



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

October 26, 2015

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Re: Access/Rhode Island v. West Warwick School Department, PR 15-24B
Access/Rhode Island v. Town of Warren, PR 15-28B
Access/Rhode Island v. East Greenwich School Department, PR 15-31B
Access/Rhode Island v. Office of Auditor General, PR 15-35B
Access/Rhode Island v. Warren Police Department, PR 15-37B

Dear Counsel:

This serves as a supplemental finding to Access/Rhode Island v. West Warwick School Department, PR 15-24, Access/Rhode Island v. Town of Warren, PR 15-28, Access/Rhode Island v. East Greenwich School Department, PR 15-31, Access/Rhode Island v. Office of Auditor General, PR 15-35, and Access/Rhode Island v. Warren Police Department, PR 15-37. Because we previously determined that Access/Rhode Island lacked legal standing to file the above-captioned matters, and as a result, this Department would review the allegations pursuant to its independent statutory authority, see R.I. Gen. Laws § 38-2-8(d), this supplemental finding is addressed to legal counsel for the above-captioned entities. The sole issue to be addressed in these supplemental findings is whether the Access to Public Records Act (“APRA”) violations committed by the above entities were willful and knowing, or reckless, and whether this Department should file a civil lawsuit.

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 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. 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.

In Access/Rhode Island v. Town of Warren, PR 15-28, we concluded that the Town of Warren (“Town”) violated the APRA when it failed to provide certification that it had received APRA training pursuant to R.I. Gen. Laws § 38-2-3.16 and when it failed to maintain APRA procedures/failed to post APRA procedures on its website. See R.I. Gen. Laws § 38-2-3(d). Significant to our conclusion was the fact that the Town Clerk acknowledged that the Town did not maintain written APRA procedures and the fact that the Town failed to provide any substantive response addressing this issue. Because the Town did not offer a substantive response to the underlying violations, we were unable to assess whether such violations were willful and knowing, or reckless, and we allowed the Town the opportunity to provide a supplemental explanation as to why these violations should not be considered willful and knowing, or reckless. We now resolve this outstanding issue.

The Town submits that the APRA violations and facts in the present matter are analogous to the APRA violations and facts investigated by this Department in Access/Rhode Island v. Newport School Department, PR 15-30, and Access/Rhode Island v. Department of Corrections, PR 15-27, where we found that the School Department and the Department of Corrections had violated the APRA, but concluded that the violations were not willful and knowing, or reckless. Specifically, the Town contends that the Town Clerk had received timely APRA training but failed to submit the proper certification form and that, upon realizing that the Town did not have written APRA procedures, the Town took immediate remedial measures and posted APRA procedures on its website by September 18, 2014, prior to Access/Rhode Island filing a complaint. See Access/RI v. Newport School Department, PR 15-30 (“Although not determinative, all these remedial actions occurred prior to the filing of the instant complaint”). See also Access/RI v. Department of Corrections, PR 15-27 (“the evidence establishes that DOC employees had received APRA training during calendar year 2013, yet had not submitted its certification”). Having reviewed the Town's supplemental response and the evidence presented, we are satisfied that the violations were not willful and knowing, or reckless. As noted by the

Town, this conclusion is consistent with our determination in the other complaints filed by Access/Rhode Island, see supra, and we adopt and incorporate our prior reasoning.

While we view the above discussion regarding the Town of Warren as appropriate – since the Town had previously not supplied a substantive response – we view the remaining issues in a different light. In particular, our prior findings relating to the Office of the Auditor General, the Warren Police Department, the West Warwick School Department, and the East Greenwich School Department make clear this Department’s concern with the violations discussed in those findings. As this Department has explained on numerous occasions, whether this Department files a civil lawsuit and seeks monetary fines for APRA violations requires the consideration of the totality of the evidence. See e.g., DesMarais v. Manville Fire Department, PR 15-08B. Applying this standard in these cases, we simply decline to file a lawsuit. Chief among our reasons is Access/Rhode Island’s acknowledgment that the APRA requests at issue were initiated by a third party in order to “test compliance.” See Access/Rhode Island v. West Warwick School Department, PR 15-24. Expending additional resources, including judicial resources, pursuing a monetary fine for actions and/or omissions relating to an APRA request made by a third party who sought to “test compliance” seems questionable. Our determination is reinforced by our recognition that any monetary fine is likely to be paid from the public fisc, as well as “the reality that while this Department examines [and litigates the remaining issues] aimed at ‘test[ing] compliance,’ the APRA (and Open Meetings Act) complaints filed by Rhode Island citizens who actually seek access to documents and meetings must await our review.” Id. (emphasis in original). All of these considerations lead us to the instant conclusion.

As this Department previously observed, “[w]e understand and appreciate Access/Rhode Island’s motivation in having Muckrock file APRA requests * * * to * * * ‘test compliance,’” id., and this “consideration is not lost upon this Department.” Id. Moreover, our decision not to file a lawsuit(s) should not be interpreted by public bodies as this Department condoning any APRA violation or an unwillingness by this Department to seek civil penalties for open government violations. Public bodies that do violate Rhode Island’s open government laws, do so at their own peril. See e.g. Beagan v. Albion Fire District, PR 11-06; DesMarias v. Manville Fire District, OM 12-24; Satchell v. West Warwick Town Council et. al., OM 12-30; Kerwin v. Rhode Island Student Loan Authority, OM 12-32; Common Cause v. 195 Redevelopment District Commission, OM 13-27; Block v. State Properties Committee, OM 14-26; Novak v. Western Coventry Fire District, OM 15-03; Cushman v. Warwick Retirement Board, OM 15-05; Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13; Boss v. Woonsocket Superintendent’s Office, PR 13-19; Scripps News v. Department of Business Regulations, PR 14-07; Kelly & Mancini v. Town of Warren, PR 14-19; International Association of Fire Fighters v. Nasonville Fire Department, PR 14-24; DesMarais v. Manville Fire Department, PR 15-08.

Although the Attorney General will not file suit in these matters, 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 serves as notice to the above-captioned entities that its omissions violated the APRA and may serve as evidence in a future similar situation of a willful and knowing, or reckless, violation. We are closing our files 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 black ink, appearing to read "Michael W. Field". The signature is fluid and cursive, with the first name being the most prominent.

Michael W. Field
Assistant Attorney General