



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 22, 2016
PR 16-05
OM 16-02

Mr. Donald B. MacDougall

Re: MacDougall v. Quonochontaug Central Beach Fire District

Dear Mr. MacDougall:

The investigation into your Access to Public Records Act (“APRA”) and Open Meetings Act (“OMA”) complaints filed against the Quonochontaug Central Beach Fire District (“Fire District”) is complete. Your two complaints dated April 30, 2014 and May 4, 2014, are addressed below.

A. April 30, 2014 Complaint

You allege that the Fire District:

1. failed to file certification forms with the Department of Attorney General until February 2014 in violation of this Department’s prior finding;
2. failed to properly respond to a 2013 APRA request because the Fire District’s response was not signed by a person certified to grant or deny access to public records in violation of the APRA and this Department’s prior finding;
3. failed to: (a) properly respond to your January 18, 2014 APRA request (Category 15) and (b) failed to properly respond to your January 18, 2014 APRA request (Category 11); and
4. failed to produce, pursuant to your APRA request, annual meeting notices for various Fire District subcommittees, and failed, pursuant to the OMA, to post annual notice electronically with the Secretary of State for the Public Works, Long Range Planning,

Police Protection, Ballfield and Playground, Community Sales, and Tennis & Golf Committees.

You filed additional correspondences dated June 13, 2014 and June 26, 2014, and the Fire District filed its response dated June 19, 2014. This Department has reviewed all correspondences and shall provide additional information below, as relevant.

At the outset, we note that in examining whether a violation of the OMA or the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA and the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire District violated the OMA or the APRA. See R.I. Gen. Laws §§ 42-46-8; 38-2-8. In other words, we do not write on a blank slate.

First, we address your allegation that the Fire District failed to comply with what you term this Department's "Decision and Order" in MacDougall v. Quonochontaug Central Beach Fire District, PR 13-17; OM 13-24. In particular, you observe that in MacDougall, this Department determined that the Fire District had violated the APRA when it failed to file APRA certifications for calendar year 2013 as required by § 38-2-3.16. Id. at p. 21. We directed that:

"within thirty (30) days of this finding [July 31, 2013] * * * any member(s) of the Fire District who have authority to grant or deny access to records must receive training (consistent with this Department's regulations posted on our website) and comply with R.I. Gen. Laws § 38-2-3.16." Id. at p. 47.

Your April 30, 2014 complaint relates that the Fire District failed to comply with this Department's thirty (30) day timeframe, and indeed only filed its APRA certification in February 2014. In your June 13, 2014 correspondence you contend that the Fire District:

"violated R.I. Gen. Laws Section 38-2-3.16 when it failed to comply with the statute's requirements by no later than January 1, 2013. Similarly, [the Fire District] violated R.I. Gen. Laws Section 38-2-3.16 when it failed to comply with the 30 day extension that the Department [of Attorney General] provided in its July 31, 2013 finding."

As best as we can tell, you assert two independent causes of action in this allegation: 1) pursuant to this Department's July 31, 2013 finding and 2) pursuant to R.I. Gen. Laws § 38-2-3.16. With respect to this allegation, initially, we must express that the Fire District's failure to timely comply with this Department's directive is of deep concern to this Department. Nonetheless, directing our attention to your assertion that the Fire District's failure to comply with this Department's finding constitutes an independent cause of action cognizable in a court of law, no evidence has been presented on this issue and we are aware of no legal authority. While we certainly do not seek to diminish the effect or ramifications of our findings, this Department's

legal recourse to enforce the failure to comply with this Department's finding is to seek redress through the substantive law allegedly violated and not through this Department's finding.

Here, your April 30, 2014 complaint alleged that the Fire District failed to timely file its 2013 APRA certification within thirty (30) days of this Department's July 31, 2013 finding. But, as noted above, failure to comply with a finding from this Department does not constitute an independent cause of action. Moreover, by the time you filed your April 30, 2014 complaint, the Fire District had already filed its APRA certification in February 2014. To be sure, the Fire District's certification concerned 2014, and not 2013, but considering that the Fire District had already filed its 2014 certification, any injunctive relief that this Department could seek with regard to the failure to timely file the 2013 certification would be moot even if we assumed that this Department's finding constituted an independent cause of action.

Moreover, you suggest that the Fire District "violated R.I. Gen. Laws Section 38-2-3.16 when it failed to comply with the statute's requirements by no later than January 1, 2013." While this basis does constitute an independent cause of action, this is the precise issue we reviewed in MacDougall when we found the Fire District violated § 38-2-3.16 by failing to timely file its certification. Having already found the Fire District in violation of this provision, we know of no authority, and none has been presented, that would again allow us to find that the Fire District violated § 38-2-3.16 for failing to timely file its 2013 certification. Instead, our recourse would have been to file an enforcement action pursuant to § 38-2-3.16 to enforce the violation found in MacDougall, but, as already described, by the time you filed the instant complaint and brought this matter to our attention, the Fire District had already filed its 2014 certification form and 2013 had ended. Faced with these facts, an enforcement action to require the Fire District to file its 2013 certification would have been moot.

Next you assert that the Fire District violated the APRA when it failed to respond properly to a 2013 APRA request because the Fire District's response was not signed by a person certified to grant or deny access to public records in violation of the APRA and this Department's finding in MacDougall. In MacDougall, this Department directed the Fire District to respond to several APRA requests you submitted to the Fire District between 2012-2013, in a manner consistent with the APRA and our finding in MacDougall. The "2013 APRA request" at issue in this complaint pertains to the Fire District's supplemental response to the APRA requests at issue in MacDougall. In particular, you contend that the Fire District's legal counsel, Attorney Knisley, provided the supplemental response, but that at the time of the supplemental response was not certified pursuant to R.I. Gen. Laws § 38-2-3.16. It is notable that your complaint contains no other allegation concerning the deficiency of the Fire District's supplemental response, except that its signatory was not certified according to the APRA.

In response to this allegation, the Fire District responds that it has:

"been unable to find caselaw on whether supplemental responses to findings by the Attorney General must be signed by 'a person certified to grant or deny access to public records.' A review of Attorney General opinions with regard to both

APRA and OMA issues reveals that many, if not most, supplemental responses have been from attorneys representing the public body.”

Here, R.I. Gen. Laws § 38-2-3.16 provides that “[n]ot later than January 1, 2013, and annually thereafter, the chief administrator of each agency and each public body shall state in writing to the attorney general that all officers and employees who have the authority to grant or deny persons or entities access to records under this chapter have been provided orientation and training regarding this chapter.” While we acknowledge and agree with the Fire District’s observation that this issue presents an issue of first impression, we apply the plain language of this provision and conclude that the person who has “the authority to grant or deny persons or entities access to records” must have been provided “orientation and training” consistent with the APRA. See R.I. Gen. Laws § 38-2-3.16. Applying this language to the facts and this case, we conclude that Attorney Kingsley, or whoever authorized the Fire District’s response, must be certified pursuant to § 38-2-3.16.

In response, the Fire District argues that Attorney Knisley is not an “officer[] and employee[]” within the purview of R.I. Gen. Laws § 38-2-3.16, but reading this provision as a whole, we must conclude that an interpretation that would allow a non-certified person the ability or authority “to grant or deny persons or entities access to records” would render the certification requirement nugatory. Since the Fire District’s supplemental response appears to “grant or deny persons or entities access to records,” the supplemental response should have been signed or otherwise authorized by a person certified pursuant to R.I. Gen. Laws § 38-2-3.16. Therefore, we find the Fire District violated the APRA when someone not certified pursuant to R.I. Gen. Laws § 38-2-3.16 responded or authorized the Fire District’s supplemental response.

You also claim that the Fire District violated the APRA when it failed to respond to Category No. 15 and when it failed to provide you access to documents requested in Category No. 11 of your January 18, 2014 APRA request. Request No. 15 sought “[c]opies of the audiotapes for the 2011, 2012, and 2013 Annual Meetings,” while request No. 11 sought “[c]opies of all APRA Certificates of Compliance for 2013 and 2014 required to be signed by the Moderator (the ‘Chief Administrative Officer’ as defined by the APRA) and filed pursuant to RI General Laws Section 38-2-3.16.”

In its response, the Fire District acknowledges that Category No. 15 was not addressed in its February 28, 2014 response although in fairness, the Fire District did respond to the other fourteen (14) categories requested. In doing so, however, we are compelled to note that your original January 18, 2014 APRA request sought fourteen (14) categories, and the Fire District provided a response to these fourteen (14) categories. After emailing your original January 18, 2014 APRA request, you emailed the Fire District (also on January 18, 2014) indicating that you “inadvertently forgot to include the following category (No. 15)” and requesting that the Fire District include your Category No. 15. As indicated above, and as the Fire District

acknowledges, the Fire District neglected to respond to Category No. 15 and this violated the APRA.¹

With respect to your allegation that the Fire District failed to produce a copy of the 2013 and 2014 Certificate of Compliance (Request No. 11), we find no violation. No evidence has been produced that the Fire District maintained a copy of the requested Certificates of Compliance, and even your April 30, 2014 complaint indicates that the Fire District “likely cannot produce [the certificate] because [the Fire District] apparently failed to comply with the Department’s July 31, 2013 [finding].” Regardless of the circumstances or reasoning, because there is no evidence that the Fire District maintained the requested document at the time of your APRA request, the Fire District did not violate the APRA when it failed to provide you a copy. See R.I. Gen. Laws § 38-2-3(h).

Next, you take issue with the Fire District’s response to Category No. 14 of your January 18, 2014 APRA request, which sought “[c]opies of the Annual Notices of Scheduled 2014 meetings for all [Fire District] Committees required to be filed with the Rhode Island Secretary of State at the beginning of each calendar year.” In particular, you relate that as of January 18, 2014, the Secretary of State’s website indicated that annual notices had been filed for six (6) Fire District subcommittees (Finance and Budget, Beach and Dunes, Special Events, Real Estate and Property, Boating, and Civil Improvement), yet none of these notices had been provided to you as part of the Fire District’s February 28, 2014 response. According to your complaint, six (6) other Fire District subcommittees (Public Works, Long Range, Police Protection, Ballfield and Playground, Community Sales, and Tennis & Golf) failed to post annual notice on the Secretary of State’s website. The Fire District’s Moderator, Ms. Nancy Matthews, indicates in her affidavit that “[b]ecause of the size, scope, and magnitude of the 2014 Request, I failed to fully respond to Category 14 by inadvertently omitting certain subcommittee annual notice” and that this omission was “unintentional.”

On this issue, we find that the Fire District violated the APRA when it failed to provide access to the six (6) subcommittee notices posted on or before January 18, 2014. With respect to these notices, the evidence demonstrates that annual notices for these subcommittees were posted on or before the date of your January 18, 2014 APRA request and no evidence has been submitted that the Fire District did not maintain these annual notices at the time of your APRA request. Accordingly, based upon the evidence presented, the failure to provide such documents violated the APRA.

You also contend that the Fire District’s failure to post on the Secretary of State’s website the annual notices for the six (6) other subcommittee notices violated the OMA. In this respect, the OMA provides that “[a]ll public bodies shall give written notice of their regularly scheduled

¹ Although the record evinces extensive discussions between you and the Fire District on myriad subjects, after the Fire District’s February 28, 2014 response, it does not appear that you contacted the Fire District concerning the omission of Category No. 15. We cannot help but wonder whether such an outreach would have remedied this situation short of filing an APRA complaint on this issue.

meetings at the beginning of each calendar year” and that the “notice shall include the dates, times, and places of the meetings and shall be provided to members of the public upon request and to the secretary of state at the beginning of each calendar year in accordance with [the OMA].” R.I. Gen. Laws § 42-46-6(a).

The OMA provides that only “aggrieved” citizens may file a complaint with this Department. R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Supreme Court examined the “aggrieved” provision of the OMA. In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission’s March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission’s March 25, 1996 meeting, Mr. Hawkins and his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission’s notice was deficient, the trial justice determined that the Lottery Commission violated the OMA, and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was “unnecessary” to address the merits of the OMA lawsuit because “the plaintiffs Graziano and Hawkins ha[d] no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

“has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice. Id. at 221-22. (Emphases added).

Here, we have been presented no evidence concerning whether you attended the meetings in question, sought to attend the meetings in question, or did not attend the meetings in question because of the allegedly deficient annual notice. It also may bear noting that you have made no allegation that the subcommittees’ supplemental notice was deficient. R.I. Gen. Laws § 42-46-6(b). Accordingly, pursuant to Graziano, we find insufficient evidence to determine that you are aggrieved by this allegation and find no violation. See Clark v. West Glocester Fire District, OM 14-35 (no evidence aggrieved by lack of annual notice).

B. May 9, 2014 Complaint

By letter dated May 9, 2014, you also assert that the Fire District’s “improper and evasive response to [your] January 18, 2014 APRA request, specifically Request No. 6” violated the APRA. To explain, Request No. 6 sought from the Fire District:

“[c]opies of all correspondence (including email) from January 1, 2012 to the present between (1) [Fire District] elected and/or appointed public officials and (2) Rhode Island’s State representatives including, but not limited to, Donna

Walsh and Dennis Algiere regarding the proposed Charter amendments presented by the Board of Governors for a vote at the 2012 Annual Meeting.”

By letter dated February 28, 2014, the Fire District responded that it “does not have or maintain the requested records.” Following the Fire District’s denial, you contacted other person(s) and entities where you were apprised that Representative Walsh “sponsored the bill to change [the Fire District’s] Charter based on correspondence/email from [the Fire District’s] General Counsel Knisley.” See Complaint, p. 4. Based upon this, and perhaps other evidence, you claim the Fire District violated the APRA when it failed to provide you correspondence from the Fire District’s legal counsel, Attorney Knisley, to Representative Walsh or other members of the General Assembly.

In this respect, it has been observed:

“it is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested. The rationale for this rule is that [the Freedom of Information Act] was not intended to reduce government agencies to fulltime investigators on behalf of requesters. Therefore, agencies are not required to maintain their records or perform searches[,] which are not compatible with their own document retrieval systems. ‘The linchpin inquiry is whether the agency is able to determine ‘precisely what records [are] being requested.’” Assassination Archives and Research v. Central Intelligence Agency, 720 F.Supp. 217 (D.D.C. 1989).

Here, after carefully reviewing the record and assuming that the Fire District maintains correspondence from Attorney Knisley to “Rhode Island’s State representatives including, but not limited to, [Representative] Donna Walsh and [Senator] Dennis Algiere regarding the proposed Charter amendments presented by the Board of Governors for a vote at the 2012 Annual Meeting,” we find no violation. Our reasoning stems from our conclusion that no evidence has been presented that the Fire District maintains records responsive to the first prong of your APRA request inquiry, *i.e.*, a correspondence from or to the “[Fire District’s] elected and/or appointed public officials.”

Specifically, no evidence has been presented that Attorney Knisley is an “elected and/or appointed official.” In your June 26, 2014 rebuttal you contend that “the documentary evidence presented with this rebuttal demonstrates, Attorney Knisley was appointed as QCBFD District/General Counsel by former Moderator Steve Long and unanimously approved as such by the QCBFD Board,” however, the evidence you submitted – including exhibits A, B, C, and D – fail to support your argument.² For example, in your rebuttal you contend that “QCBFD also has

² Attached as exhibits A and B are the minutes for the Board of Governors’ July 23 and October 9, 2011 meetings. While the minutes reflect that the Board discussed the search and hiring of Attorney Knisley as the “General Counsel,” at no moment do the minutes, or other evidence submitted, evince that “Attorney Knisley was appointed as QCBFD District/General Counsel by

appointed public officials, including QCBFD District Counsel because the District Counsel is designated/appointed by the Board of Governors as enabled by the QCBFD Charter and By-laws at Article 11.” (Emphasis in original). With respect to the Fire District’s Charter, Section 4 provides, in relevant part:

“[s]aid qualified voters...may elect the following officers: a moderator, seven members of the governing body of the fire district known as the Board of Governors, a clerk, and a treasurer...Except for the position of moderator, each elected official shall serve a one year term or until the next annual meeting and until others be chosen in their stead.”

District/General Counsel is not included in the list of officers elected by the Fire District’s voters, nor is it included in any other provision of the Fire District’s Charter. Further, Article 11 of the Fire District’s By-laws provides “[t]he Board of Governors may designate the District Counsel who shall be a member in good standing of the Bar of the State of Rhode Island and shall serve at the pleasure of the Board of Governors.” (Emphases added). This language is distinguishable from the language in Articles 4, 5, and 6, which provide that the moderator, administrative officers, and clerk are elected and serve a specified number of years. Instead, the language in Article 11 is more akin to the language in Article 12 of the By-laws, which states, in relevant part, “[t]he Board of Governors shall designate all contract employees who shall serve at the pleasure of the Board of Governors.” (Emphases added).

Indeed, in your June 26, 2014 rebuttal, you pointed out that a “state or municipal appointed official” means:

“any officer or member of a state or municipal agency as defined herein who is appointed for a term of office specified by the constitution or a statute of this state or a charter or ordinance of any city or town or who is appointed by or through the governing body or highest official of state or municipal government.” R.I. Gen. Laws § 36-14-2(9)(code of ethics).

Respectfully, no evidence has been presented that Attorney Knisley satisfies any of these conditions, *i.e.*, appointed for a term of office specified by constitution, statute, charter, or ordinance; or who is appointed by or through the governing body or highest official of state or municipal government. At best, Attorney Knisley is “designate[d]” to serve as “district counsel” by the Fire District’s Board of Governors and serves at their pleasure. See Fire District By-laws, Article 11. In fact, in a February 9, 2014 correspondence from you to the Fire District’s Moderator, you acknowledge that “Attorney Knisley is not a ‘public body official’...he is neither an elected official nor an appointed official...Further, he is not an employee of the QCBFD.” Your correspondence also asserts that Attorney Knisley “does not have ‘custody or control’ of QCBFD public records.”

former Moderator Steve Long and unanimously approved as such by the QCBFD Board.” In addition, the fact that Attorney Knisley indicates that he is General Counsel for the Fire District in exhibits C and D is not evidence that he is an “appointed and/or elected official.”

Although we recognize that the position of "District Counsel" is referenced in the Fire District's By-laws, even assuming that Attorney Knisley holds this position, we have great difficulty concluding that the District Counsel is an "appointed public official" within the purview of your APRA request. Our conclusion is buttressed by your January 18, 2014 APRA request, specifically, comparing Request Nos. 6 and 7. According to your January 18, 2014 APRA request, you sought:

"6. Copies of all correspondence (including email) from January 1, 2012 to the present between (1) [Fire District] elected and/or appointed public officials and (2) Rhode Island's State representatives including, but not limited to, Donna Walsh and Dennis Algieri regarding the proposed Charter amendments presented by the Board of Governors for a vote at the 2012 Annual Meeting.

7. Copies of all correspondence (including email) from September 1, 2013 to the present between (1) representatives of Rhode Island governmental agencies including, but not limited to, CRMC, DEM and DOH and (2) [the Fire District's] elected and/or appointed officials, and/or agents such as Linda Steere, as well as attorneys from Jeff Knisley's and/or Peter Ruggiero's law firms regarding the proposed West Pond restoration project." (Emphasis added).

As Attorney Petrarca observes in his June 19, 2014 response to your complaint, your Request No. 7 specifically sought correspondence from Attorney Knisley or others in his law firm, and we find that the inclusion of this language in Request No. 7, but the absence of this language in Request No. 6, is significant. Indeed, although Attorney Petrarca presented this argument in his June 19, 2014 response, your June 26, 2014 rebuttal failed to address this argument. Furthermore, even if we assume, as you suggest, that the Fire District's attorneys "are agents of the QCBFD, as defined by the Collette decision," this fact is of no moment since any correspondence from the Fire District's attorneys to "Rhode Island's State representatives" would not be responsive to your APRA request for a correspondence from or to the "[Fire District's] elected and/or appointed public officials." At the very least, we cannot find that the Fire District violated the APRA when it concluded that any correspondences to/from Attorney Knisley failed the first prong of your APRA request. Therefore, we find that the Fire District's response did not violate the APRA.

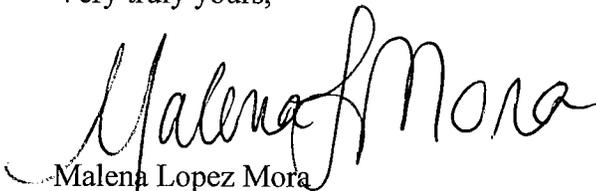
Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies available in suits filed under the OMA: (1) "[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];" or (2) "the court may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members found to have committed a willful or knowing violation of [the OMA]." R.I. Gen. Laws § 42-46-8. The court may also impose a civil fine of up to two thousand dollars (\$2,000) against a public body or any of its members found to have committed a willful or knowing violation of the APRA, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated the APRA. R.I. Gen. Laws § 38-2-9(d).

Here, we conclude that neither remedy is appropriate at this time and that this Department will allow the Fire District the opportunity to remedy these violations. With respect to the Fire District's failure to respond to Category No. 15 of your January 18, 2014 request, it is unclear whether the audiotapes exist and/or are within the Fire District's custody or control, however, the Fire District must respond to this aspect of your request in a manner consistent with the APRA and this finding. In addition, with respect to the annual notices of the six (6) subcommittees that were "inadvertently omit[ed]" from the Fire District's February 29, 2014 response, the Fire District must also respond to this aspect of your request in a manner consistent with the APRA and this finding. Although the Fire District may typically assess a search, retrieval, and copying cost in accordance with R.I. Gen. Laws § 38-2-4, for the matters discussed in this finding, the Fire District is prohibited from assessing a charge. See R.I. Gen. Laws § 38-2-7(b) ("All copying and search and retrieval fees shall be waived if a public body fails to produce requested records in a timely manner; provided, however, that the production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under section 38-2-4."). Because you allege no other deficiency with the Fire District response to the 2013 supplemental response, other than the signatory, we deem no remedial action necessary in this case. Notwithstanding the above, this finding serves as notice to the Fire District that its actions violated the APRA and may serve as evidence of a willful and knowing or reckless violation in any future similar case.

While the Attorney General will not file suit in this matter at this time, nothing in the OMA or the APRA precludes an individual from pursuing a complaint in the Superior Court. The complainant must file an OMA complaint within ninety (90) days from the date of the Attorney General's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. R.I. Gen. Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter, although we reserve the right to reopen this matter should the Fire District not remedy these violations on its own.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Malena Lopez Mora
Special Assistant Attorney General

Cc: R. Jeffrey Knisley, Esquire