



STATE OF RHODE ISLAND  
OFFICE OF THE ATTORNEY GENERAL

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*Peter F. Neronha*  
*Attorney General*

**VIA EMAIL ONLY**

July 23, 2020  
PR 20-55

FreedomOfInformation45@

Ron Cavallaro, Esquire  
General Counsel, Community College of Rhode Island

**RE: FreedomOfInformation45 v. Community College of Rhode Island**

Dear Sir/Madam and Attorney Cavallaro:

We have completed an investigation into the Access to Public Records Act (“APRA”) complaint filed by FreedomOfInformation45@ (“Complainant”) against the Community College of Rhode Island (“CCRI”). For the reasons set forth herein, we find that CCRI did not violate the APRA.

*Background and Arguments*

The Complainant requested all reports prepared by outside vendor Financial Aid Services after February 2018. When CCRI withheld one responsive document under R.I. Gen. Laws § 38-2-2(4)(K) and § 38-2-2(4)(B), the Complainant filed the instant Complaint seeking disclosure of the withheld document.<sup>1</sup>

CCRI maintains that nondisclosure of the document was proper. It asserts that the document is from Financial Aid Services, Inc. – a private vendor hired as a consultant – to the College’s Vice President of Student Affairs/Chief Outcomes Officer. The document was prepared to review the College’s Financial Aid Office’s procedures and processes and included the drafter’s initial impressions regarding her review up to that point. CCRI contends that the document is a working paper or work product that contains the drafter’s initial impressions and that these characteristics exempt the document under R.I. Gen. Laws §§ 38-2-2(4)(B) and (K).

CCRI also provided a copy of the document for our *in camera* review.

The Complainant did not file a rebuttal.

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<sup>1</sup> The Complainant does not take issue with CCRI’s representation that only one document was responsive to the request.

Relevant Law and Findings

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 states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. *See* R.I. Gen. Laws § 38-2-3(a). Exemption (K) permits nondisclosure of documents that constitute “[p]reliminary drafts, notes, impressions, memoranda, working papers and work products[.]”

Although Exemption (K) protects “work product,” without limiting it to *attorney* work product made in anticipation of litigation, we look to caselaw regarding the attorney work product privilege for guidance in defining what constitutes “work product.” Recently, in *Providence Journal v. Office of the Governor*, PR 20-08, we noted that the term “work product” is undefined by the APRA, but that in the context of attorney work product, “[w]ork 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.” *Id.* (quoting *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001)). In that matter, we determined that Exemption (K) did not apply to “final communications sent between the government and a private party” that were engaged in an arms’ length negotiation with each other where such documents did not constitute “internal documents that reveal protected opinions or thought processes.” *Providence Journal*, PR 20-08 (citing *Crowe Countryside Realty Associates Co. LLC v. Novare Engineers, Inc.*, 891 A.2d 838, 842 (R.I. 2006), which notes that work product encompasses opinions and mental processes)).

The Rhode Island Supreme Court has recognized that a document constitutes work product entitled to a high degree of protection when it “reveals the opinions, judgments, and thought processes of counsel.” *State v. von Bulow*, 475 A.2d 995, 1009 (R.I. 1984) (quoting *In Re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir.1982)). In a different case, the Rhode Island Supreme Court held that a document that “was prepared at the request of the board of directors during its quest for advice” constituted protected factual work product even though it did not contain opinions or legal advice. *State v. Lead Indus. Ass’n, Inc.*, 64 A.3d 1183, 1194 (R.I. 2013). Similarly, the Rhode Island Supreme Court has 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); *see also City of Colorado Springs v. White*, 967 P.2d 1042, 1045 (Co. 1998) (“the deliberative process privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency”).

We now turn to the document at issue here. Based on our *in camera* review, we observe that CCRI retained the private vendor as a consultant and that the document at issue consists of the drafter’s observations, opinions, and recommendations related to her review of CCRI’s Financial Aid

Office's processes and procedures. To the extent the document also describes the work performed by the consultant as part of her assignment and review process, such information is interconnected with and reflects the drafter's process and recommendations. We conclude that the document "reveals the opinions, judgments, and thought processes" of the consultant. *von Bulow*, 475 A.2d at 1009. There is also no indication that this document was externally shared or publicized or implicates any of the circumstances that might constitute a waiver of the exemptions embodied within Exemption (K).

A document similar in nature was examined in *City of Colorado Springs*, where a request was made for "a report generated by an outside consultant \* \* \* at the request of the head of the Community Services Department." 967 P.2d at 1045. Similar to this matter, the report "contained the results of an investigation of the Industrial Training Division, an entity under the supervision of the Community Services Department. The report was related to an internal evaluation of the Industrial Training Division." *Id.* After outlining the deliberative process privilege, the Colorado Supreme Court held the document exempt from public disclosure, explaining that its review confirmed that the document contained "an evaluation of the working environment and policies of the Industrial Training Division." *Id.* at 1057. The Court added the report "contains observations on the current atmosphere and suggestions on how to improve it," was designed to develop "strategies to improve the division," was "largely composed of employees' opinions as to the strength and weaknesses of the Industrial Training Division and its administrator," and was created to "assist the decisionmaking process rather than to serve as an expression of a final agency decision." *Id.* The Court further observed that the author of the report lacked authority to promulgate final decisions for the agency, but rather could only offer suggestions to the true decisionmakers and did so through the report. *Id.* As the Court concluded, "the deliberative process privilege protects opinions and recommendations to a government agency by outside consultants so long as such opinions and recommendations are obtained during the agency's deliberative predecisional process." *Id.*

The Complainant does not dispute CCRI's characterization of the document. Instead, the Complainant maintains that Exemption (K) does not apply because "the document being requested is a report provided by an outside firm hired by the college." That is true, so far as it goes, but this distinction is without a legal difference in these circumstances. As the United States Supreme Court has held in the context of the deliberative process privilege, "the exemption extends to communications between Government agencies and outside consultants hired by them." *Klamath Water Users*, 532 U.S. at 10 (holding that 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").<sup>2</sup> Indeed, the District of Columbia Court of Appeals has held that "[t]he Government may have a special need for the opinions and recommendations of temporary consultants and those individuals should be able to give their

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<sup>2</sup> We reference federal caselaw 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 in interpreting our open record law." *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556, 558 n.3 (R.I. 1989).

judgments freely without fear of publicity.” *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); *see also City of Colorado Springs*, 967 P.2d at 1057 (“The report is largely composed of employees’ opinions as to the strengths and weaknesses of the Industrial Training Division and its administrator. The role of these opinions and observations was to assist the decisionmaking process rather than to serve as an expression of a final agency decision.”). Additionally, courts have recognized that information pertaining to the review process and the facts considered as part of the deliberative process also come within the ambit of protection. *See Playboy Enterprises, Inc. v. Dep’t of Justice*, 677 F.2d 931, 936 (D.C. Cir. 1982) (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”).

Although the above-cited caselaw pertains to the deliberative process privilege, it provides helpful guidance.<sup>3</sup> The deliberative process privilege and the protection for work product, as well as R.I. Gen. Laws § 38-2-2(4)(K)’s exemption for “impressions,” all serve overlapping interests related to protecting the ability to work internally and to candidly express opinions, impressions, and thought processes. The above-cited caselaw – as well as the plain language of Exemption (K) – reflects a clear intent to permit (but not require) a governmental body to ask employees or consultants to offer frank feedback and evaluation, without fear that such comments will be chilled by publicity. That same policy interest is served by protecting the consultant’s work product or impressions in this case from disclosure.

We thus conclude that the same logic for the protection of consultant work in the deliberative process context applies to this situation where the evidence indicates that the impressions and work product contained in the document were candidly shared as part of an internal review process performed by a consultant working for the public body. As such, on these specific facts, we conclude that this document falls within Exemption (K) and constitutes “impressions” and “work product.”

For these reasons, we conclude that CCRI did not violate the APRA when it withheld the document under R.I. Gen. Laws § 38-2-2(4)(K). We find no violations.<sup>4</sup>

### Conclusion

Although this Office has found no violations, nothing within the APRA prohibits an individual from instituting an action for injunctive or declaratory relief in Superior Court. *See* R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

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<sup>3</sup> We do not evaluate whether the document could have been withheld under Exemption (E), which encompasses the deliberative process privilege, because CCRI did not cite that exemption as a basis for withholding the document.

<sup>4</sup> Because we determine that the document was properly withheld under Exemption (K), we need not address CCRI’s additional citation of Exemption (B).

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

Sincerely,

PETER F. NERONHA  
ATTORNEY GENERAL

By: /s/ Kayla O'Rourke  
Kayla O'Rourke  
Special Assistant Attorney General