Re: Providence Journal v. Office of the Governor

Dear Attorneys Freel and Richards:

We have completed our investigation into the Access to Public Records Act (“APRA”) complaint filed by Attorney Freel on behalf of the Providence Journal (“Complainant”) against the Office of the Governor (“Governor’s Office”). For the reasons set forth herein, we find that the APRA allowed the Governor’s Office to withhold a number of documents in response to the Complainant’s APRA request, but did not allow the withholding of other documents.

**Background**

On July 15, 2019, a reporter for the Complainant made an APRA request to the Governor’s Office seeking:

> “[A]ll communications to and from IGT and the governor’s staff, Department of Revenue and Lottery staff – and their consultants – since January 1, 2019 that relate to the proposed extension of the IGT contract and related issues (i.e. waiver of Master Contract requirements).

Please provide all documents generated since January 2019 that relate to those discussions, including proposed amendments to current contract, proposed new contract language, term sheets.”

According to its website, IGT stands for International Game Technology and is a private company that provides services related to gaming.
After extending the time for its response pursuant to R.I. Gen. Laws § 38-2-3(e), the Governor’s Office substantively responded to the request on August 27, 2019. The Governor’s Office provided 138 documents to the Complainant and withheld ninety-one (91) documents that it asserted were not public pursuant to one or more of the following four exemptions:


2. R.I. Gen. Laws § 38-2-2(4)(E), which exempts “[a]ny records which would not be available by law or rule of court to an opposing party in litigation;”


4. R.I. Gen. Laws § 38-2-2(4)(M), which exempts “[c]orrespondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.”

The Governor’s Office provided the Complainant with a general description of the approximate number and nature of the withheld documents and the exemptions pursuant to which they were being withheld. Shortly after the Governor’s Office provided its response, the reporter who submitted the initial APRA request asked the Governor’s Office to provide an “exemption log” listing the specific documents that were withheld. The Governor’s Office declined to do so, asserting that an index of withheld documents is not required by the APRA. At the request of this Office in connection with the pending Complaint, the Governor’s Office provided Complainant additional information about the withheld documents. That supplemental submission is attached hereto as Exhibit A.

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2 The Governor’s Office asserted that in addition to the above-referenced 138 documents, it also produced approximately 1,396 pages of documents to the Providence Journal on August 29, 2019 in response to a related APRA request. That related APRA request is not the subject of this finding and we know of no complaint regarding the Governor’s Office’s response to that request.

3 In its initial response to Complainant, the Governor’s Office also cited R.I. Gen. Laws § 38-2-2(4)(B), which exempts “[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation that is of a privileged or confidential nature.” However, in responding to this Complaint, the Governor’s Office did not assert Exemption (B) as a basis for withholding any documents and we do not consider it in our analysis.

4 The Complainant did not request in its Complaint or in response to our acknowledgment letters that we investigate the specificity of the Governor’s Office’s denial. As such, we do not consider it necessary to determine whether the response adequately provided “the specific reasons for the denial.” R.I. Gen. Laws § 38-2-7(a).
Broadly speaking, some of the withheld documents are email communications between the State and IGT and reflect negotiations related to the IGT proposal and/or its enabling legislation. The other withheld documents are internal agency or interagency State communications related to negotiations with IGT, some of which included communications with legal counsel representing State agencies.

**Legal Arguments**

- **Complainant**

Complainant maintains that “the Governor’s Office has wrongfully refused to provide access to public records concerning a matter of significant public interest in violation of APRA.” Specifically, Complainant contends that “the Governor’s Office relies heavily on the so-called ‘deliberative process privilege’” while “there is absolutely no reference to any such ‘privilege’ in APRA.” Complainant also argues that “even assuming that the [deliberative process privilege] might apply here…outside the confines of litigation and in connection with an APRA request, the ‘privilege’ is not absolute and it does not provide a state agency with a shield behind which it can invariably hide its deliberations in all instances.” (Emphasis in original).

Next, the Complainant asserts that the Governor’s Office’s invocation of R.I. Gen. Laws § 38-2-2(4)(K), exempting “[p]reliminary drafts, notes, impression, memoranda, working papers and work products,” “should not protect internal communications or communications to and from third parties.” Complainant argues that “[c]ommunications actually sent and received by the parties involved are not ‘drafts’ and they are not ‘preliminary.’”

Finally, the Complainant “does not contest the right of the Governor’s Office to invoke the attorney-client privilege,” but argues that the Governor’s Office has “broadly asserted” this exemption and requests that this Office conduct an *in camera* review to confirm that the exemption was properly applied. Likewise, the Complainant acknowledges that the APRA exempts “correspondence to or from a government official acting in their official capacity,” but argues that the Governor’s Office broadly asserted the exemption without making clear which documents were withheld on that basis.

- **Governor’s Office**

The Governor’s Office submitted a substantiative response, which included affidavits from Senior Deputy Chief of Staff, Kevin Gallagher, and Deputy Legal Counsel, Kimberly Ahern, as well as a copy of all withheld documents for this Office’s *in camera* review. The Governor’s Office maintains that in addition to the time its staff spent searching and retrieving responsive documents, Attorneys Claire Richards and Ahern expended over twenty (20) hours reviewing the potentially responsive documents and determining whether they are public. As described in Exhibit A, the Governor’s Office categorized the withheld documents into Four Groups.

The Governor’s Office maintains that the first group of documents (“First Group”) contain approximately 17 email exchanges between a combination of the state negotiation team and the
negotiating team representing IGT from March 15, 2019 through June 26, 2019. The Governor’s Office asserts that those email exchanges and attachments are not public records because they reflect the negotiation of the proposed contract extension and “have draft and confidential summaries of primary terms and conditions in word format, with spaces for each party to leave feedback and also include redline and track changes on them.” The Governor’s Office asserts it withheld the First Group of documents pursuant to R.I. Gen. Laws §§ 38-2-2(4) (E) (records that would not be available to an opposing party in litigation) and (K) (preliminary drafts, notes, impressions, working papers and work products).

Next, the Governor’s Office withheld a second group of documents (“Second Group”), including eight (8) email exchanges between May 15, 2019 and June 27, 2019, pursuant to R.I. Gen. Laws §§ 38-2-2(4)(E) and (K) because the documents constitute back-and-forth email exchanges between the State and IGT negotiating teams that include attachments with “drafts of the proposed legislation,” “marked draft and confidential,” and containing “track changes and edits that have been made between the parties.”

The Governor’s Office next identifies a third group (“Third Group”) of withheld documents containing approximately 43 interagency communications beginning in January 2019 between members of the Governor’s staff, Lottery, and Revenue, which “include early discussions in advance of the negotiations beginning with IGT, reviewing the draft term sheets once the negotiations had begun, and also reviewing the draft legislation once it was being prepared as part of the negotiations as well.” The Governor’s Office withheld these documents pursuant to R.I. Gen. Laws §§ 38-2-2(4)(E) and (K). This Third Group also includes additional documents reflecting internal communications between the Governor’s staff related to negotiations.

Finally, the Governor’s Office also withheld a fourth group (“Fourth Group”) of approximately fifteen (15) email exchanges between the state negotiating team and legal counsel for the Governor’s Office, Lottery, and Revenue wherein the parties seek or receive “legal advice related to the negotiation of primary terms or proposed legislation.” The Governor’s Office asserted these exchanges were not public pursuant to R.I. Gen. Laws §§ 38-2-2(4)(A)(i)(a) (records relating to the client/attorney relationship), (E), and (K).

The Governor’s Office argues that the deliberative process privilege is recognized under state and federal law and serves an “important social policy” that “allows government agencies to formulate new policy and negotiate terms without fear that every preliminary vacillation will become public.” Additionally, the Governor’s Office argues that Exemptions (E) and (K) apply to documents shared between the government and third parties. In support of this proposition, the Governor’s Office cites Conservation Law Foundation v. Office of the Governor, PR 16-08, which applied the deliberative process privilege to documents exchanged between government entities and the New England States Committee on Electricity, which represents the collective perspective of the six New England states in regional electricity matters and advances the New England states’ common interest. The Governor’s Office also cites Providence Journal Co. v. Convention Ctr. Authority, 774 A.2d 40, 46 (R.I. 2001), where the Rhode Island Supreme Court held that communications between the government and a private company regarding the company’s confidential financial information related to non-final negotiations were protected
under Exemption (B). The Governor’s Office acknowledged that Convention Ctr. Authority “fell within a separate exemption than the one at issue here,” but argued that under “the same logic” third party communications should also be exempt in this case.

The Governor’s Office provided this Office with copies of the withheld documents for our in camera review and an in camera exemption log specifically listing each withheld document and the particular exemption(s) pursuant to which it was withheld. We reviewed each document based only on the specific reason(s) for withholding the document cited by the Governor’s Office in the in camera exemption log, notwithstanding whether the Governor’s Office potentially could have asserted additional exemptions for withholding any particular document. See R.I. Gen. Laws § 38-2-7(a) (requiring public body to “provide the specific reasons for the denial” and noting that “[e]xcept for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body”). In order to provide clear direction to the Governor’s Office regarding the action it must take with respect to particular documents, we reference the documents based on their number in the in camera exemption log.

**Relevant Law**

When we examine an APRA complaint, our authority is to determine whether a violation of the APRA has occurred. See R.I. Gen. Laws § 38-2-8. In doing so, we must begin with the plain language of the APRA and relevant caselaw interpreting this statute.

The APRA provides that all records maintained by public bodies are subject to public disclosure unless the document falls within one of the twenty-seven (27) enumerated exemptions. See R.I. Gen. Laws § 38-2-2(4)(A)-(AA). As noted above, four exemptions are relevant to this matter.

Before proceeding, we believe it appropriate to discuss the nature of Exemption (E) and the deliberative process privilege, which was a topic on which the parties expressed disagreement. This Office recently confirmed that Exemption (E) resembles Exemption 5 of the Freedom of Information Act (“FOIA”) and encompasses the judicially-recognized deliberative process

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5 The Governor’s Office contends that publicly disclosing this exemption log could itself reveal information that the Governor’s Office believes is protected. The Complainant did not press an objection to not being provided with an exemption log and we see no compelling reason to disclose this log that was provided in camera. The log was produced to assist this Office’s review of the materials and is essentially a tool that allowed us to more readily identify the various documents as we assessed whether their disclosure was properly or improperly withheld pursuant to the APRA. We note that the exemptions set forth in the in camera exemption log correspond with the more general description of the documents and exemptions that were set forth in the Governor’s initial denial and in Exhibit A.

6 We reference FOIA because the Rhode Island Supreme Court has made clear that “[b]ecause APRA generally mirrors the Freedom of Information Act * * * we find federal case law helpful
privilege. See Providence Journal v. Executive Office of Health and Human Services, PR 20-01. We recently engaged in a thorough and comprehensive analysis of that privilege in Providence Journal, PR 20-01, with which both the Complainant and the Governor’s Office are no doubt familiar. We do not repeat that analysis here, but it can be briefly summarized as follows:

The deliberative process privilege has been applied both in the context of FOIA cases and as a judicially recognized litigation privilege. The United States Supreme Court has explained (in the context of a FOIA case) the policy reasons for recognizing a deliberative process privilege: “[t]he deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government.” Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8–9 (2001) (internal quotations and citations omitted). Similarly, the United States Supreme Court has described the deliberative process privilege as furthering the policy of “protect[ing] the decision-making process of government agencies and [particularly] documents reflecting advisory opinions, recommendations and deliberations.” N.L.R.B. v. Sears Roebuck and Company, 421 U.S. 132, 150 (1975) (internal quotations and citations omitted). The Rhode Island Supreme Court likewise recognized that the deliberative process privilege “protects the internal deliberations of an agency in order to safeguard the quality of agency decisions.” In re Comm’n on Judicial Tenure & Discipline, 670 A.2d 1232, 1235 (R.I. 1996).

Providence Journal, PR 20-01. A document qualifies for nondisclosure under the deliberative process privilege if it is both “predecisional” and “deliberative.” Id. (citing Providence Journal Co. v. U.S. Dept. of Army, 981 F.2d 552, 557 (1st Cir. 1992)).

Findings

- First and Second Group of Documents (Between Governor’s Office and IGT)

We turn to the First Group and Second Group of withheld documents, which consist of communications between the State and IGT. Although the in camera exemption log did not specify which documents fall within the First and Second Groups, it is apparent to us that the First and Second Groups correspond with Documents 1-25 on the exemption log, which consist of the documents exchanged between the Governor’s Office and IGT. The Governor’s Office asserted that those documents are exempt pursuant to Exemptions (E) and (K).

1. Exemption (E)
After conducting our in camera review, we conclude that Exemption (E) does not apply to the communications between the Governor’s Office and IGT. The chief purpose of the deliberative process privilege is to “safeguard and promote agency decisionmaking processes” by promoting candid discussions among staff within an agency. Providence Journal Co., 981 F.2d at 557. This exemption generally does not apply to communications between an agency and a private entity. See Ctr. for Int’l Envtl. Law v. Office of U.S. Trade Representative, 237 F. Supp. 2d 17, 25 (D.D.C. 2002) (“communications between agencies and outside parties are not protected under [FOIA] Exemption 5”). To be sure, in the FOIA context, the Supreme Court recognized that some courts “have held that the exemption extends to communications between Government agencies and outside consultants hired by them.” Dept. of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 10 (2001). However, in “such cases, the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.” Id. In those cases, “the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.” Id.

The record before us indicates that the Governor’s Office and IGT were two separate parties engaged in an arms-length negotiation regarding the terms of a potential contract between them. Negotiations between the government and a private party are not protected by the deliberative process privilege. See Brownstein Zeidman & Schomer v. Dep't of the Air Force, 781 F. Supp. 31, 35 (D.D.C.1991) (“While FOIA exemption 5 does protect intragovernmental deliberations, it does not cover negotiations between the government and outside parties.”). We were not provided with any evidence or argument indicating that IGT was functioning as a state employee and serving as a consultant to the Governor’s Office in these negotiations. Rather, the record indicates that IGT “was an advocate for its own interests and not a provider of independent advice.” Ctr. for Int'l Envtl. Law, 237 F. Supp. 2d at 27. Accordingly, the deliberative process privilege is inapplicable.

The two matters cited by the Governor’s Office in support of the proposition that the deliberative process privilege applies to communications with third parties are both distinguishable. Conservation Law Foundation v. Office of the Governor, PR 16-08, specifically noted that the records were exchanged between State entities and a Committee that represented the common perspective of six states, and that the parties shared a common interest. Cf Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode Island, No. CV 13-405S, 2016 WL. 11270567, at *1 (D.R.I. Aug. 4, 2016) (purpose of common-interest doctrine is to permit “allied lawyers and clients – who are working together in prosecuting or defending a lawsuit or in certain other legal transactions – [to] exchange information among themselves without loss of the privilege”). Here, although the parties may have been cooperatively seeking to negotiate terms in a mutually agreeable manner, the parties were independently negotiating with each other to achieve the best results on behalf of their respective clients, not working toward advancing a common interest.
Reliance on Convention Ctr. Authority, 774 A.2d at 46, is equally unavailing because that case pertained to a different exemption and involved a private party sharing confidential financial information with the government. In this case, we were not presented with any evidence or argument that the withheld documents pertain to IGT sharing confidential, proprietary information, or that Exemption (B) should apply.

2. Exemption (K)

The documents in the First Group and Second Group were also withheld pursuant to Exemption (K). The Governor’s Office argued that these communications fall under Exemption (K) because they are “preliminary drafts, memoranda and work product.” Although the APRA does not define the term “draft,” it is defined in Merriam-Webster dictionary as “a first or preliminary form of any writing, subject to revision, copying, etc.” Black’s law dictionary similarly defines the term as “[a]n initial or preliminary version.” Additionally, we have previously noted that the “term ‘working paper’ is undefined by the APRA, but in general the term refers to pre-publication drafts of written work intended to be finalized in the future. Importantly, the term implies that the document will, at some point, be completed.” Shorey v. City of Pawtucket, PR 16-53. Likewise, the “term ‘work product’ is also undefined by the APRA, but it is defined by Black’s Law Dictionary as material ‘prepared by or for a lawyer or prepared for litigation, either planned or in progress.’” Id. (quoting Black’s Law Dictionary (10th ed. 2014)).

We will first discuss the emails in the First and Second Groups, and then turn to separately discussing the documents that were attached to those emails. We begin by noting that the emails do not reflect a substantive back and forth discussion regarding draft terms. Rather, the emails largely deal with transmitting attachments, planning meetings, discussing tasks, and sharing information. None of the withheld emails are “memoranda.” Additionally, the emails between the Governor’s Office and IGT all appear to be final emails that were actually sent, not preliminary drafts. Based on our in camera review, the emails also do not contain substantive excerpts of draft language that might bring them within the ambit of Exemption (K). Further, we were not presented with evidence demonstrating that these emails constitute work product. Even if the definition of “work product” under Exemption (K) is not limited to attorney work product, the documents at issue here constitute final communications sent between the government and a private party, not internal documents that reveal protected opinions or thought processes. See Klamath, 532 U.S. at 8–9 (“Work product protects mental processes of the attorney, while deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”) (internal citations omitted); Crowe Countryside Realty Associates Co. LLC v. Novare Engineers, Inc., 891 A.2d 838, 842 (R.I. 2006) (noting that work product encompasses attorney opinions and mental processes). As such, we conclude that the emails between IGT and the Governor’s Office are not exempt under Exemption (K). Accordingly, we conclude that the Governor’s Office violated the APRA by withholding those emails.

The issue of whether the documents attached to those emails are exempt under (K) is a different question. Most of the attachments in question constitute drafts of potential contract terms or legislation, or a chart summarizing potential contract terms for discussion purposes. These
attachments are generally described in transmittal emails as drafts, labeled as drafts, and contain elements evincing that they are works in progress, such as track changes, placeholders, and comment bubbles. Such documents are exempt under Exemption (K) as working papers or preliminary drafts and the Governor’s Office did not violate the APRA by withholding those documents.

However, the attachments to the email indexed as Document 11 on in camera exemption log, as well as Document 16 (which is a stand-alone document that was not attached to an email), both appear to constitute final documents that fall outside the scope of Exemption (K), and we were not provided with any information to the contrary. As such, it appears based on the record before us that the Governor’s Office violated the APRA by withholding the attachment to Document 11, as well as Document 16.

Within ten (10) business days, the Governor’s Office should produce to Complainant the emails with IGT that it withheld (Documents 1-15 and 17-25, minus the attachments), and either produce the attachment to Document 11 and Document 16, or provide additional evidence and information regarding why it contends those particular two documents are exempt.

- **Third and Fourth Group of Documents (Internal and Interagency Communications)**

The remaining withheld documents are internal communications or communications among state agencies that fall under the Third and Fourth Groups. The Governor’s Office exempted those documents under one or more of the following exemptions: Exemption (A)(I)(a) (relating to the attorney/client relationship), Exemption (E) (deliberative process), Exemption (K) (preliminary drafts and working papers), and/or Exemption (M) (correspondence with elected official).

1. **Exemption (M)**

We turn first to the single document that the Governor’s Office exempted under Exemption (M), which was identified as Document 80 in the in camera exemption log. Rhode Island General Laws § 38-2-2(4)(M) exempts “[c]orrespondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.” The single document withheld pursuant to this exemption consists of an email to the Governor and it is apparent that the email was sent to the Governor in her official capacity in connection with the IGT contract negotiations. Accordingly, we find that the Governor’s Office did not violate the APRA by exempting this document under R.I. Gen. Laws § 38-2-2(4)(M). This internal document was also withheld pursuant to Exemption (E), which we conclude also applies.

2. **Exemption (A)(I)(a)**

We next turn to the documents that the Governor’s Office withheld as relating to the attorney/client relationship. For a number of these documents, the Governor’s Office also cited additional exemptions, but we need not review the applicability of those other exemptions if we determine that assertion of the attorney/client exemption was appropriate.
The APRA exempts “[a]ll records relating to a client/attorney relationship.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). By the plain language of the APRA, this provision exempts documents “relating” to the attorney/client “relationship,” which is broader than documents protected by the attorney/client privilege. See Harris v. City of Providence, PR 16-33; Graziano v. Rhode Island Auditor General, PR 98-01; see also R.I. Gen. Laws § 38-2-2(4)(E). Complainant indicated that it does not contest the Governor’s Office’s citation to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) as a basis to exempt documents, but asks this Office to confirm that this exemption was applied “in a manner consistent with the overriding goals and objectives in APRA and in the cases construing APRA.”

Based on our review of the withheld documents, we easily conclude that most of the documents withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) were either sent to or generated by the Governor’s Office legal counsel, or other state attorneys, and relate to an attorney/client relationship. The documents that we conclude were permissibly withheld pursuant to this exemption include correspondences to, from, or copying state legal counsel that pertain to discussions, work product, and/or information sharing that can fairly be construed as informing legal strategy. We also find no evidence that anyone was copied on these communications who would fall outside the attorney/client relationship between state attorneys and state employees. As such, with the three exceptions described below, we conclude that the documents withheld on this basis relate to the attorney/client relationship and thus, it did not violate the APRA to withhold those documents. See R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

However, there were three documents exempted on this basis for which there is insufficient evidence from which to conclude whether the exemption applies. The document identified on the in camera exemption log as Document 33 is mostly exempt but contains two emails at the bottom of page one going onto page two that do not appear to contain any substantive content, although they may have contained attachments. It is not apparent to us that the individuals on those emails are attorneys, and it is also unclear whether those emails would be subject to either Exemption (E) or (K), which were the other two asserted bases for withholding Document 33. Based on the information available, we question whether those two bottom emails (and any documents that may have been attached to them) should have been produced. See R.I. Gen. Laws § 38-2-3(b) (requiring public body denying request to consider whether any reasonably segregable portion of the record is public, and if so, to provide that portion).

Documents 70 and 78 on the in camera exemption log are calendar meeting invitations seemingly related to the IGT negotiations that contain little or no substantive content. Although attorneys are listed on those documents, it is not apparent whether those documents contain any content or convey any information that relates to an attorney/client relationship and implicates the policy considerations protected by the attorney/client privilege.

Accordingly, for Documents 33 (two bottom emails only), 70, and 78, within ten (10) business days, the Governor’s Office should either produce those documents to Complainant or provide additional evidence and information supporting its claim that those particular documents are exempt.
3. Exemption (K)

We now turn to the internal and interagency documents that were withheld solely under Exemption (K). Those documents consist of both emails and attachments, as well as stand-alone documents that were not attached to emails. Based on our review, we conclude that the attachments and other non-email documents contain internal impressions and work product, and/or are preliminary drafts that contain track changes or other features indicating that the document is a work-in-progress. With the exceptions discussed below, we also conclude that the emails exempted on this basis reflect internal impressions and work product, and also come within the ambit of Exemption (K).

However, based on the record before us, we conclude that the emails associated with Documents 63 (top email in chain only), 64, 65, 76, 79, 82, and 86 do not contain internal work product or impressions and do not fall within Exemption (K). Accordingly, it appears based on the record before us that the Governor’s Office violated the APRA by withholding those emails. Within ten (10) business days, the Governor’s Office should produce those emails to Complainant or provide additional information and evidence demonstrating why those documents fall within the ambit of Exemption (K).

4. Exemptions (E) and/or (K)

We finally turn to the remaining documents, which were exempted pursuant to both Exemptions (E) and (K) and include both emails and attachments.

It has been recognized that the deliberative process privilege “requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.” *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 89 (1973). Nonetheless, more factual-type material can come within the ambit of the privilege if it reveals the agency’s internal deliberative process. In *Playboy Enterprises, Inc. v. Dep’t of Justice*, the United States Court of Appeals for the D.C. Circuit noted that the deliberative process privilege encompasses “the evaluation and analysis of the multitudinous facts made by the [decision-maker’s] aides and in turn studied by him in making his decision.” 677 F.2d 931, 936 (D.C. Cir. 1982). The Court discussed a prior case where disclosure of summaries that were “compilations of facts, devoid of any conclusions, recommendations, opinions or advice” came within the ambit of the deliberative process privilege because disclosure “would have permitted inquiry into the mental processes of the [decision-maker] by revealing what materials he considered significant in reaching a proper decision, and how he evaluated those materials.” *Id.* (citing *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974)).

Here, many of the documents withheld on the bases of Exemptions (E) and (K) reflect a back-and-forth discussion among state personnel regarding gathering information and reviewing considerations related to the IGT negotiations. Although these documents do not necessarily all express an opinion or viewpoint, they reflect the thought processes of state staff and reveal the nature of the material considered by decision-makers about how to proceed with regard to the IGT negotiations. Such content implicates the policy purposes behind the deliberative process.
privilege and the need to safeguard candid internal government pre-decisional discussions and deliberations. Additionally, some of the documents withheld on these grounds also included preliminary drafts and working papers that fall within the scope of Exemption (K). Accordingly, we conclude that the Governor’s Office did not violate the APRA by withholding the internal and interagency records it withheld under Exemptions (E) and (K), with the exceptions noted below.

Based on the record before us, the following documents do not fit within Exemption (K) and do not appear to contain substantive content that reveals the internal deliberations of the Governor’s Office: Documents 7 30 (excluding top email and attachment), 40, 41, 43 (excluding the attachment), 46 (excluding attachment), 47 (excluding the attachment), 51 (excluding the top email in the chain), 55 (excluding the attachment), 58 (excluding the attachment), 60 (excluding the attachments), 71, 72 (excluding the attachments), 73, 74 (excluding the attachment), 76 (excluding the attachment), 79 (excluding the attachment), 81 (excluding the attachments), 83 (excluding the attachment), and 87 (excluding the attachment). Those documents reveal the individuals involved in the internal process but do not seem to reveal any substantive information about the deliberations that would fall under either Exemption (E) or (K). It is not apparent to us based on the information provided how disclosure of those documents would impermissibly infringe on the purpose of the deliberative process privilege. Accordingly, within ten (10) business days, the Governor’s Office should produce those documents (not including any portions that were excluded above), or provide additional information and evidence regarding why those particular documents should be exempt under Exemptions (E) or (K).

**Conclusion**

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).

We were not presented with evidence that the violations found herein were willful and knowing, or reckless. To the contrary, the evidence indicated that the Governor’s Office spent a significant amount of time reviewing the documents and asserted good faith legal arguments in support of its contention that the documents were exempt.

Although injunctive relief may be appropriate, we believe it appropriate to first allow the Governor’s Office an opportunity to comply with this finding. Thus, within ten (10) business days, the Governor’s Office must produce documents and/or provide a supplemental submission consistent with this finding. Any supplemental submission, or portions thereof, may be provided in camera to the extent deemed necessary by the Governor’s Office. Within ten (10) business

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7 For each Document, attachments are only excluded if the parenthetical immediately following the Document number indicates that the attachments to that document are excluded.
days after the Governor’s Office makes its production and/or submission, the Complainant may submit a response if it deems necessary.

Although this Office will not file suit in this matter at this time, nothing within the APRA prohibits the Complainant from filing an action in Superior Court seeking injunctive or declaratory relief. See R.I. Gen. Laws § 38-2-8(b). This file remains open pending completion of the steps described above.

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla E. O’Rourke
Kayla E. O’Rourke
Special Assistant Attorney General
Exhibit A
November 5, 2019

Ms. Kayla E. O’Rourke
Special Assistant Attorney General, Civil Division
Office of the Attorney General
150 South Main Street
Providence, RI 02903

Re: Providence Journal v. Office of the Governor

Dear Ms. O’Rourke and Mr. Freel:

This letter is in response to the request we received from the Attorney General’s Office on October 25, 2019 to provide additional information about the documents that were withheld in order for both parties to understand and brief the issues as thoroughly as possible.

The first group of documents are those between the state negotiating team (Kevin Gallagher, Mark Furcolo, and Gerald Aubin) and the negotiating team representing IGT. These communications began on March 15, 2019 and continued through June 26, 2019. The exempted documents are approximately 17 e-mail exchanges between a combination of those above parties negotiating terms. Eight of these e-mail exchanges include attachments that have draft and confidential summaries of primary terms and conditions in word format, with spaces for each party to leave feedback and also include redline and track changes on them. The Governor’s office asserted that these documents are exempt under both 38-2-2-(4)(K) (preliminary drafts, notes, mental impressions, working papers and work products) and (E) (records that would not be available to an opposing party in litigation).

The second group of documents, between May 15, 2019 and June 27, 2019, are also between members of the State negotiating team and the IGT negotiating team. The second group of documents are e-mails exchanging drafts of the proposed legislation that will eventually be introduced to the General Assembly. Like the first group of documents, these are back and forth e-mail exchanges between the IGT team and Kevin Gallagher. There are 8 e-mail exchanges in this second group, of which 7 include draft legislation. In addition to being marked draft and confidential, the draft legislation also includes track changes and edits that have been made between the parties. The Governor’s office asserted that these documents are exempt under both 38-2-2-(4)(K) (preliminary drafts, notes, mental impressions, working papers and work products and (E) (records that would not be available to an opposing party in litigation).
The remaining documents are interagency communications between the Governor’s staff (primarily Kevin Gallagher), revenue, and lottery that began on January 25, 2019 and continue until June 27, 2019. These include approximately 43 e-mail messages and documents to prepare for the negotiations and during the negotiations as well. These e-mail messages are between members of the Governor’s staff (Kevin Gallagher, Claire Richards, and Eileen Cheng) and members of the Lottery (Gerald Aubin, Peg Rose, Marilyn McConaghy, Valerie Morozov) and Revenue (Mark Furcolo). These messages include early discussions in advance of the negotiations beginning with IGT, reviewing the draft term sheets once the negotiations had begun, and also reviewing the draft legislation once it was being prepared as part of the negotiations as well. The Governor’s office asserted that these documents are exempt under both 38-2-2-(4)(K) (preliminary drafts, notes, mental impressions, working papers and work products and (E) (records that would not be available to an opposing party in litigation).

They also include internal communications between the Governor’s staff as well that began on January 28, 2019 and continued through June 27, 2019. These are e-mail communications between Kevin Gallagher and various members of the Governor’s staff, such as Claire Richards, Diane Bestwick, Brett Smiley, Josh Block, and Jennifer Bodgan. These communications began in January as the state negotiating team was beginning to prepare for negotiations and continue through the negotiations. These e-mail messages include draft terms sheets as the negotiations were progressing, the draft legislation and draft press releases. They also include clerical e-mails, for instance between Kevin Gallagher and his assistant, Diane Bestwick, for scheduling and printing assistance of the negotiations. The Governor’s office asserted that these documents are exempt under both 38-2-2-(4)(K) (preliminary drafts, notes, mental impressions, working papers and work products and (E) (records that would not be available to an opposing party in litigation).

Finally, there approximately 15 e-mail messages that are with the state negotiating team and legal counsel (either Claire Richards, Eileen Cheng, Marilyn McConaghy, or Valerie Morozov) seeking or receiving legal advice related to the negotiation of primary terms or proposed legislation. These are exempt under 38-2-2-(4)(A)(I)(a)(records relating to an attorney/client relationship), as well as 38-2-2-(4)(K) (preliminary drafts, notes, mental impressions, working papers and work products and (E) (records that would not be available to an opposing party in litigation).

Please do not hesitate to reach out if you have any further questions or concerns.
Sincerely,

Claire Richards, Executive Counsel

Kimberly Ahern, Deputy Counsel

CC:

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