



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

December 9, 2015

PR 14-25B

Ms. Nancy Howard
16 Dianne Avenue
Portsmouth, Rhode Island 02871
Vhoward17@cox.net

RE: **Howard v. Rhode Island Turnpike and Bridge Authority**

Dear Ms. Howard:

This correspondence serves as a supplemental finding to Howard v. Rhode Island Turnpike and Bridge Authority, PR 14-25. In Howard, we reviewed your May 7, 2014 complaint and concluded that the Rhode Island Turnpike and Bridge Authority (“RITBA”) violated the Access to Public Records Act (“APRA”) when it failed to comply with your APRA request within ten (10) business days.

The sole issue to be addressed in this supplemental finding is whether the RITBA’s violation was willful and knowing, or reckless. We acknowledge your submission dated October 23, 2014. As requested, the RITBA responded to our inquiry and we now resolve this outstanding issue.

Legal counsel for the RITBA, Matthew C. Reeber, Esquire, provided a response, along with an affidavit from Attorney William E. O’Gara. Attorney Reeber states, in pertinent part:

“In the instant case the facts are that Ms. Howard forwarded two requests for documents in March of 2014. Both of the requests were extensive and required the production of numerous documents. The Authority did not disregard the requests but timely produced numerous documents. [] The fact that numerous documents were produced is inconsistent with a claim of intentional disregard of the law. * * *

Rather than ignoring the request, there was an inadvertent error that resulted in some but not all the documents being timely produced.”

Attorney O’Gara states, in pertinent part:

“On March 27, 2014 my office forwarded a response to Ms. Howard to the records request at issue. The request was voluminous and included contract documents, correspondence and various board minutes.

Six days prior to that response on March 21, 2014 I had written to Ms. Howard notifying her that the Authority would require an additional twenty days to respond to her [initial] request. I took this action because I understood her request would require additional time to gather the documents.

On March 31, 2014 Ms. Howard forwarded a second request for documents. The second request was similar in nature in that it required the production of meeting minutes, contract documents and other materials.

After I sent the documents on March 27th I received additional responsive documents from the Authority. I believed the documents to include the response to the second request.

On April 11, 2014 my office forwarded a packet of documents to Ms. Howard. At the time that was sent, I believed that it included all of the records in my possession responsive to her requests.

When Ms. Howard filed the complaint I discovered that the additional documents had not been included in my prior responses and I immediately sent the documents to her.”

Our focus is whether the RITBA 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.

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.

In the instant case, it appears the March 11, 2014 APRA request sought documentation pertaining to contract awards to Site Resources LLC including:

- “1. All contracts/agreements and change orders awarded from January 2005 to present March 2014;
2. RITBA Meeting Minutes approving contract/agreements under Item 1 above;
3. RITBA Board Agenda Item Tracking System documentation;
4. All Requests for Proposals (or Bids) posted on the RI Purchasing web site pertaining to contracts/agreements award under Item 1 above.”

On March 27, 2014, the RITBA, through its attorney, William E. O’Gara, Esquire, responded to your March 11, 2014 APRA request by providing seventy-one (71) pages. It further appears that on March 31, 2014, you made another APRA request seeking documents similar in nature to your initial APRA request, such as meeting minutes and contract documents, which the RITBA responded to on April 11, 2014. It does not appear that you dispute this assertion. While RITBA acknowledges that some responsive documents may not have been timely provided to you, RITBA attributes this error to the two successive and voluminous APRA requests received from you and its belief that it had provided you all responsive documents.

When viewed against our prior findings wherein this Department found public bodies knowingly and willfully, or recklessly violated the APRA such that a civil lawsuit was warranted, we cannot find that the RITBA willfully and knowingly, or recklessly, violated the APRA. See International Association of Fire Fighters v. Nasonville Fire Department/District, PR 14-24 and PR 14-24B (the Department/District proffers that the documents were provided forty-four (44) business days after the discovery of the error. The Department/District provides no explanation why the documents were not provided in a more timely manner after the discovery of the error and it is noteworthy that under the APRA the maximum time period to respond to an APRA request is thirty (30) business days. See R.I. Gen. Laws § 38-2-3(e)); Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B (the City violated the APRA when 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”).

Here, there is no doubt that RITBA failed to provide all responsive documents to you in a timely manner, but there is also no question that RITBA timely responded to two successive APRA requests. While the failure to provide all responsive documents violated the APRA, see Howard, PR 14-25, considering the totality of the evidence it is difficult to conclude that RITBA’s omission rose to the willful and knowing, or reckless, standard. Our conclusion is supported, but is certainly not determined, by the fact that within days of being apprised of its error, RITBA provided you the omitted documents. Based on these specific facts, we find insufficient evidence to file a civil lawsuit in this case.

Howard v. Rhode Island Turnpike and Bridge Authority

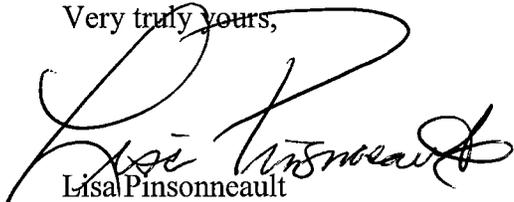
PR 14-25B

Page 5

Although the Attorney General will not file suit in this matter at this time, nothing in the APRA precludes an individual from pursuing a complaint in the Superior Court. Please be advised that we are closing our 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,

A handwritten signature in black ink, appearing to read "Lisa Pinsonneault". The signature is fluid and cursive, with a large initial "L" and "P".

Lisa Pinsonneault

Special Assistant Attorney General

Extension 2297

LP/pl

Cc: Matthew C. Reeber, Esquire