



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400 - TDD (401) 453-0410

*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

June 12, 2015

PR 15-34

Ms. Linda Lottridge Levin

Re: Access/Rhode Island v. Town of Scituate

Dear Ms. Levin:

The investigation into your Access to Public Records Act (“APRA”) complaint filed on behalf of Access/Rhode Island against the Town of Scituate (“Town”) is complete. You allege the Town 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; and
2. failed to maintain APRA procedures/post APRA procedures on its website, see R.I. Gen. Laws § 38-2-3(d).

As related by you, on March 31, 2014, Access/Rhode Island’s contractor, “MuckRock[, ] requested from the [Town] ‘Written procedures for access to the agency’s public records, including any records request forms required or suggested by the agency’ required by § 38-2-3(d).” In response to MuckRock’s APRA request, the Town responded the next day, April 1, 2014, by providing an APRA form, but supplied no APRA procedures. Based on this response, you argued that the Town “did not possess written procedures, but rather just a request form.”

In response to your complaint, this Department received a substantive response from the Town’s legal counsel, David M. D’Agostino, Esquire. Mr. D’Agostino writes that at or about the time the APRA was amended in 2012, his office engaged in a review and update of the Town’s APRA procedures, which was “completed in August 2012.” According to Mr. D’Agostino:

“the Town has maintained APRA procedures since they were adopted by the Town Council in August 2012. Based on information provided by Town Clerk

Long, the person responsible for posting to the website in 2012 has since retired (she now resides in Florida.) That said, it [is] highly unlikely that [the] Town's updated APRA Request Form would have been posted to the Town's website (a fact about which there is no dispute), but not the APRA Policies and Procedures. They were adopted at the same time; they would have been transmitted at the same time; and, they would have been available to be posted at the same time. It is more likely that a technical error occurred that caused the Form, but not the Policies and Procedures, to be uploaded to the Town's website. While we concede that the Policies and Procedures were not on the website, we contend this was inadvertent and out of the Town's control."

With respect to your allegation that the Town failed to file APRA certification forms pursuant to R.I. Gen. Laws § 38-2-3.16, Mr. D'Agostino relates that the Clerk and other Town officials have regularly attended APRA trainings by this Department. As related by Mr. D'Agostino "[i]t would appear, then, that lack of Certification (which requires self-reporting on the forms provided) was related, not to lack of training, but to inadvertently failing to provide (or perhaps, failing to fill out) the Certification form to the RI Attorney General's Department."<sup>1</sup>

You provided 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 Town 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, we find that the Town violated the APRA. In particular, although the Town suggests that Town officials received APRA training for calendar year 2014, no evidence has been presented that an APRA certification form was submitted to this Department in accordance with the

---

<sup>1</sup> The Town does not raise Access/Rhode Island's standing to file the instant complaint and our discussion in Access/Rhode Island v. West Warwick Public Schools, PR 15-24 makes the assertion or non-assertion of this argument irrelevant. We review this complaint solely on the basis of this Department's independent statutory authority. R.I. Gen. Laws § 38-2-8(d).

APRA. Furthermore, the Town “concede[s] that the Policies and Procedures were not on the website.” R.I. Gen. Laws § 38-2-3(d). This also violated the APRA.

Lastly, with respect to your allegation that the Town violated the APRA because it did not maintain APRA procedures in accordance with R.I. Gen. Laws § 38-2-3(d), we find no violation. In particular, the Town asserts that it has maintained APRA procedures since at least August 2012, and in support of this position the Town provided this Department with a copy of its APRA procedures. These procedures indicate that they were “Revised August 2012.”

In your rebuttal you observe that the “Town did not provide a copy of those procedures in response to the [MuckRock] APRA request; instead, it merely provided a copy of the request form for records.” Thus, according to you, “while the Town may have had a written procedure in place, it improperly failed to provide a copy of the procedures when requested to do so and violated the [APRA].”

Respectfully, nothing in your rebuttal contradicts the assertion or evidence that the Town did maintain APRA procedures in accordance with R.I. Gen. Laws § 38-2-3(d). Indeed, your rebuttal acknowledges that “the Town may have had a written procedure in place.” Accordingly, with respect to the issue you raised in your complaint, *i.e.*, that the Town failed to maintain APRA procedures, we find no violation.

Notwithstanding the foregoing, your rebuttal contends that “while the Town may have had a written procedure in place, it improperly failed to provide a copy of the procedures when requested to do so and violated the statute.”<sup>2</sup> This allegation, *i.e.*, that the Town improperly responded to MuckRock’s March 31, 2014 APRA request, was not raised in your complaint and was only first raised in your rebuttal. For this reason, the Town has never had an opportunity to address this new allegation.

---

<sup>2</sup> In other instances where you attempt to demonstrate that a public body violated the APRA by failing to maintain APRA procedures, you reference or include as an exhibit the correspondences between MuckRock and the public body confirming that the public body had no APRA procedures. See Access/Rhode Island v. Charlestown Police Department, PR 15-29 (April 4, 2014 follow-up email from MuckRock seeking APRA procedures after only form provided); Access/Rhode Island v. Newport School Department, PR 15-30 (May 27, 2014 follow-up email indicating “please clarify where Newport Public Schools has written APRA procedures”); Access/Rhode Island v. East Greenwich School Department, PR 15-31 (June 23, 2014 follow-up e-mail stating “[d]oes EGSD have written procedures for submitting and processing of APRA requests”); Access/Rhode Island v. Town of Warren, PR 15-28 (April 1, 2014 follow-up e-mail confirming “[t]his is a request for the APRA procedures that your office uses”); Access/Rhode Island v. West Warwick School Department, PR 15-24 (May 5, 2014 follow-up e-mail indicating “[c]an you confirm whether West Warwick Public Schools has written procedures for processing APRA requests?”). In this case, we have been presented with no evidence that MuckRock made a follow-up inquiry after the Town provided its APRA form by e-mail dated April 1, 2014.

With respect to this newly raised issue, 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 Town 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." Accordingly, it would be improper for us to decide a matter first raised in your rebuttal where the Town had no opportunity to present its arguments or evidence to this Department. Additionally, if we required a public body to respond to an issue post-rebuttal, as well as allow the complainant another opportunity to rebut, we would be needlessly extending the timeframe within which open government cases are resolved. To further delay the resolution of other open government cases 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.

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 Town has submitted its APRA certification to this Department, and as discussed earlier, the evidence suggests that Town employees may have had timely APRA training, yet failed to submit certification forms to this Department in a timely manner. Additionally, the evidence establishes that the Town did have APRA procedures, that these procedures are now posted on the Town's website, and that it is likely that "a technical error occurred that caused the form, but not the policies and procedures, to be uploaded to the Town's website." Even your rebuttal acknowledges that this type of "after-the-fact compliance may be a factor to consider in determining appropriate remedies." Based on the totality of circumstances, we find insufficient evidence to support a willful and knowing, or reckless, violation.

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 Town that its omissions violated the APRA and may serve as evidence in a future similar

Access/Rhode Island v. Town of Scituate

PR 15-34

Page 5

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 that reads "M. W. Field".

Michael W. Field  
Assistant Attorney General

Cc: David D'Agostino, Esquire