



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

October 26, 2015
PR 15-18B

Louis DeSimone, Esq.

In Re: Albion Fire District

Dear Attorney DeSimone:

This correspondence serves as a supplemental finding to In Re: Albion Fire District, PR 15-18, released May 18, 2015. In In Re: Albion Fire District, we initiated an Access to Public Records Act ("APRA") investigation into the Albion Fire District's ("Fire District") failure to timely comply with R.I. Gen. Laws § 38-2-3.16 and concluded that the Fire District violated the APRA when it failed to timely comply with R.I. Gen. Laws § 38-2-3.16. See R.I. Gen. Laws § 38-2-8(d). The sole issue to be addressed in this supplemental finding is whether the Fire District's violation was willful and knowing, or reckless. As requested, the Fire District responded to our inquiry and we now resolve this outstanding issue.

By correspondence dated June 10, 2015, you provided a supplemental response on behalf of the Fire District. In pertinent part, the Fire District states:

"As previously stated, prior to your correspondence, the district was unaware that an additional review course was required.

With regard to any question as to intentional conduct, the district attempted to comply upon notification by the department and immediately updated the applicable certification through use of the video stream offered. Further, as evidenced by the affidavit, the error was due to a lack of information and constituted an oversight by the district."

Included in the Fire District's supplemental response was an affidavit by the Fire District's Clerk, Ms. Lois Moore. In relevant part, Ms. Moore attests:

"During 2011, members of the Board of Fire Commissioners and I attended the Attorney General's Open Government Summit in order to become familiar with

the procedures for open meetings and open records requests under Rhode Island law.

Upon notification that my certification as the contact person for public records requests was not sufficient under the required regulations, I reviewed the video presentation through the link provided by the Office of the Attorney General and submitted the requisite form for certification through the district's legal counsel.

Prior to said notification from our counsel, I was unaware of the certification requirement beyond my attendance at the Open Government Summit.

At no time did the district willfully or knowingly fail to provide indicia of certification to the attorney general's representative. Any gap in certification was inadvertent and due to the district being unaware of the requirements.

At no time during my tenure as clerk has there been any intent on behalf of the district commissioners or myself to violate or subvert the Open Meetings Law, Public Records Law or any ruling issued by the Office of the Attorney General."

Our focus is whether the Fire District 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 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 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 In Re: Albion Fire District, PR 15-18, this Department had little difficulty concluding that the Fire District violated the APRA when it failed to submit APRA certifications by January 1, 2015 as required by R.I. Gen. Laws § 38-2-3.16.¹ In fact, it was not until after this Department

¹ Rhode Island General Laws § 38-2-3.16 requires 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.”

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initiated this investigation on March 3, 2015, that the Fire District ultimately submitted certification.

Even if we were to accept the Fire District's explanation that "the district was unaware that an additional review course was required," the fact that this Department sent several notifications to the Fire District that this Department was not in receipt of the Fire District's APRA certification form, in our opinion, demonstrates that the Fire District was "cognizant of an appreciable possibility that [it might] be subject to the statutory requirements and [it] failed to take steps reasonably calculated to [address the issue]." See DiPrete, 635 A.2d at 1164. Specifically, the Fire District was advised that they were not in compliance with R.I. Gen. Laws § 38-2-3.16 on January 20, February 6, and February 24. Respectfully, we reject the Fire District's argument that "the district attempted to comply upon notification by the department and immediately updated the applicable certification," since no certification was received until March 3, 2015 – nearly two months after first being notified of the Fire District's noncompliance by this Department on January 20. Indeed, the fact that the Fire District assured this Department on January 20 and February 24, 2015 that certifications were "forthcoming," serves as further evidence that the Fire District was "cognizant of an appreciable possibility that [it might] be subject to the statutory requirements and [it] failed to take steps reasonably calculated to [address the issue]." See id.

Given the evidence before us, in particular the multiple notifications by this Department, the Fire District's assurances, and the Fire District's failure to provide a certification form until after this Department initiated this complaint, we find that the Fire District willfully and knowingly, or recklessly, violated the APRA when it failed to comply with R.I. Gen. Laws § 38-2-3.16. Accordingly, this Department will file a civil lawsuit against the Albion Fire District.

Very truly yours,

A handwritten signature in cursive script that reads "Malena Lopez Mora". To the right of the signature is a circular stamp containing the initials "MLM".

Malena Lopez Mora
Special Assistant Attorney General