



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

October 17, 2013  
PR 13-13B

Michael A. Kelly, Esquire

**RE: Law Offices of Michael Kelly v. City of Woonsocket**

Dear Attorney Kelly:

This correspondence serves as a supplemental finding to Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13, released July 3, 2013. In Law Offices of Michael Kelly, we reviewed your March 15, 2013 Access to Public Records Act ("APRA") complaint against the City of Woonsocket ("City") and concluded that the City violated the APRA when it failed to timely respond to your APRA request submitted on December 21, 2012. We also concluded that the City further violated the APRA when it failed to provide you with documents responsive to your APRA Request No. 8, or in the alternative, to provide you with a reason exempting responsive documents from disclosure. The sole issue to be addressed in this supplemental finding is whether the City's violations were knowing and willful, or reckless. As requested, the City responded to our inquiry and we now resolve this outstanding issue.

By letter dated July 18, 2013, the City's legal counsel, Joseph P. Carroll, Esquire, provided a response. Attorney Carroll states, in pertinent part:

With respect to the first issue, Ms. Bicki indicated that the response was not timely due to the fact that the City of Woonsocket, due to its precarious financial condition, is under the auspices of a Budget Commission. The effect of this is to create more tasks, especially for all department heads, including the City Clerk. This is further exacerbated by the fact that the ability to fill positions is constricted. In plain terms, the City is short-staffed...the Water Treatment Plant Advisory Committee has been defunct for nearly two years, was made up of citizens who were not City employees, and existed mainly before the current Public Works Director was employed by the City. Under these circumstances, locating some of the documents, even the persons who might have them, was a challenge. The point is that the length of time in responding was due to inadvertence. We understand the purpose of the statute and the necessity of adhering to it, and have done all we can to respond to the numerous requests that we do receive. Unfortunately, in this instance, we did not meet the standard that we normally do. It is my opinion that the response of the City was negligent, but there is no reason, nor any proof, that it was anything but that. There was no animus toward Mr. Kelly causing a deliberate delay.

With respect to Request #8, the purchase and sale agreement has not been produced. The request called for many items. Some eighty-nine (89) pages were sent to Mr. Kelly, some of which contained information relative to the request. It should be noted that the actual purchase and sale agreement was posted on the City's website and available to the public as of the time it was heard and voted on by the Budget Commission, which was December 13, 2012 (a week before Mr. Kelly's request was made to the City). Normally, requests made under the Open Records Act are for documents that are not readily available to the public.

In summary, the City's position is that failure to comply was the result of neglect, which does not rise to the level of reckless conduct, and certainly there has been no demonstration of any type of evidence which would lead to a finding of willful or knowing violation.

You also filed a supplemental response, which we have reviewed and considered.

Our focus is whether the City knowingly and willfully, or recklessly, violated the APRA. We first analyze whether the City committed a knowing and willful violation. 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 1163-64.

On December 28, 2009, this Department filed a lawsuit against the City for almost the exact same violation. See Lynch v. City of Woonsocket, CA No. 09-7383; see also Woonsocket Fire Fighters Association Local No. 732 v. City of Woonsocket, PR 09-28 and PR 09-28B.<sup>1</sup> There, we found that the

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<sup>1</sup> As indicated in Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13, this Department has found the City in violation of the APRA on two (2) prior occasions in addition to the violation found in

City knowingly and willfully violated the APRA when it failed to provide any response to an APRA request made by the Woonsocket Fire Fighters Association Local No. 732. A consent judgment entered on March 22, 2010, whereby the City acknowledged it was required to respond to an APRA request within ten (10) business days of receipt of the request, subject to the twenty (20) business day extension. The City agreed to pay the State a civil fine of one thousand dollars (\$1,000.00) for willfully and knowingly violating Rhode Island General Laws § 38-2-7(a). See R.I. Gen. Laws § 38-2-9(d).<sup>2</sup>

After reviewing submissions from both you and the City, we believe there is sufficient evidence to find that the violations discussed in Law Offices of Michael Kelly were knowing and willful. Here, the City has offered no evidence, except for the fact that the City is “short-staffed,” to defend why the six (6) week gap between February 13, 2013, the date the City believed a response was due, and April 2, 2013, the date the City sent most of the responsive documents, should not be considered knowing and willful. In defense of its actions in the 2009 finding, the City argued that it was “short-staffed” and was thus unable to timely provide a response to an APRA request. Again, in the instant matter, the City offers no defense to the lack of a timely response other than the City being “short-staffed.”<sup>3</sup> Instead, our inquiry concerns whether the City 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. We must answer this question in the affirmative.

While a prior lawsuit generally may or may not support the existence of a knowing and willful violation, this Department’s 2009 lawsuit against the City for practically the same violation – lack of a timely response to an APRA request – and the City’s consent judgment in that case, clearly shows that the City is aware of the APRA’s time period for a response and recognizes that a failure to timely respond may constitute a knowing and willful violation. At the very least, it shows that the City was put “on notice” that being “short-staffed” is not enough to overcome the knowing and willful standard. As we stated in Woonsocket Fire Fighters Association Local No. 732 v. City of Woonsocket, although we can appreciate the City’s position that it is short-staffed, the issues facing the City are not unlike those facing other Rhode Island communities. We refuse to allow public bodies to justify their non-compliance with the APRA by simply asserting that they are short-staffed without any other reasonable, good faith explanation and evidence.

With regard to the City’s lack of response to Request No. 8, the City does not address this issue, other than to state that the documents requested were publicly available at the time of your APRA request. This does not address why such a lack of response should not be considered knowing and willful, or reckless. Moreover, although the City asserts that the purchase and sale agreement is publicly available on its website, the City fails to address that Request No. 8 sought more than just the purchase and sale

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Woonsocket Fire Fighters Association Local No. 732 v. City of Woonsocket, PR 09-28 and PR 09-28B. See Ward v. City of Woonsocket, PR 09-27; Ward v. City of Woonsocket, PR 00-14.

<sup>2</sup> This statute was amended in September 2012, increasing the fine to two thousand dollars (\$2,000.00) for a knowing and willful violation. See R.I. Gen. Laws § 38-2-9(d). The amended statute also allows for a one thousand dollar (\$1,000.00) fine for a reckless violation. See id.

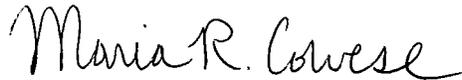
<sup>3</sup> In Woonsocket Fire Fighters Association Local No. 732 v. City of Woonsocket, PR 09-28, the City never provided a response to the complainant’s APRA request. In the instance matter, the City did provide an initial, albeit untimely, response to you and required an extension. This distinction is of little moment, however, since the issue at hand concerns the lack of response once the thirty (30) business day period expired.

agreement. See Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13 (“8. Any and all documents, correspondence and communications, including e-mails, including but not limited to a purchase agreement, that relate to the acquisition of land for the new water treatment plant.”). Because the City provided some sort of response to all the other requests contained in your APRA inquiry, it is clear that the City knew, or should have known, that it was required to provide some sort of response to Request No. 8. Therefore, we also find the City knowingly and willfully violated the APRA when it failed to provide a response to Request No. 8. In fact, even at this juncture, we are unsatisfied with the City’s response and have seen no evidence that the City has complied with this category.

Given the evidence before us and the totality of the circumstances in this specific instance, we find that the City knowingly and willfully violated the APRA in this instance.<sup>4</sup> Accordingly, this Department will file a civil lawsuit against the City.

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

Very truly yours,



Maria R. Corvese  
Special Assistant Attorney General  
Extension 2225

MC/pl

Cc: Joseph P. Carroll, Esquire

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<sup>4</sup> Since we conclude that the City’s actions amount to a knowing and willful violation, we need not reach whether the City’s actions were reckless.