



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

August 11, 2015

PR 15-44

Mr. William Mudge

Re: Mudge v. Town of North Kingstown

Dear Mr. Mudge:

The investigation into your Access to Public Records Act (“APRA”) complaint against the Town of North Kingstown (“Town”) is now complete. Your September 7, 2014 complaint alleges that the Town violated the APRA when it failed to respond to your July 2, 2014 APRA request in a timely manner. Specifically, your complaint related:

“I would like to file a complaint against the North Kingstown Town Manager, M[r]. Embury, for not responding to the attached APRA request dated July 02, 2014 regarding certain inspection report documentation I first requested from the superintendent of schools on June 12, 2014, which directed me to contact the town.” (Emphasis added).

By email dated September 18, 2014, this Department acknowledged receipt of your complaint and confirmed that your complaint alleged that the Town violated the APRA “when it failed to respond to your July 2, 2014 APRA request.” This Department’s acknowledgement letter, which again raised only the allegation of a failure to respond to your July 2, 2014 APRA request, indicated that “[i]f you have any additional information that you wish this Department to consider, or if this acknowledgment letter does not accurately reflect your complaint, please contact [this Department] in writing within five (5) business days.” (Emphasis added). In addition, because your complaint referenced the “attached APRA request dated July 02, 2014,” and because your complaint did not include a copy of your July 2, 2014 APRA request, this Department requested that you “forward a copy of your APRA request to [this Department’s] attention.” We received no such correspondence or other clarification indicating that this Department’s acknowledgment letter was incorrect or incomplete, nor did this Department receive the “attached APRA request dated July 02, 2014,” within the five (5) business day period set forth in our acknowledgment letter.

In response to your complaint regarding the Town's failure to timely respond to your July 2, 2014 APRA request, on October 10, 2014, we received a substantive response from the Town Solicitor James H. Reilly, Esquire. The Town provides a description of the timeline of events between yourself and the Town, beginning with your initial June 12, 2014 email seeking documents from the Superintendent of Schools and ending with your complaint to this Department. With respect to your complaint regarding the Town's failure to respond to your July 2, 2014 APRA request, the Town contends that "[they] do not have any record of a July 2, 2014 request."

One day after the Town's response, you advised this Department, for the first time, that "the reference to a July 2 APRA [request in your complaint] was incorrect." Specifically, your October 11, 2014 email to this Department explained:

"[i]n summary, Town Manager and/or the Town Building Inspector did not respond in a timely manner, to my APRA requests submitted on Wednesday, July 9, 2014 12:53 PM and Friday, July 11, 2014 6:04 PM. Please note the reference to a July 2 APRA was incorrect; however, the email subject title included a July 2 date." (Emphasis added).

Thereafter, although this Department's procedure does not permit a complainant to file a second correspondence without leave from this Department after the public body has provided its response, by email dated October 13, 2014, you filed what you term your "comments" to the Town's response. In relevant part, you related:

"[w]hile I have previously acknowledged that the July 02, 2014 was incorrect, the referenced email enclosure left no doubt that I was referring to my email of June 12, 2014 1:12 PM which had been acknowledged and addressed by Attorney Carroll and her letter of June 26, 2014." (Emphasis added).

It appears your June 12, 2014 correspondence was directed to the School Department and not the entity subject to the instant complaint, i.e., the Town.

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.

As related above, your September 7, 2014 complaint alleged that the Town failed to timely respond to your July 2, 2014 APRA request. Despite this Department's September 18, 2014 acknowledgment letter seeking any clarification or correction within five (5) business days, as well as our September 18, 2014 request that you provide the "attached APRA request dated July 02, 2014," you provided no clarification until October 11, 2014 – one (1) day after the Town

answered your complaint by stating, among other things, that the Town “do[es] not have any record of a July 2, 2014 request.” Of course, by email dated October 11, 2014, you advised this Department that you did not submit a July 2, 2014 APRA request, but instead, were complaining about the untimely response to a July 9, 2014 and July 11, 2014 APRA requests. An October 13, 2014 email from you again acknowledges that the July 2, 2014 date “was incorrect,” and further complains about a June 12, 2014 request. Based upon the foregoing, it is clear that the allegation contained within your complaint, *i.e.*, that the Town failed to timely respond to your July 2, 2014 APRA request, is “incorrect” and the Town did not violate the APRA with respect to this allegation.

Having addressed the issue in your complaint, this Department must consider whether to address the allegations contained in the correspondences you sent to this Department after the Town responded to your complaint. We decline to do so and observe that this Department’s precedent, including a prior finding to you, makes clear that this Department will not consider issues first raised in a rebuttal where a public body has not had the opportunity to address the newly raised allegation. See Boss v. City of Woonsocket’s School Board Review Committee, OM 14-19 (Department of Attorney General will not consider allegations first raised in rebuttal); Mudge v. North Kingstown School Committee, OM 12-35 (“if new issues could have been raised when the complaint was filed, but were not raised until after the public body responded to the allegations raised in the complaint, the public body would have no opportunity to respond to the allegation”).

In this case, the above facts make clear that the Town had no occasion to address the issues you raised about a June 12, 2014,¹ July 9, 2014, and July 11, 2014 requests because you did not raise these issues until after the Town filed its response to your complaint on October 10, 2014. As we previously noted, this Department’s September 18, 2014 acknowledgment letter directed that “if this acknowledgment letter does not accurately reflect your complaint, please contact [this Department] in writing within five (5) business days.” We received no response within this time period. Moreover, this Department’s acknowledgment letter also advised that “[y]our rebuttal should be limited to the matters addressed in the Town’s response and should not raise new issues that were not presented in your complaint or addressed in the Town’s response.” Accordingly, it would be improper for us to decide a matter that was 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 – when the issue should have been corrected or raised 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, once again, limited to the issues addressed within the public body’s response. To further delay the resolution of other open government cases when the issues in this

¹ It bears noting that an October 11, 2014 email from you expresses that “[w]hile I did not submit a formal email to the [North Kingstown School Department] for Wi-Fi documentation, [the School Committee’s legal counsel] responded to my June 12 request as if it was a formal APRA request.” Our resolution of this case does not require us to determine whether your June 12, 2014 request was made pursuant to the APRA.

case could have been raised 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; Access/Rhode Island v. Providence Police Department, PR 15-33. This finding is consistent with our precedent, including Mudge, OM 12-35.

Lastly, even if we ignore the above-described procedural deficiency, we would still have concerns that your June 12, 2014, July 9, 2014, and July 11, 2014 requests were not made according to the Town's or the School Department's APRA procedures. In this respect, the APRA mandates that "[e]ach public body shall establish written procedures regarding access to public records[.]" R.I. Gen. Laws § 38-2-3(d). Here, your June 12, 2014, July 9, 2014 and July 11, 2014 requests were all made by email and directed to the School Superintendent, Town Manager, or the North Kingstown Building Official. In accordance with the North Kingstown School Department's APRA procedure, "[r]equests to inspect public records can be mailed or dropped off at the North Kingstown School Department, 100 Fairway Drive, North Kingstown, RI 02852 and directed to the Superintendent's Office. **E-mail requests cannot be accepted.** To make a public records request by fax, please contact the Superintendent's Office before faxing the request." (Emphasis in original). The Town's APRA procedure provides that "[a] request to inspect and/or copy public records of the Town of North Kingstown may be presented orally or in writing to the following Designated Public Records Officers during normal business hours (8:30 a.m. to 4:30 p.m. Monday through Friday)." Although unnecessary to resolve, based upon these provisions, we question whether the June 12, 2014, July 9, 2014, and July 11, 2014 requests were made in accordance with the School Department's and/or Town's APRA procedures. See e.g., Access/Rhode Island v. New Shoreham Police Department, PR 15-26 (APRA request not valid since not made in accordance with Town's APRA procedures); Canavan v. City of Central Falls, PR 00-18.

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). 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,

Michael W. Field
Assistant Attorney General

Cc: James H. Reilly, Esquire