



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

November 2, 2016

PR 16-16B

Mr. Joe Smith

Re: Smith v. The Compass School

Dear Mr. Smith:

This correspondence serves as a supplemental finding to Smith v. The Compass School, PR 16-16, released May 5, 2016. In Smith v. The Compass School, we reviewed your May 12, 2015 Access to Public Records Act (“APRA”) complaint against The Compass School (“School”) and concluded that the School violated the APRA when it failed to adequately and completely respond to your APRA request dated January 13, 2015. The sole issue to be addressed in this supplemental finding is whether the School’s violation was knowing and willful, or reckless. As requested, the School responded to our inquiry and we now resolve this outstanding issue.

By letter dated May 18, 2016, Attorney Matthew R. Plain provided a supplemental response. Attorney Plain states, in pertinent part:

“[I]n order to find that the Compass School knowingly and willfully violated the APRA, its ‘act or omission constituting a violation of law must have been deliberate’ rather than ‘the result of mistake, inadvertence, or accident.’ *Carmody v. Rhode Island Conflict of Interest Comm’n*, 509 A.2d 453, 459 (R.I. 1986). Further, the public official must be shown to have been ‘cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and failed to take steps reasonably calculated to resolve the doubt.’ *DiPrete v. Morsilli*, 635 A.2d 1155, 1164 (R.I. 1994).

Here, the public official charged with responding to Mr. Smith’s APRA request was the school’s former director, Dr. Donald Holder. Dr. Holder served as the school’s director between the summer of 2014 and the summer of 2015. Dr. Holder had been the school’s third director in three years. The Compass School admits that as a result of the school’s constant search and transition efforts, its one-person administrative team experienced challenges developing the necessary

check and balances for procedures such as responding to requests under the APRA. In this case, the prior interim director was the sole administrator, and the only Compass official with authority to speak on behalf of the school that was aware that Mr. Smith's request had been propounded. Since Dr. Holder's tenure ended, by mutual agreement, in the summer of 2015, the Compass School has completely revamped its process for responding to APRA requests and has embraced a new operating strategy based on cornerstones of transparency and collaboration. The Compass School has stabilized its leadership so that the school can better fulfill its responsibilities to the people of Washington County and continue to provide high quality education to its youngest citizens. The Compass School is pleased that all of Mr. Smith's APRA requests have now been fulfilled and he is not waiting on any additional information.

The Compass School does not dispute that Dr. Holder understood and appreciated that the school was subject to the APRA. What is more, the Compass School does not dispute that Dr. Holder's response to Mr. Smith's APRA request was wrought with mistakes. Such mistakes, however, do not rise to the level of a knowing and willful violation of the APRA. Under the *DiPrete* decision, which the Attorney General relied on in its finding of May 5, 2016, a public official is found to have committed a knowing and willful violation where he was 'aware of an appreciable possibility that he might be subject to the statutory requirements, and he failed to take any steps to resolve that problem.' *Id.* (emphasis in original). In contrast to *DiPrete*, Dr. Holder took several reasonable steps (although not enough steps, as it turned out) in an attempt to fulfill Mr. Smith's requests.

For instance, despite the confusion surrounding Mr. Smith's initial email of January 13, 2015, * * * Dr. Holder responded within the 10 business day requirement and indicated that the school was in the process of gathering the information. Some of the documents, such as the 2014 audit, had not yet gone before the school council for approval so it was not possible for Dr. Holder to fulfill Mr. Smith's request for that information. Dr. Holder also confirmed that there were no documents responsive to Mr. Smith's request for communications between the Compass School and Kingston Hill Academy about sharing wait-listed students' names and invited a further discussion if Mr. Smith had any questions. It seems clear that because Dr. Holder knew the requestor personally (since the pair were colleagues at Bryant University), he treated the requests with more informality than he should have. That said, Dr. Holder did follow up with additional information responsive to Mr. Smith's request on January 22, 2015 and again on February 5, 2015. Dr. Holder's mistakes in failing to follow up with the additional information were certainly unfortunate, but they do not constitute a knowing and willful violation of the APRA. To find that Dr. Holder failed to take any steps to fulfill Mr. Smith's requests would simply be incompatible with the facts."

Our focus is whether the School knowingly and willfully, or recklessly, violated the APRA. 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 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.

In Catanzaro v. East Greenwich Police Department, PR 13-08, this Department addressed the “reckless” standard for the first time since the APRA was amended on September 1, 2012 to include a civil penalty of \$1,000 for a “reckless” violation of the law. Regrettably, the APRA itself does not provide a definition of “reckless,” and therefore, we look for guidance from other authorities.

As we observed in Catanzaro, Rhode Island General Laws § 3-14-7(c)(1) entitled, “Liability for Reckless Service of Liquor” states:

“[s]ervice of liquor is reckless if a defendant intentionally serves liquor to an individual when the server knows that the individual being served is a minor or is visibly intoxicated, and the server consciously disregards an obvious and substantial risk that serving liquor to that individual will cause physical harm to the drinker or to others.” (Emphasis added).

Black’s Law Dictionary defines reckless as:

“[c]haracterized by the creation of substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence; it is a gross deviation from what a reasonable person would do.” See Black’s Law Dictionary (9th ed. 2009).

According to the Restatement (Third) of Torts, an actor’s conduct is reckless if:

“(a) the actor knows of the risk of harm created by the actor’s conduct, or knows facts that make that risk obvious to anyone in the actor’s situation, and (b) the precaution that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the actor’s failure to adopt the precaution a demonstration of the actor’s indifference to the risk.” See REST 3D TORTS-PEH § 2.

We have addressed on multiple occasions whether a public body has violated the APRA in such a manner as to warrant a civil lawsuit.

In Finnegan v. Town of Scituate, PR 15-41, the Town of Scituate violated the APRA when it failed to mail its denial letter within ten (10) business days of a request. The evidence suggested that the denial letter was timely prepared, but misfiled (in the APRA file the Town of Scituate had created for this matter), and was mistakenly not mailed to the Complainant. This Department found that the Town of Scituate violated the APRA, but did not conclude, based upon the evidence presented, that the violation amounted to a willful and knowing, or reckless violation.

In International Association of Fire Fighters v. Nasonville Fire Department/District, PR 14-24B, this Department concluded there was sufficient evidence to find that the violations were reckless, or willful and knowing. The only argument put forth by the Department/District is that the failure to respond was “inadvertent and unintended” and that the Department/District did not set out to “intentionally violate the APRA, nor did it consciously disregard the terms of the statute.” The Department/District “intended to comply with the initial document request, but, admittedly, was sidetracked by the dereliction of a now former employee.” We found those arguments are unpersuasive and not controlling, and accordingly, filed a lawsuit against the Department/District.

In the instant case, although we recognize some mitigating factors, namely the School did respond to you within ten (10) business days, provided a partial response, and offered to meet with you, the School admits that it “understood and appreciated that [it] was subject to the APRA.” The facts support the School’s acknowledgment and demonstrate an awareness of the statutory requirement, or stated differently, the School was “cognizant of an appreciable possibility that [it might] be subject to the statutory requirements [of the APRA] and [it] failed to take steps reasonably calculated to [address the issue].” See DiPrete, 635 A.2d at 1164.

While in some respects the School's partial response to you within ten (10) business days is a mitigating factor, in other respects, these actions demonstrate and support the School's awareness of the APRA and its requirements. Indeed, in this case, even after the ten (10) business days expired and the School failed to respond to all categories of your APRA request – either by denying the request, extending the time, or providing you documents – on February 4, 2015, you wrote to the School reminding it of its APRA obligations and – even though the time to respond had already expired – you offered to extend the School's response time an additional twenty (20) business days. Although you received some additional documents and correspondence the following day – including the School's acceptance of your offer for a twenty (20) business day extension – the evidence demonstrates that you received no further follow-up from the School and, on May 12, 2015, filed the instant complaint. As best as we can tell, it does not appear that you received a complete response to your APRA request until the School responded to this Department's investigatory demand by letter dated June 12, 2015. Given this timeline, and in particular the nearly five (5) months from the date of request until the fulfillment of the School's APRA obligations, in combination with the School's acknowledgment that it "understood and appreciated that [it] was subject to the APRA," we conclude that the School's APRA violation was willful and knowing, or reckless, and that this Department will file a civil lawsuit. Our precedent supports our finding.

In Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B, we found that the City violated the APRA when, *inter alia*, it took an additional six (6) weeks from when the City believed a response was due to provide such a response. The only evidence or argument the City offered to explain its untimely APRA response was that the City was "short-staffed." In our supplemental finding, this Department stated:

...although we can appreciate the City's position that it is short-staffed, the issues facing the City are not unlike those facing other Rhode Island communities. We refuse to allow public bodies to justify their non-compliance with the APRA by simply asserting that they are short-staffed without any other reasonable, good faith explanation and evidence.

We also held that "[b]ecause the City provided some sort of response to all the other requests contained in your APRA inquiry, it is clear that the City knew, or should have known, that it was required to provide some sort of response to Request No. 8. Therefore, we found the City knowingly and willfully violated the APRA when it failed to provide a response to Request No. 8." See also Scripps News v. Department of Business Regulation, PR 14-07 (the Department of Business Regulation ("DBR") offered no evidence to defend the almost two (2) month delay in responding to the request. The only argument put forth by DBR was that the "failure to respond was an inadvertent mistake" that happened "because of the press of other business of an extremely busy governmental agency" and that the "inadvertent delay *** occasioned no harm other than the delay itself."). Additionally, our past findings have noted that an employee who is responsible for an APRA violation, yet leaves the public body during the course of this Department's investigation, may not – by itself – foreclose a civil lawsuit. See International Association of Fire Fighters v. Nasonville Fire Department/District, PR 14-24B.

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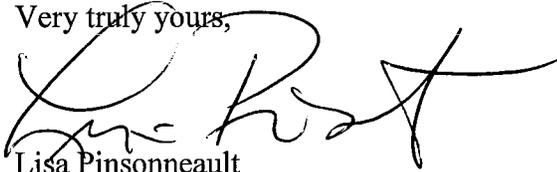
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Given the evidence before us and the totality of the circumstances in this specific instance, we find that the School willfully and knowingly, or recklessly, violated the APRA. Accordingly, this Department will file a civil lawsuit against the School.

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", written over a horizontal line.

Lisa Pinsonneault

Special Assistant Attorney General

Extension 2297

LP/kr

Cc: Matthew R. Plain Esq.