



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

November 21, 2017

PR 17-44B

Mr. Bill Mudge

**Re: Mudge v. Town of North Kingstown**

Dear Mr. Mudge:

This correspondence serves as a supplemental finding to Mudge v. Town of North Kingstown, PR 17-44, released September 5, 2017. In Mudge v. Town of North Kingstown, we reviewed your April 19, 2017 Access to Public Records Act (“APRA”) complaint against the Town of North Kingstown (“Town”) and concluded that the Town violated the APRA when it failed to timely respond to your March 15, 2017 APRA request. See R.I. Gen. Laws § 38-2-7. The sole issue to be addressed in this supplemental finding is whether the Town’s violation was willful and knowing, or reckless. As requested, the Town responded to our inquiry and we now resolve this outstanding issue.

By letter dated September 19, 2017, Attorney Matthew F. Callaghan, Jr., Esquire, provided a supplemental response. Attorney Callaghan states, in pertinent part:

“It must be noted that, because Mr. Mudge’s request for financial records was for records of the school department, the request should properly have been directed to the school department, not the town. With respect to his request for the 2016 Audit, the Audit could not have been produced because the independent auditor had not completed the audit at the time. The Audit was furnished to Mr. Mudge as soon as it had been completed during May 2017. As explained in our prior correspondence, the failure of the town to provide a timely written respon[se] to Mr. Mudge was totally inadvertent and unintentional. Actually, it is my understanding that, after Mr. Mudge had submitted his APRA request, he and the town finance director [Mr.] Ted Pryzbala had a number of discussion regarding the status of his pending request. The excellent record of the town in responding to APRA requests over the past six (6) years makes it clear that the town has been, and remains very willing to, provide records in response to any requests submitted under the APRA.

In no respect does this incident constitute willful, knowing or reckless conduct in violation of the APRA. That conclusion is fully supported by the town's consistent adherence to the requirements of the APRA over the past six (6) years. This isolated incident was totally inadvertent and unintentional and certainly does not, in any respect, constitute willful, knowing or reckless conduct which would warrant further proceedings in the Superior Court."

We acknowledge your rebuttal.

Our focus is whether the Town 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 wilfully' 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 wilful' 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. (Emphasis added).

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 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 (9<sup>th</sup> 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 begin with Attorney Callaghan’s averment that because your request for financial records was for records of the school department, your request should properly have been directed to the school department, not the town. We respectfully reject this argument. In fact, in the Town’s response to your APRA complaint filed with this Department, the Town Clerk, in her affidavit, states, “[b]ecause the request was for financial records, I referred the matter to [the Finance Director] and assumed he would respond in the appropriate manner.” Indeed, you addressed your APRA request for financial records to the Finance Director and to the Town Clerk, and both of these individuals were designated by the Town as appropriate APRA officers. Respectfully, neither the Finance Director nor the Town Clerk advised you that your APRA request for financial records did not, in any way, comply with the Town’s APRA procedures. Additionally, the Town’s website contains a link to its APRA procedures. It provides contact information for those seeking records concerning the Police Department, the Fire Department, Finances, Planning and “All Other Requests.” Pursuant to its APRA procedures, the Town Clerk was the designated public records officer for all records request except those records specifically set forth in the Town’s APRA procedures, stated supra. You made an APRA request in a manner consistent with the applicable APRA posted procedures.

Attorney Callahan also states “[a]ctually, it is my understanding that, after Mr. Mudge had submitted his APRA request, he and the town finance director \* \* \* had a number of discussions regarding the status of his pending request.” While this Department certainly encourages parties to effectively communicate with each other and attempt to resolve outstanding issues, we are mindful that public bodies must adhere to statutory mandates, including time frames. We

conclude the Town was consciously aware of its statutory obligations and failed to take reasonable steps to address its statutory obligations. See Kelly & Mancini v. Town of Warren, PR 14-19B. Here, we have little difficulty concluding that the Town was “cognizant of an appreciable possibility that [it might] be subject to the statutory requirements and [it] failed to take steps reasonably calculated to [address the issue].” See DiPrete, 635 A.2d at 1164.

We also reject the argument that the Town could not produce the records responsive to your request for the 2016 Audit because the Audit had not been completed at the time of your APRA request. Here, the issue is not whether the Town could have provided the Audit, but rather that the Town did not respond to your APRA request in a timely manner. A public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. If no response is sent within ten (10) business days, the lack of response will be deemed a denial. See R.I. Gen. Laws § 38-2-7(b). Despite being aware of its statutory obligations, the Town did not provide a timely response as required by the APRA.

Finally, in Chappell v. Town of North Kingstown, PR 11-31, this Department also found that the Town violated the APRA when it failed to timely respond to the Complainant’s APRA request. In Chappell, the Town proffered that its failure to respond was due to that fact that the APRA request was “misplaced,” and that the failure to respond was “inadvertent and unintentional.” Considering our prior finding, we fail to see how the Town was unaware of its APRA obligations considering that the facts in Chappell are remarkably similar to the facts in the present matter and that, in Chappell v. Town of North Kingstown, PR 11-31, we cautioned the Town that its unlawful conduct could “serve as evidence of a willful or a knowing violation in any similar situation.” Id. In the instant case, you made an APRA request in accordance with the Town’s APRA procedures; however, neither the Town Clerk nor the Finance Director responded to your request in a timely manner. It is troubling to this Department that the Town did not follow through or follow up on your APRA request to ensure that it was responded to in a timely manner and respectfully, the Town has simply not provided an adequate reason to explain this omission.

Given the evidence before us, we find that the Town recklessly and/or willfully and knowingly violated the APRA when it failed to respond to your March 15, 2017 APRA request in a timely manner. Accordingly, this Department will file a civil lawsuit against the Town of North Kingstown.

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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 A. Pinsonneault". The signature is fluid and cursive, with a large initial "L" and "P".

Lisa A. Pinsonneault  
Special Assistant Attorney General

LP/kr

Cc: Matthew F. Callaghan, Jr., Esq.