

STATE OF RHODE ISLAND  
PROVIDENCE, SC

SUPERIOR COURT

ATTORNEY GENERAL PETER F. KILMARTIN, :  
IN HIS OFFICIAL CAPACITY, :  
PLAINTIFF, :

C.A. NO.: P.C. 14-

V. :

RHODE ISLAND DEPARTMENT OF BUSINESS :  
REGULATIONS, :  
DEFENDANT. :

**COMPLAINT**

**I. INTRODUCTION**

Attorney General Peter F. Kilmartin (“Attorney General”), acting in his official capacity, brings this action upon information and belief that the Rhode Island Department of Business Regulations (“DBR”) recklessly violated the Rhode Island Access to Public Records Act (“APRA”) when it failed to timely respond to an APRA request filed by Mr. Mark Greenblatt, on behalf of Scripps News, on July 10, 2013. The Attorney General respectfully requests that this Honorable Court declare that the actions of DBR violated the APRA, assess civil fines and attorneys fees against DBR, and further order any other such remedy this Honorable Court deems just and equitable.

**II. PARTIES**

1. Plaintiff is the Attorney General of the State of Rhode Island. Pursuant to Rhode Island General Laws § 38-2-8(b), the Attorney General shall investigate APRA complaints filed with the Department of Attorney General (“Department”), and if the complaint is found to be meritorious, the Attorney General may institute proceedings for civil penalties and/or injunctive or declaratory relief.

2. Defendant DBR is a “public body” as defined by Rhode Island General Laws § 38-2-2(1), and is thus subject to the APRA. See R.I. Gen. Laws § 38-2-1 et seq.

### **III. JURISDICTION**

3. The Rhode Island Superior Court is vested with jurisdiction over this matter pursuant to R.I. Gen. Laws § 38-2-9.

### **IV. FACTS**

4. The APRA requires that all public bodies respond within ten (10) business days to a request for documents. 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 ten (10) business days of the request 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 ten (10) business days, then the public body may extend the time to respond an additional twenty (20) business days, for a total of thirty (30) business days. See id.; see also R.I. Gen. Laws § 38-2-3(e).
5. On July 10, 2013, Mr. Mark Greenblatt filed an APRA request with DBR, on behalf of Scripps News.
6. A response to said APRA request was due by July 23, 2013.
7. On September 12, 2013 and September 20, 2013, Mr. Greenblatt filed an APRA complaint with this Department, alleging that DBR failed to respond to Scripps News’ APRA request.
8. On September 20, 2013, DBR provided a response to said APRA request.

9. On March 14, 2014, this Department issued a finding, Scripps News v. Rhode Island Department of Business Regulations, PR 14-07, wherein this Department found the complaint meritorious and DBR in violation of the APRA. Exhibit A, Scripps News v. Rhode Island Department of Business Regulations, PR 14-07. Specifically, this Department found DBR violated the APRA when it failed to timely respond to Scripps News' APRA request dated July 10, 2013. See R.I. Gen. Laws § 38-2-7(b).
10. After concluding that DBR violated the APRA, this Department allowed DBR the opportunity to address whether the untimely response to said APRA request was knowing and willful, or reckless. Exhibit A at 6.
11. By supplemental finding dated July 11, 2014, this Department concluded that the APRA violation in Scripps News v. Rhode Island Department of Business Regulations, PR 14-07, was reckless. Exhibit B, Scripps News v. Rhode Island Department of Business Regulations, PR 14-07B.

**V. COUNT ONE – VIOLATION OF THE APRA**

12. Plaintiff hereby incorporates Paragraphs 1 through 11 herein.
13. DBR violated R.I. Gen. Laws § 38-2-7(b) when it failed to timely respond to the APRA request dated July 10, 2013.
14. Plaintiff asks this Honorable Court to declare that DBR violated R.I. Gen. Laws § 38-2-7(b).

**VI. COUNT TWO – RECKLESS VIOLATION**

15. Plaintiff hereby incorporates Paragraphs 1 through 14 herein.
16. DBR recklessly violated R.I. Gen. Laws § 38-2-7(b) when it failed to timely respond to said APRA request dated July 10, 2013 because:

- a. DBR had knowledge of the APRA and the time period requirements prescribed by R.I. Gen. Laws § 38-2-7(b).
  - b. DBR responded to the July 10, 2013 APRA request on September 20, 2013, well outside the ten (10) business day timeframe.
17. Plaintiff asks this Honorable Court to assess a civil fine against DBR for a reckless violation in accordance with R.I. Gen. Laws § 38-2-9(d).
18. Plaintiff asks this Honorable Court to assess attorney fees and costs against DBR pursuant to R.I. Gen. Laws § 38-2-9(d).

**WHEREFORE**, pursuant to R.I. Gen. Laws § 38-2-8(b), Plaintiff respectfully requests this Honorable Court 1) declare that DBR recklessly violated R.I. Gen. Laws § 38-2-1 et seq.; 2) assess civil penalties against DBR in accordance with R.I. Gen. Laws § 38-2-9(d); 3) assess attorney fees and costs against DBR in accordance with R.I. Gen. Laws § 38-2-9(d); and 4) further award any such relief as this Court deems just and equitable.

**PLAINTIFF DEMANDS A JURY TRIAL**

Respectfully submitted,

PLAINTIFF,  
By his Attorney,

PETER F. KILMARTIN  
ATTORNEY GENERAL



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Department of Attorney General  
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Dated: July 11, 2014.

# **EXHIBIT A**



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL CORRESPONDENCE ONLY**

March 14, 2014  
PR 14-07

Mr. Mark Greenblatt

**Re: Scripps News v. Rhode Island Department of Business Regulations**

Dear Mr. Greenblatt:

This Department's investigation into your Access to Public Records Act ("APRA") complaint filed against the Rhode Island Department of Business Regulations ("DBR") is complete. By email correspondences dated September 12, 2013 and September 20, 2013, you allege DBR failed to timely respond to your<sup>1</sup> APRA request dated July 10, 2013 for the following documents, in violation of Rhode Island General Laws § 38-2-7:

- 1) Any emails from 6-21-05 sent to/from Jack Broccoli (a state employee of Rhode Island's insurance division), or written by Jack Broccoli to someone else in regards to subject matters dealing with [specifically named insurance companies].
- 2) A copy of any publicly releasable portion of any file which may have been kept by your agency dealing with any matter relating to what may have been discussed in those emails on 6-21-05.

In response to your complaint, we received a substantive response from legal counsel to DBR, Elizabeth Kelleher Dwyer, Esquire. Attorney Dwyer states, in pertinent part:

The Insurance Division of DBR is comprised of a total of 32 employees who regulate approximately 30 domestic insurance companies, 1,400 foreign insurance companies and 90,000 licensees. The press of other business distracted the managers [sic] of the division from the original request. When reminded of this oversight by Scripps, the Insurance Division provided a response in six working days.

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<sup>1</sup> We recognize that you, as a reporter, made a request on behalf of Scripps News. All references to "you" therefore refer to Scripps News and not a specific individual.

The request was received from Scripps on July 10, 2013. The request asked for a specific email received by a particular state employee on June 21, 2005 relating to [specifically named insurance companies] and any publically releasable portion of any file dealing with matters discussed in that email. There was an inadvertent delay in response to the request and Scripps contacted the Insurance Division on September 12, 2013 to inquire as to the status. That phone call prompted Insurance Division personnel to realize that a response had not been sent and on September 20, 2013, the Insurance Division produced an anonymous email received on May 18, 2005 and a responsive email sent on May 20, 2005. The May 20, 2005 email requested that additional information be provided and stated “[t]he Department considers any discussions to be confidential under our examination authority.”

R.I. Gen. Laws § 27-13.1-4 provides the Department with broad authority to obtain and evaluation [sic] information concerning insurance companies. In 2005 both [specifically named insurance companies] were Rhode Island domestic insurance companies. Managers in the Insurance Division routinely consult the only attorney that is assigned to the Insurance Division on any Access to Public Records request. In this case the sole topic was whether all of the records fell within the ambit of R.I. Gen. Laws § 27-13.1-5(f) or whether the initial emails, having been received from an anonymous source and not in reference to a particular examination, fell outside R.I. Gen. Laws § 27-13.1-5(f) should be produced. That conversation began, however, was not completed due to the intervention of other business. As a result, the Insurance Division inadvertently violated the time for response under the Access to Public Records Act.

You did not file a reply to DBR’s response.<sup>2</sup>

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 DBR violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

Under the APRA, a public body has ten (10) business days to respond to a request for documents. See R.I. Gen. Laws § 38-2-7.<sup>3</sup> If the public body denies the request, a written

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<sup>2</sup> This Department’s letter to you dated September 23, 2013 allowed you an opportunity to reply to DBR’s response: “You have five (5) business days from receipt of the DBR’s response to provide a reply to this Department.” (Emphasis in original).

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). The APRA explicitly states that “[e]xcept for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” See R.I. Gen. Laws § 38-2-7(a). If no response is sent within ten (10) business days, the lack of response is deemed a denial. See R.I. Gen. Laws § 38-2-7(b).

Here, it is undisputed that you made an APRA request dated July 10, 2013 via email, in accordance with DBR’s APRA procedure. It is further undisputed that you received no response, not even a letter extending the time to respond to your request, until September 19, 2013 via email from Attorney Dwyer, almost two (2) months after the date by which DBR was required to respond. This untimely response came only after you called DBR on September 12, 2013 to inquire as to the status of your APRA request. Thus, DBR violated the APRA when it failed to respond within ten (10) business days to your July 10, 2013 APRA request.<sup>4</sup> See R.I. Gen. Laws § 38-2-7.

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). 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).

This Department has recently examined the issue of public bodies failing to provide timely responses to APRA requests. See, e.g., Boss v. Woonsocket Superintendent’s Office, PR 13-19 and PR 13-19B; Law Office of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B; O’Rourke v. Bradford Fire District, PR 13-11; Catanzaro v. East Greenwich Police Department, PR 13-08; Conservation Law Foundation v. Rhode Island Department of Administration, PR 12-16; Quirk v. Town of North Providence, PR 12-02 and PR 12-02B. In the instant matter, we have concerns regarding DBR’s untimely response to your July 10, 2013 APRA request and whether such actions should be considered knowing and willful, or alternatively, reckless. In her response, Attorney Dwyer argues that DBR’s failure to respond “because of the press of other business of an extremely busy governmental agency” does not rise to the level of knowing and willful behavior, nor does it rise to reckless behavior.

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<sup>3</sup> If, for good cause, the public body cannot comply with a records request within 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 id.; see also R.I. Gen. Laws § 38-2-3(e).

<sup>4</sup> In an email dated September 19, 2013 from Attorney Dwyer to you, DBR did provide two emails it considered responsive to your request. By email dated October 4, 2013 from Attorney Dwyer in response to your complaint, DBR provided you with specially named insurance companies’ Exam Warrants and Reports. Since DBR provided these documents to you, we do not opine whether these documents were within the scope of your APRA request or whether these documents are public under the APRA.

There were two instances in 2013 where we found two separate public bodies had knowingly and willfully violated the APRA when they failed to respond within ten (10) business days to APRA requests.<sup>5</sup> Both sets of findings resulted in lawsuits. See Kilmartin v. Woonsocket Superintendent's Office, PC 13-5510; Kilmartin v. City of Woonsocket, PC 13-5198.<sup>6</sup> In Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B, we found that the City violated the APRA when, *inter alia*, it took an additional six (6) weeks from when the City believed a response was due to provide such a response. The only evidence the City offered to explain its untimely APRA response was that the City was "short-staffed." In our supplemental finding, this Department stated:

...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. See Law Offices of Michael Kelly, PR 13-13B.

In Boss v. Woonsocket Superintendent's Office, PR 13-19 and PR 13-19B, we also concluded that the Superintendent's Office knowingly and willfully violated the APRA when it failed to timely respond to the Complainant's APRA request dated December 1, 2012. There, this Department found that the facts of Boss were indistinguishable from those of Law Offices of Michael Kelly. The Superintendent's Office received the Complainant's APRA request dated December 1, 2012. On December 5, 2012, the Superintendent's Office extended the time to respond an additional twenty (20) business days. A response was due by January 15, 2013. The Complainant did not receive a response until March 7, 2013. Absent a "confluence of events" and lack of intent, the Superintendent's Office offered no further evidence as to why its response was untimely. The fact that the Superintendent's Office timely responded to an earlier related APRA request from the Complainant and further extended the time period to respond to the Complainant's second APRA request dated December 1, 2013 within the requisite time period showed that not only was the Superintendent's Office aware of the APRA requirements, but that it was capable of compliance. Notably, this Department stated that "the 'confluence of events' cited in the Superintendent's affidavit as reason for the untimely response was in effect when the Superintendent's Office received [the Complainant's earlier] APRA request, at which time such 'events' did not prevent the Superintendent's Office from timely responding."

In sum, both public bodies in Law Offices of Michael Kelly and Boss defended their actions by arguing that "a confluence of events," including being short-staffed, led to the "inadvertent" delay in response. As detailed above, we found that these reasons were not enough to defend the

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<sup>5</sup> Based on the facts presented, we found the actions in Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B and Boss v. Woonsocket Superintendent's Office, PR 13-19 and PR 13-19B rose to the standard of knowing and willful. Thus, in each supplemental finding, we stated that "we need not reach whether [their] actions were reckless."

<sup>6</sup> Kilmartin v. City of Woonsocket, PC 13-5198 remains ongoing in Providence Superior Court. Kilmartin v. Woonsocket Superintendent's Office, PC 13-5510, settled and has been dismissed.

lack of APRA compliance. In her response, Attorney Dwyer argues that the only reason for the “inadvertent” delay was caused by the “press” and “intervention of other business.” More concisely, she states that “the lack of response was an oversight by Insurance Division due to the volume of issues its very small staff deals with on a daily basis.” While we certainly appreciate that DBR may be under-staffed and, like all public bodies, has many responsibilities, this Department is charged with enforcing the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. If we excuse a public body’s lack of response simply because the public body is “busy,” then the APRA would be eviscerated. Accordingly on the evidence presented, we have great difficulty accepting this argument.

Before concluding, we understand that the ultimate remedy you seek is disclosure of the responsive documents DBR withheld from disclosure. After an *in camera* review of those documents, it appears that all documents withheld were created within the course of an insurance investigation, which are required to be kept confidential pursuant to R.I. Gen. Laws § 27-13.1-5(f)(1)(i). You provide no argument to the contrary. In fact, your argument for disclosure rests upon the fact that DBR filed an untimely response to your complaint and thus “waived its rights to cite exemptions going forward,” not that the documents withheld were public records. We have great difficulty accepting the argument that documents maintained by DBR relating to third parties should be disclosed because of an untimely response. Our position is strengthened by the language of R.I. Gen. Laws § 27-13.1-5(f)(1)(i), which explicitly exempts such documents from disclosure under the APRA:

Except as provided in section 5(e) above and in this subsection, documents, materials, or other information, including but not limited to, all working papers, and copies thereof, created, produced by, obtained by or disclosed to the director or any other person in the course of an examination made under this chapter, or in the course of analysis by the director of the financial condition or market conduct of a company shall be confidential by law and privileged, shall not be subject to the Access to Public Records Act, chapter 38-2 \*\*\*. (Emphasis added).

Not only does the statute explicitly exempt such documents from the APRA – in fact, they are deemed “confidential by law” - but even the Rhode Island Superior Court has examined this statute and found that “under sections 5(e) and 5(f), not only is DBR prohibited from releasing ancillary documents, but it is also immune from subpoena, the Access to Public Records Act, or any other means for making such documents public when in the control of DBR.” See Heritage Healthcare Services, Inc., et al. v. The Beacon Mutual Insurance Company, et al., PC 02-7016, Decision filed April 17, 2007 (Silverstein, J.).

You provide no argument that the documents withheld do not fall within this provision. The APRA provides that “[e]xcept for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” See R.I. Gen. Laws § 38-2-7(a). Under the specific set of facts before us, we are satisfied that “good cause” has been established to overcome a waiver argument. Based upon our foregoing analysis, we conclude that the documents need not be disclosed on the basis of a waiver argument.

Scripps News v. Department of Business Regulations

PR 14-07

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We acknowledge that Attorney Dwyer, in her response to your complaint, explained why such a violation should not be considered knowing and willful, or reckless. Consistent with this Department's precedent, however, we allow DBR an additional opportunity to further address this issue if it deems appropriate. DBR shall have ten (10) business days from the date of this letter to provide us 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.

A copy of any and all responses by DBR should be presented to you. If you wish, you may also present evidence or arguments addressing this issue within the same timeframe, which must also be forwarded to legal counsel for DBR. 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,



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Maria R. Corvese  
Special Assistant Attorney General  
Extension 2225

Cc: Elizabeth Kelleher Dwyer, Esquire

# **EXHIBIT B**



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

July 11, 2014

PR 14-07B

Mr. Mark Greenblatt

Mark.greenblatt@shns.com

**Re: Scripps News v. Rhode Island Department of Business Regulations**

Dear Mr. Greenblatt:

This correspondence serves as a supplemental finding to Scripps News v. Rhode Island Department of Business Regulations, PR 14-07, released March 14, 2014. In Scripps News v. Rhode Island Department of Business Regulations, we reviewed your<sup>1</sup> September 12, 2013 and September 20, 2013 Access to Public Records Act (“APRA”) complaint against the Rhode Island Department of Business Regulations (“DBR”) and concluded that DBR violated the APRA when it failed to timely respond to your APRA request dated July 10, 2013. We also concluded that DBR did not waive its right to assert reasons for withholding certain documents since the documents concerned third parties and were deemed “confidential by law” under certain insurance examination statutes. *Id.* Thus, this Department was satisfied that “good cause” had been established to overcome a waiver argument. *See* R.I. Gen. Laws § 38-2-7(a). The sole issue to be addressed in this supplemental finding is whether the DBR violations were knowing and willful, or reckless. As requested, the DBR responded to our inquiry and we now resolve this outstanding issue.

By letter dated April 22, 2014, Attorney Elizabeth Kelleher Dwyer provided a supplemental response. Attorney Dwyer states, in pertinent part:

“As detailed in DBR’s initial submission the request was received from Scripps on July 10, 2013. There was an unintentional and inadvertent delay in response to the request and Scripps contacted the Insurance Division on September 12, 2013 to inquire as to the status. That phone call prompted Insurance Division personnel to realize that a response had not been sent and eight calendar days later, the

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<sup>1</sup> We recognize that you, as a reporter, made a request on behalf of Scripps News. All references to “you” therefore refer to Scripps News and not a specific individual.

Insurance Division produced the responsive public documents and indicated that other non-public documents would not be produced.

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APRA requests can be difficult to track to assure that mistakes are not made. In this case, the inadvertent failure to respond has caused DBR to put into place additional procedures to prevent another occurrence. Under our new procedure, a single administrative person is designated to receive the APRA requests and track that a timely response is made. The purpose is to provide a reminder to the person providing the substantive response. In this way we hope that two sets of eyes on the deadline will result in timely compliance.

\*\*\* In this case, the requesting party made no attempt to prove, or even to argue, that the inadvertent delay was either 'knowing and willful' or 'reckless.' This is also the first time that this agency has been found to be in violation of the APRA. Under these facts there is no basis for a finding that the failure to respond in a timely manner was 'knowing and willful' or 'reckless.'

\*\*\* A finding of an unintentional violation is not a statement that the agency does not need to comply with the APRA. It is the opposite - a definitive statement that the agency must comply. However, the fact of noncompliance cannot be the only proof of the 'knowing and willful' or 'reckless' conduct.

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These facts also do not fall within the ambit of the definition of 'reckless' in *Cantazaro [sic] v. East Greenwich Police Department*. In *Catanzaro* the Attorney General referenced R.I. Gen. Laws § 3-14-7(c)(1) which provides in part '[r]eckless conduct is... a gross deviation from what a reasonable person would do' [sic] and the Restatement which requires actual knowledge of a risk. Neither of these is present in a case of inadvertent delay which occasioned no harm other than the delay itself.

There is no evidence in this case that the failure to respond was anything other than a simple mistake. In fact, the fact that a complete response was provided within six business days of the reminder contact from Scripps and all public documents were produced at that time evidences the opposite conclusion – that the failure to respond was an inadvertent mistake not a knowing and willful or reckless refusal to abide by the statute.

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This matter is much more akin to *Conservation Law Foundation v. Rhode Island Department of Administration*, PR 12-16. In that matter the request had been made but not responded to by the Department of Administration. The person responsible indicated that it had not been properly diaried for response and had

been inadvertently missed. There were no prior violations by the public body. The same is true here.”

Our focus is whether DBR 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 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 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 on September 1, 2012 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 (9<sup>th</sup> 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.

After reviewing DBR's April 22, 2014 supplemental response, we believe there is sufficient evidence to find that the violations discussed in Scripps News v. Department of Business Regulation were reckless. Here, DBR has offered no evidence to defend the almost two (2) month delay in responding to the request. In fact, the only argument put forth by DBR is that the “failure to respond was an inadvertent mistake” that happened “because of the press of other business of an extremely busy governmental agency” and that the “inadvertent delay \*\*\* occasioned no harm other than the delay itself.” Id. PR 14-07. Frankly, this argument is unpersuasive.

In Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B, we found that the City violated the APRA when, *inter alia*, it took an additional six (6) weeks from when the City believed a response was due to provide such a response. The only evidence or argument the City offered to explain its untimely APRA response was that the City was “short-staffed.” In our supplemental finding, this Department stated:

...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. See Law Offices of Michael Kelly, PR 13-13B.

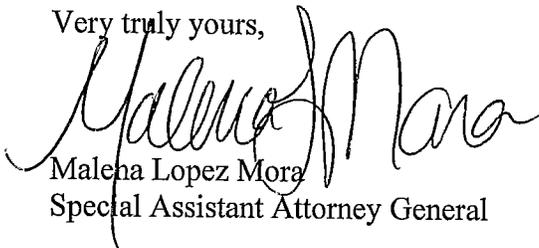
The same reasoning applies to the instant matter. Public bodies cannot avoid complying with the APRA requirements simply because they are “extremely busy.” DBR further contends that once they received the APRA request, managers in the Insurance Division consulted with an attorney and that the “conversation began, however, was not completed due to the intervention of other business.” Id. PR 14-07. This fact demonstrates that the failure to respond was not “inadvertent” as DBR argues, but that DBR was consciously aware of its statutory obligations

but failed to take reasonable steps to address them.<sup>2</sup> Finally, although DBR places emphasis on the fact that once they received a “reminder contact” from Scripps, the responsive documents were produced six (6) business days later, in our opinion this fact does little to aid DBR and only highlights that the instant APRA request could – and should – have been responded to in a timely manner.<sup>3</sup>

Given the evidence before us and the totality of the circumstances in this specific instance, we find that the DBR recklessly violated the APRA. Accordingly, this Department will file a civil lawsuit against DBR.

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: Elizabeth Kelleher Dwyer, Esquire  
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<sup>2</sup> Rhode Island General Laws § 38-2-3(e) permits public bodies to extend the time period for responding to a request. If, as DBR claims, there was confusion as to which documents “fell within the ambit of R.I. Gen. Laws § 27-13.1-5(f),” DBR likely could have asserted an additional twenty (20) business days to resolve these issues. Of course, the fact that DBR responded to the request six (6) business days after the “reminder contact” provides some question as to whether an extension would have been for “good cause.” Nonetheless, this is just one example of a reasonable step DBR could have taken to avoid violating the APRA.

<sup>3</sup> DBR also states that they have “put into place additional procedures to prevent another occurrence.” While we acknowledge this new measure, we note that steps taken to prevent future violations do not cure a past violation.