



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**

January 8, 2016

PR 14-13B

Jennifer A. Fitzgerald, Esquire

**Re: Fitzgerald v. Warwick Police Department**

Dear Attorney Fitzgerald:

This correspondence serves as a supplemental finding to Fitzgerald v. Warwick Police Department, PR 14-13. In Fitzgerald, we reviewed your complaint and concluded that the Warwick Police Department (“Police Department”) violated the Access to Public Records Act (“APRA”) when it, among other things, assessed a “flat fee” of \$5.00 per report in response to your APRA request seeking reports and records pertaining to two (2) identifiable individuals. The sole issue to be addressed in this supplemental finding is whether the Police Department’s violation was reckless, or willful and knowing. We acknowledge your submission, as well as the Police Department’s, and we now resolve this outstanding issue.

The Police Department’s legal counsel, Peter D. Ruggiero, Esquire, states, in pertinent part:

“I conducted an interview with the Warwick Police Department command staff, including the Chief and Deputy Chief, regarding the question as to why the flat fee policy remained in effect up to and including this incident. Based on the Warwick Police Department’s internal research on this question, the conclusion was that the continued imposition of the flat fee was an administrative oversight, not imposed with the specific intent to disregard the relevant provisions of the APRA as to the imposition of reasonable costs. As evidence that this was simply an administrative oversight, the Warwick Police Department immediately ceased imposing the flat fee when brought to their attention and has thereafter modified their APRA policies to comport to the relevant cost imposition requirements of APRA.

Based upon my interviews with the Police Department command staff, the flat fee policy had not been previously addressed or challenged by any person and/or entity requesting public records. This was the first and only instance. Upon discovery of the fee and its conflict with the requirements of the relevant provisions of APRA, the Police Department immediately remedied the situation,

provided the sought after public records in this instance without any fee or charge and has amended their APRA access policies accordingly. As such, the Police Department exhibited no specific intent, deliberate disregard and/or indifference toward the relevant provisions of APRA in this instance. The failure of the Police Department to revise their fee policy is attributable to administrative mistake or negligence – far below the level of intent, deliberateness or indifference required for an action to constitute reckless, willful or knowing behavior.”

Our focus is whether the Police Department 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 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 (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 have carefully reviewed and considered the record and find insufficient evidence to determine that the instant APRA violation was willful and knowing, or reckless. Most notably, Mr. Ruggiero explains that “the flat fee policy had not been previously addressed or challenged by any person and/or entity requesting public records” and that this case represented “the first and only instance.” While we have never required that a public body commit a previous violation before this Department would consider a violation to be willful and knowing, or reckless, see e.g., Black v. Barrington Bd. of Tax Assessment Review, PR 05-05, the fact that there is no evidence of a previous challenge to the Police Department’s flat fee is a relevant consideration in determining whether the instant violation was willful and knowing, or reckless.<sup>1</sup> In this vein, Mr. Ruggiero had previously represented that “once the matter was brought to [his] attention, [he] reviewed the situation and directed the Warwick Police Department to cease applying the \$5.00 processing charge for public records requests.” Ruggiero Letter, dated February 20, 2014.

It is also of some relevance that it appears from our review that the Police Department’s response was processed consistent with the manner in which a police department may respond to an inquiry from a criminal defense attorney – such as yourself – in conjunction with an ongoing criminal defense matter. Assuming, for the moment, that the Police Department processed your

---

<sup>1</sup> We also have no record of the Warwick Police Department violating the APRA in the last decade.

Fitzgerald v. Warwick Police Department

PR 14-13B

Page 4

request in this manner, and not pursuant to the APRA, we know of no authority that would render the \$5.00 per report assessment objectionable.

To be sure, your correspondences made clear that under the APRA you were seeking “[a]ny and all records relating to the arrest, detention, investigation, prosecution, and/or sentencing” of two identifiable individuals. But, in response to your APRA request, not only did the Police Department assess two \$5.00 “report” charges, but the Police Department also provided you one document relating to each person requested, neither of which were required to be disclosed pursuant to the APRA.

The first document was an “Incident Report.” This Department has made clear that “when a law enforcement agency investigates a complaint and determines that an arrest is not warranted, there exists a strong presumption that records arising out of that investigation fail to meet the threshold requirement established by R.I. Gen. Laws § 38-2-2(4)(i)(D)(c).”<sup>2</sup> Radtke v. Department of Public Safety, PR 13-10. See also Snow v. Dept. of Public Safety, PR 10-12 (the Department of Public Safety did not violate the APRA by denying a request for an incident report that did not culminate in an arrest). Based upon our precedent, we must observe that the Police Department provided you access to the “Incident Report” that could have been lawfully exempted under the APRA. In fact, close inspection of the “Incident Report” reveals that the Police Department provided you access to this document, which concerned an incident that occurred on July 28, 2011, even though the scope of your request concerned events from July 22, 2011 through July 26, 2011. Accordingly, the “Incident Report” was not even responsive to your request.

As for the second document provided, the Police Department created a document indicating that a records check had been completed on the individual you requested information on and advised you that “[i]t was found that this record has been expunged.” Clearly, this response is outside the parameters of the APRA and even your supplemental response acknowledges that the Police Department created this document in response to your inquiry. See R.I. Gen. Laws § 38-2-3(h) (“Nothing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made”).

At this juncture, our focus is to determine whether the violation discussed herein was willful and knowing, or reckless. While we certainly do not lose sight of the fact that you made an APRA request and the Police Department responded by assessing you two \$5.00 “report” charges in violation of the APRA, the factors described above lead us to the conclusion that this was a cost assessment procedure that had been in place for an unknown amount of time and that apparently had not been challenged until this situation. Moreover, although you no doubt made an APRA request, the fact that the Police Department may have handled your request in a manner consistent with a request made by a criminal defense attorney and provided you access to documents that the APRA would have exempted (or not required to be created) provides sufficient doubt in our minds that the violation discussed in Fitzgerald rose to the level necessary

---

<sup>2</sup> Of course, the APRA allows a public body, in its discretion, to provide access to an exempt document.

Fitzgerald v. Warwick Police Department

PR 14-13B

Page 5

to file a civil lawsuit. As a practical matter, the Police Department could have lawfully denied your APRA request, which would have required you to seek access to the requested documents as a criminal defense attorney and not under the APRA. Under this scenario, the \$5.00 per report fee would not have been improper and we find that it is imprudent to file a lawsuit against the Police Department for essentially treating this as a criminal defense matter and providing you access to documents/information that you would not be entitled to under the APRA. This, as well as the other factors discussed herein, lead us to conclude that there is insufficient evidence to find that the violation discussed in Fitzgerald was willful and knowing or reckless. See Quirk v. Town of North Providence, PR 12-02B (this Department concluded that the Town's actions did not amount to a willful and knowing violation because, based upon the evidence presented, the Town's violation was the result of a clerical error and that the Town had subsequently complied with the APRA request.)

Notwithstanding the foregoing, our supplemental finding serves as notice to the Police Department that its actions violated the APRA and may serve as evidence of a willful and knowing, or reckless, violation in any future similar case. The Police Department would be well served in future cases to ensure that it distinguish APRA requests from other non-APRA requests and appropriately process these matters. Please be advised that we are closing your 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,



Lisa A. Pinsonneault  
Special Assistant Attorney General

Cc: Peter D. Ruggiero, Esquire