



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
Mark.greenblatt@shns.com

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 your¹ 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.

¹ 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.²

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 § 38-2-7.³ If the public body denies the request, a written

² 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.⁴ 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.

³ 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).

⁴ 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.⁵ Both sets of findings resulted in lawsuits. See Kilmartin v. Woonsocket Superintendent's Office, PC 13-5510; Kilmartin v. City of Woonsocket, PC 13-5198.⁶ 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

⁵ 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."

⁶ 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.

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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