



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

July 28, 2014
PR 14-19

Joelle C. Sylvia, Esquire
Kelly & Mancini PC

RE: Kelly & Mancini v. Town of Warren

Dear Attorney Sylvia:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Town of Warren (“Town”) is complete. By correspondence dated May 5, 2014, you alleged the Town violated the APRA when it failed to respond to your March 11, 2014 APRA request. You further allege that “[o]n March 21, 201[4], Ms. Coelho, the Town Clerk, responded that she required an additional twenty (20) days to compile and deliver the responses to the request” and, that as of May 5, 2014, “[you had] not received the requested documents.” Also, you state that “[a]t a Zoning Board hearing held on April 17, 2014, the Assistant Town Solicitor admitted that the response to the public record request was due by April 22, 2014.”

This Department received a substantive response from Anthony DeSisto, Esquire. Mr. DeSisto states, in pertinent part:

“On March 11, 2014, the Warren Town Clerk received a number of Access to Public Records Act (APRA) request from the complainants.¹ The requests sought numerous documents maintained by the Warren Building Official. On March 21, 2014, the Warren Town Clerk informed the complainants that she needed additional time to respond pursuant to R.I. Gen. Laws § 38-2-3(e), due to the expansive nature of the requests.

The ultimate responses to the complainants [sic] March 11 requests were inadvertently delayed due to a miscommunication between the Town Clerk and

¹ This Department was only supplied with one (1) APRA request seeking five (5) categories of documents.

the Town Building Official. Both the Clerk and the Building Official believed that the other person would respond to the complainants [sic] requests. The Town was not alerted to the fact that the responses did not go out until receiving your letter dated May 15, 2014. If the complainant had contacted the Town of Warren prior to filing the instant complaint with your office on May 5, 2014, the responses would have been made immediately available to the complainants. The APRA requests have been provided to the complainants as of May 20, 2014.

First, the instant complaint is not appropriately before your office. Under R.I. Gen. Laws § 38-2-8(a), the complainants may petition the chief administrative officer of the public body, in this case the Warren Town Manager, if they believed they are aggrieved. Only after the chief administrative officer has been petitioned may the complainants seek redress with your office under § 38-2-8(b). Here, complainants have made no effort to seek redress with the Town before filing the complaint with your office.

Further, this is not a knowing, willful, or reckless act on the part of the Town. This is an honest, understandable, and inadvertent mistake on the part of two Town employees. If complainants had reached out to the Town, the Town would have worked to immediately redress any grievances on the part of the complainants. The Town will continue to work with the complainants to ensure their access to public documents.”

We received your June 16, 2014 rebuttal. You state, in pertinent part:

“***I want to correct the statement that we have received the records and have had them since May 20, 2014. This is not, in fact, the case. On May 20, 2014, the Town Clerk emailed us three documents which are minutes of meetings.***This clearly falls far short of the records requested in my March 11, 2014 public records request. In fact, when inquiring into the same, Ms. Coelho informed me that the Building Department was producing the rest of the documents. *** I have yet to receive the remaining documents responsive to the March 11, 2014 request.”

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 or to examine the wisdom of a given statute, 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 Town violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or copy such records. See R.I. Gen. Laws § 38-2-3(a). To effectuate this mandate, the APRA provides procedural requirements

governing the time and means by which a request for records is to be processed. A public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. If the public body denies the request, a written response detailing the specific reasons for the denial shall be sent within those ten (10) business days to the person or entity making the request. See R.I. Gen. Laws § 38-2-7(a). If no response is sent within ten (10) business days, the lack of response will be deemed a denial. See R.I. Gen. Laws § 38-2-7(b). If, for good cause, the public body cannot comply with a records request within those ten (10) business days, then the public body may extend the period an additional twenty (20) business days, for a total of thirty (30) business days. See R.I. Gen. Laws § 38-2-7(b).

In arriving at our conclusion, we respectfully reject the Town's argument that, pursuant to R.I. Gen. Laws § 38-2-8, this Department does not have jurisdiction over your complaint simply because you did not first petition the chief administrative officer of the Town. Under R.I. Gen. Laws § 38-2-8(a), "[a]ny person . . . denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that public body" R.I. Gen. Laws § 38-2-8(a). (Emphasis added). The plain language of R.I. Gen. Laws § 38-2-8 does not require that a complainant exhaust his or her administrative remedies prior to filing an APRA complaint with this Department. See Downey v. Carcieri, 996 A.2d 1144, 1150-51 (R.I. 2010) (holding that under the plain language of R.I. Gen. Laws § 38-2-8 a complainant is not required to exhaust all administrative remedies prior to filing a complaint in Superior Court). To the contrary, and as evidenced by the use of the word "may" in the statute, a complainant has the option to petition the chief administrative officer, but is not required to do so prior to filing a complaint with this Department.

It is undisputed that you made an APRA request dated March 11, 2014. It is further undisputed that you received a response from the Town on March 21, 2014 extending the time to respond by an additional twenty (20) business days. Finally, it is undisputed that as of May 5, 2014, you still had not received the documents requested. Thus, the Town violated the APRA when it failed to respond to your March 11, 2014 APRA request in a timely manner. See R.I. Gen. Laws § 38-2-7. In addition, we have concerns regarding the Town's untimely response and whether such omission should be considered knowing and willful, or alternatively, reckless.

This Department has previously examined the issue of public bodies failing to provide timely responses to APRA requests. In Boss v. Woonsocket Superintendent's Office, PR 13-19 and PR 13-19B and Law Office of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B, this Department found knowing and willful violations of the APRA, which resulted in lawsuits.²

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

Additionally, in Scripps News v. Rhode Island Department of Business Regulations, PR 14-07 and PR 14-07B, we found that the Rhode Island Department of Business Regulations committed a reckless violation of the APRA and a lawsuit was filed.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, 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).

You contend that as of June 16, 2014, with the exception of “three documents which are minutes of meetings***,” you “have yet to receive the remaining documents responsive to the March 11, 2014 request.” In contrast, the Town contends that “[t]he APRA requests have been provided to the complainants as of May 20, 2014.” Since this Department has been provided with no evidence to support either contention, you shall have five (5) business days from receipt of this finding to provide the Town, and this Department, with a list of the documents or categories from the March 11, 2014 APRA request that are still outstanding. Upon receipt of that list, the Town shall have ten (10) business days to provide this Department (and you) with a supplemental explanation as to why its untimely response should not be considered knowing and willful, or reckless, in light of its recognition of the APRA requirements and this Department’s precedent. Such a determination by this Department would subject the Town to civil fines. In its

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:

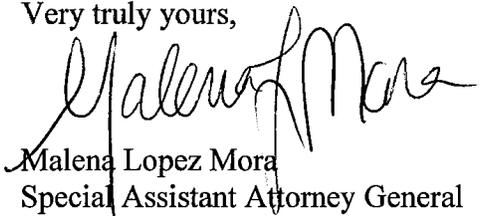
“that when a violation of the statute is reasonable and made in good faith, it must be shown that the official ‘either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute * * * Consequently an official may escape liability when he or she acts in accordance 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. (Emphasis added).

response, the Town must also substantively address your contention that your March 11, 2014 APRA request remains unsatisfied and provide appropriate supporting documents.

A copy of any and all responses by the Town should be presented to you. If you wish, you may also present evidence or arguments addressing the civil fine issue within the same timeframe, which must also be forwarded to legal counsel for the Town. At the end of this time period, we will issue our supplemental finding on this matter and determine whether civil fines are appropriate.

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
Extension 2307

Cc: Anthony DeSisto, Esquire