaccio argues that the documents requested were not public records. Since the requested records were not public records, the School Department suggests that no response was required, and in any event, a response was provided by letter dated January 16, 2015. Mr. Marcaccio also argues that Access/Rhode Island lacks standing to file the instant complaint.<sup>1</sup>

You filed a rebuttal dated January 30, 2015, which shall be discussed below.

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 School Department violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA provides that "[e]ach public body shall establish written procedures regarding access to public records[.]" R.I. Gen. Laws § 38-2-3(d). Effective September 2012, "a copy of these procedures shall be posted on the public body's website if such a website is maintained and be made otherwise readily available to the public." Id. In addition, R.I. Gen. Laws § 38-2-3.16, which also became effective September 2012, 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

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<sup>1</sup> With respect to the 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).

entities access to records under this chapter have been provided orientation and training regarding this chapter.”

Here, the School Department acknowledges that it failed to file a timely APRA certification pursuant to R.I. Gen. Laws § 38-2-3.16 and failed to post its APRA procedures in a timely manner on its website pursuant to R.I. Gen. Laws § 38-2-3(d). Although the School Department subsequently complied with both provisions, its failure to do so in a timely manner violated the APRA.

Next, we address your claim that the School Department failed to respond to MuckRock’s March 31, 2014 APRA request until the expiration of forty-one (41) business days in violation of R.I. Gen. Laws § 38-2-3(e). We find no violation.

In particular, the evidence demonstrates that by e-mail dated March 31, 2014, MuckRock made an APRA request to the School Department seeking “[w]ritten procedures for access to the agency’s public records, including any records request forms required or suggested by the agency.” The School Department responded the following day, April 1, 2014, indicating in relevant part that “attached is the East Greenwich School Committee’s Policy regarding open meetings and public requests.” Indeed, the attachment was entitled “A Guide to Rhode Island’s Laws on Open Meetings and Public Records,” and was adopted by the School Committee on October 4, 2011. In large part, the attachment contains excerpts from the APRA and contains text that is similar to the APRA.

In your rebuttal, you relate that the School Department:

“erroneously claims that it complied in a timely manner with the request for a copy of its APRA procedures. The [School] Department did provide a reply in a timely manner, but it was not a reply responsive to the request. The document provided by the [School] Department – a school committee policy that essentially reiterated the language of the open records statute was not the one that the APRA request sought even though the response implied otherwise. It did not include the required written procedures for filing APRA requests. Nor did the reply indicate that no written procedures were available, as it should have done under the circumstances, as per R.I.G.L 38-2-7(c). It was only after a follow-up request that the [School Department] acknowledged, in an August 20 email, that it did not have the written APRA procedures required by statute.” (Emphasis added).

Here, we begin with your acknowledgment – respectfully a significant acknowledgment – that the School Department “did provide a reply in a timely manner.” Since your complaint alleges that the School Department failed to provide a timely response to MuckRock’s March 31, 2014 APRA request, your recognition that the School Department “did provide a reply in a timely manner” is largely dispositive of this issue.

Despite the foregoing recognition, you argue in your rebuttal that the policy provided by the School Department “was not the one that the APRA request sought” and “did not include the

required written procedures for filing APRA requests.” In this respect, you no longer challenge that the School Department’s response was “timely,” but instead contend that the School Department’s “timely” response was not responsive or appropriate to MuckRock’s APRA request. See e.g., Access/Rhode Island v. Newport School Department, PR 15-30. This raises two (2) issues.

First, the issue you now raise – the appropriateness of the School Department’s April 1, 2014 response – was not raised in your complaint and instead was raised for the first time in your rebuttal. Consistent with this Department’s precedent, we decline to address an issue that was first raised in a rebuttal and that a public body has not had the opportunity to address. See e.g., Boss v. City of Woonsocket’s School Board Review Committee, OM 14-19; Mudge v. North Kingston School Committee, OM 12-35 (Department of Attorney General will not consider allegations first raised in rebuttal). Clearly, the School Department had no opportunity to address this issue and our January 6, 2015 acknowledgment letter made clear that “[y]our rebuttal should be limited to the matters addressed in the response and should not raise new issues that were not presented in your complaint or addressed in the response.” Since Access/Rhode Island was aware of the timeliness and appropriateness of the School Department’s April 1, 2014 response well before its December 2014 APRA complaint was filed with this Department, the issue concerning the appropriateness of the School Department’s response could have been, but was not, raised in your December 2014 APRA complaint. See e.g., Access/Rhode Island v. Newport School Department, PR 15-30. Accordingly, it would be improper for us to decide a matter first raised in your rebuttal where the School Department had no opportunity to present its arguments or evidence to this Department.<sup>2</sup>

Second, even if we were to ignore the fact that your argument concerning the appropriateness of the School Department’s response is not properly before this Department, we would still find no violation. While we have our concerns whether the provided APRA policy complied with R.I. Gen. Laws § 38-2-3(d), your argument that the provided document “was not the one that the APRA request sought” ignores the plain language of MuckRock’s March 31, 2014 APRA request, which sought the “[w]ritten procedures for access to the agency’s public records, including any records request forms required or suggested by the agency.” In brief, the School Department provided the APRA procedures that it maintained. Whether the School Department’s APRA procedures complied with the substantive provisions of R.I. Gen. Laws § 38-2-3(d) is an entirely separate question – one that you have not raised before this Department until your January 30, 2015 rebuttal, if at all. Since the School Department provided the

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<sup>2</sup> Additionally, if we required a public body to respond to an issue post-rebuttal – when the issue could have been raised in the complaint and/or been corrected within five (5) business days of our acknowledgment letter – we would be needlessly extending the timeframe within which open government cases are resolved by seeking a further response from a public body and presumably allowing an additional rebuttal from you limited to, once again, the issues addressed in the response. To further delay the resolution of other open government cases when this issue could have been clarified or corrected at the earliest possible juncture does not serve the public interest. See R.I. Gen. Laws § 38-2-8(b); Access/Rhode Island v. West Warwick School Department, PR 15-24.

document that it maintains in a timely manner, we find no violation. See R.I. Gen. Laws § 38-2-3(h).

Lastly, we consider your complaint that the School Department failed to timely respond to MuckRock's June 27, 2014 APRA request for a "full list of the teachers who have received layoff letters for the 2014-2015 school year, as well as the full list of teachers' names submitted to the Rhode Island Department of Education for possible layoff for the 2014-2015 school year."

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.

The School Department violated the APRA. While the School Department contends the documents requested were exempt from public disclosure – an opinion that we need not reach – there is no question that even if the School Department were correct in its legal conclusion, the APRA nonetheless required a response. Since the School Department failed to provide any response to MuckRock's June 27, 2014 APRA request until January 16, 2015 – well after the timeframes set forth in the APRA – the School Department violated the APRA. See R.I. Gen. Laws §§ 38-2-3(e); 38-2-7.

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).

Here, injunctive relief is not appropriate. The School Department has posted its APRA procedures on its website and has submitted an APRA certification to this Department. Both of these remedial actions occurred prior to the filing of the instant APRA complaint. Additionally, the School Department has indicated that the requested documents pertaining to MuckRock's

June 27, 2014 APRA request are not maintained. Even your rebuttal acknowledges that this type of “after-the-fact compliance may be a factor to consider in determining appropriate remedies.” While you assert that the foregoing violations are willful and knowing, or alternatively reckless, you provide no support or evidence for this conclusion.

Our main concern relates to the School Department’s failure to provide a timely response to MuckRock’s June 27, 2014 APRA request even though no responsive documents existed. In this respect, after MuckRock made its June 27, 2014 APRA request, MuckRock sent follow-up e-mails dated July 10, 2014, July 25, 2014, August 7, 2014, August 15, 2014, August 20, 2014, November 20, 2014, and December 11, 2014. None of these correspondences generated a response from the School Department until after Access/Rhode Island filed the instant complaint. Such a failure has led this Department to seek civil fines on numerous occasions. See e.g., DesMarais v. Manville Fire Department, PR 15-08; Scripps News v. Department of Business Regulations, PR 14-07; Kelly and Mancini v. Town of Warren, PR 14-19; International Assoc. of Firefighters v. Nasonville Fire Department, PR 14-24; Boss v. Woonsocket Superintendent’s Office, PR 13-19.

Therefore, consistent with this Department’s practice, and pursuant to this Department’s independent statutory authority granted pursuant to R.I. Gen. Laws § 38-2-8(d), the School Department shall have ten (10) business days from receipt of this finding to provide this Department with a supplemental explanation as to why its untimely response relating to MuckRock’s June 27, 2014 APRA request should not be considered a knowing and willful violation, or reckless, in light of the APRA, Supreme Court case law,<sup>3</sup> and this Department’s

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<sup>3</sup> The Rhode Island Supreme Court examined the “knowing and willful” standard in Carmody v. Rhode Island Conflict of Interest Comm’n, 509 A.2d 453 (R.I. 1986). In Carmody, the Court determined that:

“the requirement that an act be ‘knowingly and willfully’ committed refers only to the concept that there be ‘specific intent’ to perform the act itself, that is, that the act or omission constituting a violation of law must have been deliberate, as contrasted with an act that is the result of mistake, inadvertence, or accident. This definition makes clear that, even in the criminal context, acts not involving moral turpitude or acts that are not inherently wrong need not be motivated by a wrongful or evil purpose in order to satisfy the ‘knowing and willful’ requirement.” See id. at 459.

In a later case, DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994), the Court expounded on Carmody and held:

“that when a violation of the statute is reasonable and made in good faith, it must be shown that the official ‘either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute \* \* \* Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is ‘difficult to

precedent. Such a determination by this Department would subject the School Department to civil fines. At the end of this time period, we will issue our supplemental finding on this matter and determine whether civil fines are appropriate. Because of this Department's determination concerning Access/Rhode Island's lack of standing, and our determination that the Attorney General is pursuing this matter based upon our independent statutory authority set forth in R.I. Gen. Laws § 38-2-8(d), we are closing this file with respect to Access/Rhode Island, but this file remains open with respect to the Attorney General's independent statutory review as discussed, supra. Whether Access/Rhode Island would have standing to file a lawsuit is, of course, a decision within the jurisdiction of the Superior Court and not this Department.

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

Very truly yours,



Lisa Pinsonneault  
Special Assistant Attorney General

Cc: Raymond Marcaccio

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conceive of a violation that could be reasonable and in good faith. In contrast, when the violative conduct is not reasonable, it must be shown that the official was 'cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt.' (internal citations omitted). Id. at 1164. (Emphasis added).