



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

April 6, 2016

PR 15-50B

Mr. Donald B. MacDougall

Re: MacDougall v. Department of Health and Office of Drinking Water Quality

Dear Mr. MacDougall:

This correspondence serves as a supplemental finding to MacDougall v. Department of Health and Office of Drinking Water Quality (DOH and DWQ), PR 15-50, released on August 21, 2015. In MacDougall v. Department of Health and Office of Drinking Water Quality, we reviewed your Access to Public Records Act ("APRA") complaint filed against the Department of Health and Office of Drinking Water Quality and concluded that the DOH and DWQ violated the APRA when it failed to respond to your APRA request dated April 2, 2014. The sole issue to be addressed in this supplemental finding is whether the DOH and DWQ's violation was willful and knowing, or reckless. As requested, the DOH and DWQ responded to our inquiry and we now resolve this outstanding issue.

By letter dated September 24, 2015, Attorney Stephen Morris provided a supplemental response. Attorney Morris states, in pertinent part:

"The pertinent facts are set forth in my June 16, 2014 affidavit and supplemented here are as follows:

- a. March 31, 2014 – The DOH received Mr. MacDougall's original APRA request.
- b. April 1, 2014 – I requested clarification from Mr. MacDougall as to his request.
- c. April 2, 2014 – The DOH received Mr. MacDougall's revised APRA request setting forth four (4) specific requests.
- d. April 7, 2014 – I requested DWQ respond in writing to all four requests.
- e. April 8, 2014 – DWQ responded to requests one and two.
- f. April 9, 2014 – In anticipation of DWQ's response to requests three and four, I prepared a response to all four requests and put the file aside awaiting a response from DWQ concerning requests three and four.

* * *

My intention was to comply with the APRA and provide Mr. MacDougall a timely and complete response to his four specific requests. The DOH and DWQ's violation in this matter was an inadvertent[t], not a 'knowing and willful' or 'reckless' violation of the APRA. While waiting for DWQ's response to Mr. MacDougall's requests (numbers three and four) I set the file aside and in doing so I inadvertently failed to respond to Mr. MacDougall's requests within the time frame required under the APRA.

* * *

The facts do not lend themselves to a conclusion that DOH's untimely response to Mr. MacDougall's request was willful. According to Black's Law Dictionary, willful is defined as 'a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious.' In U.S. v. Boyd the court states that '[i]n common parlance, 'willful' is used in the sense of 'intentional,' as distinguished from 'accidental' or 'involuntary.' U.S. v. Boyd (C.C.) 45 Fed. 855 * * * The facts in this matter do not suggest an intention to be untimely in responding to Mr. MacDougall's request. * * *

According to Black's Law Dictionary, reckless is 'a term that means to be careless and indifferent to the welfare of other people,' and it is 'characterized 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.[']' The facts do not support a finding of a deliberate disregard or indifference to Mr. MacDougall. Again, the facts support the contrary, a concern to be timely, accurate and complete regarding Mr. MacDougall."

Our focus is whether the DOH and DWQ 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.

After reviewing the DOH and DWQ’s September 24, 2015 supplemental response, we believe there is insufficient evidence to find that the violation discussed in MacDougall v. Department of Health and Drinking Water Quality was willful and knowing, or reckless.

The evidence reveals that legal counsel for the DOH and DWQ sought clarification from you regarding your APRA request. After receiving your revised response, setting forth four (4) categories of documents, legal counsel sought responsive documents from the DWQ and received a partial response. While awaiting the additional and remaining response, the file was apparently set aside and, as such, the DOH and DWQ failed to respond to the APRA request within the time frame required under the APRA. Last year, this Department was faced with a similar scenario. 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,

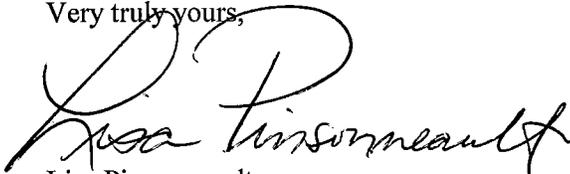
based upon the evidence presented, that the violation amounted to a willful and knowing, or reckless violation.

Although we are aware of another instance, approximately thirteen (13) years ago, where the DOH failed to respond to an APRA request in a timely manner, see Bauer v. Department of Health, PR 03-07 (“[d]ue to a family emergency, the Deputy Chief of Legal Services was unable to forward the appropriate documents * * * in a timely manner”), based upon the specific facts of this case, we conclude that the evidence fails to establish a willful and knowing, or reckless, violation that falls within the purview of DiPrete. This finding does serve as notice to the DOH and DWQ that the actions discussed herein violated the APRA and may serve as evidence of a willful and knowing, or reckless, violation in a similar future situation.

While the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual 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). Please be advised that we are closing your 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 cursive script, appearing to read "Lisa Pinsonneault". The signature is written in dark ink and is positioned above the typed name and title.

Lisa Pinsonneault
Special Assistant Attorney General

Cc: Stephen Morris, Esquire