



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 15-26

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. New Shoreham Police Department

Dear Ms. Levin:

The investigation into your Access to Public Records Act (“APRA”) complaint filed on behalf of Access/Rhode Island against the New Shoreham Police Department (“Police Department”) is complete. You allege the Police Department 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 maintain APRA procedures/failed to post APRA procedures on its website;
3. failed to timely respond to MuckRock’s APRA request for a copy of police logs for the past week (21 days), see R.I. Gen. Laws § 38-2-3(e);
4. failed to timely respond to MuckRock’s APRA request for arrest log information for the past twenty-four hours (6 days), see R.I. Gen. Laws § 38-2-3.2; and
5. failed to respond to MuckRock’s APRA request for arrest records for the past twenty-four hours (no response), see R.I. Gen. Laws § 38-2-3(e).

In response to your complaint, we received a substantive response and supporting e-mails from the Town Solicitor, Katherine A. Merolla, Esquire. Ms. Merolla denies that the Police Department violated the APRA because in the Town of New Shoreham:

“requests for public records pertaining to Town records are handled by the Town Clerk. The procedures, rules and regulations pertaining to APRA requests are clearly posted on the Town’s website and have been so posted since April 1, 2014.”

Ms. Merolla also contends that Access/Rhode Island lacks standing to file this complaint.¹

By letter dated February 10, 2015, you filed a rebuttal. You relate that “the [APRA] certification list provided [MuckRock] by [the Department of Attorney General] indicates that no representative from the Town of New Shoreham – police department or otherwise – was certified until May 9, 2014, after the initial APRA requests at issue here were first filed, and long after the statutory requirement for certifying employees had been in effect.” You also relate that:

“[r]egarding the second and third allegations, the [Police] Department states that its written procedures have been posted on the Town’s website since April 1, 2014. * * * First, as with the certification requirement, the adoption and posting of written procedures had been required for more than a year before the Department did so. Their response has thus confirmed our allegation. Second, it is worth noting that the first request Mr. Musgrave made to the Department was dated March 31, 2014, at least a day before the Town acknowledges it finally posted any procedures. In addition, in responding to the APRA request for its written procedures, the [Police] Department provided only a form for requesting records, and no written procedures at all.” (Emphases in original).

Lastly, in relevant part, you reference that the Police Department claims that:

“all requests for public records are handled by the Town Clerk. Leaving aside whether that is sufficient reason to fail to respond to the requests in a timely manner, the documentation included with our complaint shows that the police chief himself responded to the initial requests for records without suggesting that the Town Clerk be contacted.”

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

¹ With respect to the arguments that Access/Rhode Island lacks standing to file the instant complaint, we previously addressed this issue in a related complaint and our conclusion is equally applicable 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. See R.I. Gen. Laws § 38-2-8(d).

Initially, this matter requires us to identify the entity against which you filed the instant complaint. Your complaint makes the resolution of this question straightforward. The December 17, 2014 complaint contains the subject-heading “Complaint Against New Shoreham Police Department for Violations of APRA,” and the body of your complaint relates that you “write on behalf of ACCESS/RI to file a complaint against the New Shoreham Police Department[.]” This Department’s acknowledgment letter similarly identified the respondent public body as the New Shoreham Police Department. As such, it is quite evident that the focus of this complaint is on the New Shoreham Police Department, as opposed to the Town of New Shoreham (“Town”).

We begin by recognizing that your rebuttal references the Police Department’s claim that “all requests for public records are handled by the Town Clerk.” Respectfully, your rebuttal acknowledges the issue presented by this assertion, but fails to address its significance. In particular, after recognizing the Police Department’s position, your rebuttal relates that:

“[l]eaving aside whether that is sufficient reason to fail to respond to the requests in a timely manner, the documentation included with our complaint shows that the police chief himself responded to the initial requests for records without suggesting that the Town Clerk be contacted.”

Again, respectfully, the issue you identify, yet “leav[e] aside,” is the threshold issue that must be resolved.

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). As amended in September 2012, the APRA provided that:

“[t]hese procedures must include, but need not be limited to, the identification of a designated public records officer or unit, how to make a public records request, and where a public record request should be made, and 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.

While you correctly observe that the Police Department did not maintain APRA procedures, this conclusion does not end our inquiry because, as Ms. Merolla writes, in the Town of New Shoreham “requests for public records pertaining to Town records are handled by the Town Clerk.” In other words, pursuant to R.I. Gen. Laws § 38-2-3(d), the Town promulgated an APRA procedure whereby all APRA requests seeking documents from a New Shoreham department, including the Police Department, should be made to the Town Clerk. Indeed, our review of the Town’s website contains a link entitled “Public Records Request Guidelines,” and underneath this link is the language “applicable to all Town departments.” The Town’s APRA policy further provided:

“The Public Records Officer is Town Clerk Fiona Fitzpatrick, 401-466-3200. The regular business hours of the Town Clerk’s Department are 9:00 a.m. to 3:00 p.m. Our mailing address is New Shoreham Town Clerk, PO Box 220, Block Island RI 02807 and we are located in the Town Hall on Old Town Road in Block Island. Requests may be mailed to the PO Box, hand delivered, faxed to (401) 466-3219 or emailed to townclerk@new-shoreham.com.”²

This APRA procedure was posted on the Town’s website “since April 1, 2014.”

On past occasions, this Department has examined situations where a public body did, and did not, promulgate APRA procedures as required. For instance, in Stafford v. Rhode Island Family Court, PR 11-13, the Family Court promulgated a procedure concerning where and how APRA requests should be made. In Stafford, the request was not made pursuant to the established procedure, and after the Family Court did not respond to the APRA request in a timely manner, we found no violation. Specifically, we observed that because the APRA request was not made in accordance with the Family Court’s APRA procedures, the Family Court did not violate the APRA.

In Fitzmorris v. Portsmouth Town Council, PR 11-20, we faced a different situation where an oral APRA request was made during a Town Council meeting. After the Town Council failed to respond in a timely manner, we again examined whether or not the Town Council had promulgated APRA procedures and determined that the Town Council had failed to promulgate APRA procedures. Because the Town Council had not promulgated APRA procedures, we determined that nothing prohibited the oral APRA request from being considered a properly made APRA request. See id. (“This Department has previously recognized that the APRA does not dictate the method by which a request must be made when a public body has not ‘implemented a specific method by which APRA requests must be made.’”).

In this case, the Police Department is expressly included within the Town’s APRA procedures. As indicated, supra, the Town’s APRA procedure expressly includes “all Town departments” and identifies the public records officer as the Town Clerk. The Town’s APRA procedure also indicates that APRA requests may be made by mailing a request to the Town Clerk, hand-delivering a request to the Town Clerk, faxing a request to the Town Clerk, or e-mailing the Town Clerk.

Having reviewed the evidence presented, in particular MuckRock’s APRA requests and correspondences, it is clear that none of these various correspondences were made to the Town Clerk. Accordingly, since MuckRock’s APRA requests were not made in a manner consistent with the applicable APRA procedures, we find that the Police Department did not violate the APRA when it did not timely respond to MuckRock’s

² The Town’s APRA procedures have since been modified but these changes are not material to our discussion.

APRA requests dated May 7, 2014, June 9, 2014, and July 30, 2014. See Rosenfield v. North Kingstown School Department, PR 14-02 (“This Department has previously determined that an APRA request must first comport with a public body’s APRA policy before we can decide whether a violation has occurred, and we see no reason to depart from the plain language of the APRA and our findings.”); Stafford, PR 11-13.

Your rebuttal does not challenge that MuckRock’s May 7, 2014, June 9, 2014, and July 30, 2014 APRA requests were not made consistent with the Town’s promulgated APRA procedure, but you raise two issues. First, you relate that the Town indicates that its APRA procedure was not posted to its website until April 1, 2014 and “it is worth noting that the first request Mr. Musgrave made to the [Police] Department was dated March 31, 2014, at least a day before the Town acknowledges it finally posted any procedures.” (Emphasis in original). Although the timeframe and sequence you identify is correct, your argument ignores that your complaint contains no allegation that the Police Department responded in an untimely manner to MuckRock’s March 31, 2014 APRA request.³ Instead, you simply use MuckRock’s March 31, 2014 APRA request – a request that sought written procedures for access to the agency’s public records – to bolster your allegation that the Police Department did not maintain written APRA procedures pursuant to R.I. Gen. Laws § 38-2-3(d) (allegation no. 2). Since the APRA requests that form the basis of your untimely response allegations were all made by MuckRock after April 1, 2014, and because the appropriate APRA procedure was posted to the Town’s website “since April 1, 2014,” MuckRock’s March 31, 2014 APRA request is simply of no moment.

The second issue you raise is that “[l]eaving aside whether [the Town’s inclusion of the Police Department in its APRA procedures] is sufficient reason to fail to respond to the request in a timely manner, the documentation included with our complaint shows that the police chief himself responded to the initial requests for records without suggesting that the Town Clerk be contacted.” While we would have greatly preferred that the Police Chief had directed MuckRock to the appropriate public records officer, the failure to do so in this circumstance does not constitute an APRA violation. You provide no authority or argument that the Police Chief’s omission was an APRA violation.

In this respect, 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.”

³ The evidence reveals that the Police Chief advised MuckRock that the Town’s internet connection was unreliable and intermittent.

This provision was among the 2012 APRA amendments and was enacted to ensure that those “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.” *Id.* The plain language of this provision does not require that every town employee receive APRA training, but instead, is limited to “officers and employees who have the authority to grant or deny persons or entities access to records” under the APRA. Based upon this plain language, it is not difficult to conceive that among the purposes of this provision was to ensure that those “officers and employees who have the authority to grant or deny persons or entities access to records” were familiar with the APRA and its requirements.

As discussed, *supra*, the Police Chief was not designated as the public records officer for the Police Department, and instead, the Town Clerk was designated as the public records officer for all Town departments, including the Police Department. Having recognized that the Town Clerk, and not the Police Chief, was the designated public records officer, we are hard pressed to find that the Police Department, through the actions or omissions of the Police Chief, violated the APRA when the Police Chief did not direct MuckRock to the proper entity to make an APRA request. This is particularly the case when the appropriate APRA procedures “applicable to all Town departments” had been posted on the Town’s website in accordance with R.I. Gen. Laws § 38-2-3(d) for at least one (1) month *before* any of MuckRock’s APRA requests that form the basis of the untimely response allegations in your complaint. Again, while we would have greatly preferred that the Police Chief directed MuckRock to the appropriate public records officer, as a matter of law, MuckRock had been on constructive notice concerning the appropriate APRA procedures by virtue of the Town’s website since April 1, 2014. For all these reasons, we reject your allegation nos. 3, 4, and 5 alleging that the Police Department violated the APRA when the Police Department failed to timely respond to MuckRock’s APRA requests not made in a manner consistent with the applicable APRA posted procedures.⁴

⁴ It also bears noting that with respect to allegation no. 4, you contend that the Police Department violated R.I. Gen. Laws § 38-2-3.2 when it failed to respond to MuckRock’s APRA request for arrest log information within forty-eight (48) hours of the request. Instead, you contend that the Police Department responded within six (6) days. MuckRock’s July 30, 2014 APRA request, however, sought the requested arrest log information and indicated that MuckRock “look[s] forward to receiving [the Police Department’s] response to this request within 10 business days.” As discussed in Access/Rhode Island v. West Greenwich Police Department, PR 15-25, such a representation constitutes a waiver of the timeframe set forth in R.I. Gen. Laws § 38-2-3.2, and notwithstanding the issue discussed *supra*, this waiver constitutes an independent basis for our conclusion. See Gallucci v. Brindamour, 477 A.2d 617, 617 (R.I. 1984)(“Generally, a party or parties for whose benefit a right is provided by constitution, by statute, or by principles of common law may waive such right, regardless of the plain and unambiguous terms by which such right is expressed.”).

You also contend that the Police Department violated the APRA when it failed to submit an APRA certification form pursuant to R.I. Gen. Laws § 38-2-3.16, and when the Police Department failed to promulgate and post APRA procedures to its website. As the above discussion may have foreshadowed, we find no violations.

With respect to R.I. Gen. Laws § 38-2-3.16, no evidence has been submitted or gleaned that would suggest that the prerequisite set forth in this provision has been implicated, *i.e.*, an employee of the Police Department having “the authority to grant or deny persons or entities access to records” under the APRA. Instead, the evidence is clear that the Town Clerk serves as the public records officer for all Town departments, including the Police Department, and for this reason, the Police Department’s failure to provide a timely certification pursuant to R.I. Gen. Laws § 38-2-3.2 did not violate the APRA.

Further, you contend that the Police Department violated the APRA by failing to promulgate and post its APRA procedures on its website, but as discussed above, this omission does not violate the APRA because all Town departments, including the Police Department, are included within the Town’s APRA procedures, which had been posted on the Town’s website since April 1, 2014.⁵ While your rebuttal claims that no Town official submitted an APRA certification form until May 9, 2014, and that the Town violated the APRA by not posting its APRA procedure on its website until April 1, 2014, we return to the issue discussed at the beginning of this finding – the instant complaint was filed against the Police Department and not the Town. Whether the Town did or did not violate the APRA in the manner suggested by your rebuttal is not the issue presented by your complaint and the Town had no opportunity to address these newly minted allegations. As such, we decline to address the issues you raise against the Town in your rebuttal for the first time, and for the reasons discussed, find that the Police Department did not violate the APRA. See 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).

⁵ While the evidence suggests that the APRA procedures applicable at the time the instant requests were made had been posted on the Town’s website since April 1, 2014, it is unclear whether another version of the Town’s APRA procedures was posted on the Town’s website pre-April 1, 2014. In the context of the pending complaint, we need not resolve this factual issue. Additionally, your complaint indicates “[a] Muckrock visual review of the Town of New Shoreham websites on or before August 21, 2014 and site specific (‘site:www.new-shoreham.com’) Google searches (‘APRA’ and ‘public records’) found no procedures on any Town of New Shoreham website.” This averment conflicts with Ms. Merolla’s representation that the Town had its APRA procedures posted on its website “since April 1, 2014.” In resolving this conflict, we note that your complaint contains assertions from a third party, and not from the Complainant, and that no information has been provided concerning MuckRock’s search efforts. Most importantly, no screen snapshots have been provided of the Town’s website pages, which would have definitively identified the webpages MuckRock searched and the material the Town’s website contained at the time of the search.

Although the Attorney General has found no violation and 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. Please be advised that we are closing this 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

A handwritten signature in cursive script that reads "M. W. Field".

Michael W. Field
Assistant Attorney General

Cc: Katherine Merolla, Esquire