



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 18, 2015
PR 15-18

Louis DeSimone, Esq.

In Re: Albion Fire District

Dear Attorney DeSimone:

This Department's Access to Public Records Act ("APRA") investigation involving the Albion Fire District ("District") is complete. By correspondence dated March 3, 2015, this Department initiated the instant APRA investigation against the District for failure to timely comply with R.I. Gen. Laws § 38-2-3.16. See R.I. Gen. Laws § 38-2-8(d). The pertinent facts are as follows.

On January 20, 2015, this Department notified the District that the required APRA Compliance Certification Form ("certification form"), which certifies that an employee or officer of a public body has received the mandatory APRA training pursuant to R.I. Gen. Laws § 38-2-3.16, had not been submitted to this Department for calendar year 2015. Certification forms for calendar year 2015 were due no later than January 1, 2015. Also on January 20, as legal counsel for the District, you replied that "the Albion Public Records Rules provide for the clerk and legal counsel to have authority to receive and act upon requests for public records. I have prepared the certification form for myself and will provide the clerk's form upon receipt." Since we received no certification forms for yourself, the Clerk, or any other District personnel, a follow up correspondence was sent on February 6 which read, in pertinent part:

"Upon review of our records, it has come to our attention that the Albion Fire District is not in compliance with the Access to Public Records Act ('APRA').

The required training may be completed by viewing the video of our Open Government Summit on our website...Once you have viewed the Access to Public Records Act portion of the presentation, complete the enclosed certification form and forward it to this Department.

Please be advised that if we do not receive a completed certification form by February 20, 2015, this Department may seek additional measures to ensure compliance." (Emphasis original).

Notwithstanding our February 20 deadline, no certification forms were received by February 20, 2015. Thereafter, on February 24, a final notice was sent inquiring whether the District had in fact submitted the certification form but, perhaps, it was not received or mis-received by this Department. A reply was received the same day, which stated that "[you would] check to see where they mailed it," and that you would "try to scan a copy and provide it to [this Department]." On March 3, still having received no certification forms, this Department opened the instant investigation against the District for failure to comply with R.I. Gen. Laws § 38-2-3.16 and we instructed the District to provide a substantive response addressing this issue within ten (10) business days. Also on March 3, after receiving our demand letter, you provided a response on behalf of the District. The District stated, in relevant part:

"Attached is my certification as legal representative of the Albion Fire District. The document executed by the clerk is also attached.

Please note that your correspondence indicates that no response to the inquiries was forthcoming from the [D]istrict. I had discussed this matter with Assistant Attorney General Field via email and advised that the documents would be provided.

At no point did the [D]istrict ignore any correspondence or request in this regards."

The District sent a second email on March 3 indicating that:

"I have provided scan [sic] copies of the APRA Certifications which were previously referenced.

In this regard, there was an oversight in my office as I believed the original had been mailed to your office. My file indicates that it was not in fact mailed.

As such, it is requested that you accept the documents provided as timely filed in response to your original inquiry."

Attached to the first March 3 correspondence were two (2) certification forms, one executed by you as legal counsel and one executed by the District's Clerk. Your certification form, dated February 11, 2015, certified that you received APRA training on February 11, 2015. The Clerk's certification form, dated February 10, 2015, certified that she received APRA training on January 13, 2011. On March 10, in response to the District's request that we "accept the documents provided as timely filed," this Department informed the District that the investigation into the District's failure to timely comply with R.I. Gen. Laws § 38-2-3.16 remained open and that the District was free to submit a substantive response addressing the issue. We also explained that

since the Clerk certified that she received training in 2011, her 2011 certification did not extend to 2015. See R.I. Gen. Laws § 38-2-3.16.

On March 31, we received a substantive response from the District. In relevant part, the District contends that:

“The [D]istrict clerk and all of its board members have attended the Open Meetings summit provided by your department.

Prior to your correspondence, the [D]istrict was unaware that an additional review course was required. In this regard, upon notification, I as counsel for the entity, reviewed the online video presentation and filed the certification related thereto. It should be noted that the rules promulgated by the [D]istrict for requesting public records designate legal counsel and the clerk as the persons responsible for responding to such requests.

At this time, the clerk is in the process of updating her certification. Pending submission of her re-certification, all public records requests will be reviewed by legal counsel prior to response.”

At the outset, we note that in examining whether a violation of 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 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 District violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

Rhode Island General Laws § 38-2-3.16 provides “[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. The attorney general may, in accordance with the provisions of chapter 35 of title 42, promulgate rules and regulations necessary to implement the requirements of this section.” To satisfy the orientation and training requirement, a member of a public body may attend an Attorney General training in person or view a recent video of an Access to Public Records Act presentation given by the Department of Attorney General, which is available on the Attorney General’s website. See Rules and Regulations Regarding Training under the Access to Public Records Act. In addition, after satisfying the Access to Public Records Act training requirement, that individual “must certify to the Chief Administrative Officer that he or she viewed the entire Access to Public Records Act presentation, or attended the live training program, and such certification shall be forwarded by the Chief Administrative Officer to the Department of Attorney General.” Id. Stated differently, compliance with R.I. Gen. Laws § 38-2-3.16 is conditioned on timely satisfying two (2) requirements: 1) receiving the required annual training and 2) providing this Department with annual certification of that training.

The evidence shows that despite repeated notice from this Department on January 20, February 6, and February 24, and despite the District's assurances on January 20 and February 24 that the certifications were "forthcoming," no certifications were received until March 3, after the District received notice of the present investigation. Still, of the two certification forms submitted, only one brought the District in compliance with the APRA since the Clerk's 2011 training did not extend to 2015.¹ Moreover, according to your certification form, it appears that you fulfilled the training requirement on February 11, 2015, after the time for certification (and obviously training) had already passed. See R.I. Gen. Laws § 38-2-3.16.

Here, the District does not contest the fact that the certification form was untimely filed, only that this was due to an "oversight." Respectfully, we find this argument unpersuasive since this Department advised the District on January 20, February 6, and February 24, that this Department was not in receipt of a certification form and the District advised this Department on more than one occasion that the certification forms were "forthcoming." While the District contends that "at no point did the [D]istrict ignore any correspondence or request in this regard," ultimately, it was the commencement of this investigation – one and a half months after the District received its first notice of non-compliance – that prompted the District to submit the certification form. Although the District is presently in compliance with R.I. Gen. Laws § 38-2-3.16, it is not lost upon this Department that the District's present compliance was untimely and the result of this Department expending its limited resources through repeated notices as well as the initiation of this complaint. Therefore, we find that the District violated the APRA when it failed to timely comply with R.I. Gen. Laws § 38-2-3.16.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court, requesting "injunctive or declaratory relief." See R.I. Gen. Laws § 38-2-8(b). Also a court "shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***." See R.I. Gen. Laws § 38-2-9(d). Based on the totality of the circumstances, we have concerns that the District's failure to timely comply with R.I. Gen. Laws § 38-2-3.16 rises to the level of knowing and willful, or, alternatively, reckless violation.²

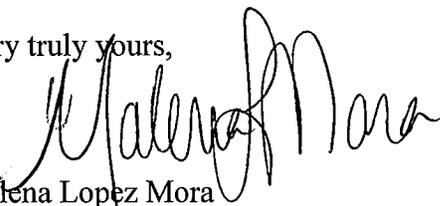
¹ It deserves mentioning that, as of the date of this finding, this Department has not received an updated certification form from the District's Clerk.

² 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

Therefore, consistent with this Department's practice, the District shall have ten (10) business days from receipt of this finding to provide us with a supplemental explanation as to why its failure to timely comply with R.I. Gen. Laws § 38-2-3.16 should not be considered knowing and willful, or reckless, in light of its recognition of the APRA and this Department's repeated requests to comply with its requirements. At the end of this time period, we will issue our supplemental finding on this matter and determine whether civil fines are appropriate.

Very truly yours,



Mátena Lopez Mora
Special Assistant Attorney General
Extension 2307

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. (Emphasis added).