STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 • www.riag.ri.gov

Peter F. Neronha
Attorney General

VIA EMAIL ONLY

October 5, 2020
PR 20-01B

Mark Freel, Esquire
Legal Counsel, Providence Journal
Locke Lord

Lisa M. Martinelli, Esquire
Executive Counsel, Executive Office of Health and Human Services

Re: **Providence Journal v. Executive Office of Health and Human Services**

Dear Attorneys Freel and Martinelli:

We have reviewed the supplemental submission filed by the Executive Office of Health and Human Services ("EOHHS") in connection with the above-referenced Access to Public Records Act ("APRA") Complaint. As discussed below, EOHHS provided the Complainant with additional records in response to this Office's prior finding in this matter and, based on the supplemental submissions, we conclude that EOHHS did not violate the APRA by exempting the remaining documents that were not provided.

Prior Finding, PR 20-01

In our prior finding, *Providence Journal v. Executive Office of Health and Human Services,* PR 20-01, we determined that EOHHS permissibly withheld a number of documents and improperly withheld one document in response to Complainant's APRA request, which sought documents related to the extension of the Deloitte/UHIP contract. Additionally, there were a number of documents for which we could not yet determine whether withholding the documents was permissible under the APRA. Accordingly, we instructed EOHHS to provide supplemental information and analysis regarding EOHHS's asserted basis for withholding those documents in light of the legal standards set forth in our finding.

We incorporate our prior finding, PR 20-01, and briefly summarize it as follows. The Complainant maintained that EOHHS "misused the so-called 'deliberative process privilege,'" "over-used the statutory exception protecting 'preliminary drafts,'" and asked this Office to confirm that EOHHS's invocation of the attorney-client exemption as a basis to withhold documents was properly applied. This Office conducted a lengthy *in camera* review of the withheld documents and determined that all but two documents (Section 1, documents (c) and (g)) withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(K) (which exempts "[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products") were permissibly withheld and requested additional information about those remaining two documents.[1] This Office also found that EOHHS improperly withheld a cover transmittal email contained within document (e) and directed EOHHS to disclose the same to the Complainant. We also engaged in a comprehensive analysis of the "deliberative process privilege," encompassed within R.I. Gen. Laws § 38-2-2(4)(E) and requested EOHHS provide supplemental information concerning the documents withheld pursuant to that privilege. Specifically, for each document that EOHHS withheld pursuant to the deliberative process privilege, we asked EOHHS to apply the test set forth in *Providence Journal Co. v. U.S. Dept. of Army*, 981 F.2d 552, 557 (1st Cir. 1992) and to explain why the document (including any reasonably segregable portion of it) was predecisional and deliberative such that it would come within the ambit of the deliberative process privilege. Finally, we determined that although the documents withheld pursuant to the attorney-client relationship exemption, R.I. Gen. Laws § 38-2-2(4)(A)(I)(a), were permissibly withheld, certain portions of some of those documents (Section 3, documents (c), (e), (f), (g), (h), (i), (k), and (q)) were not apparently sent, received, or copied to legal counsel (in the first instance), but were withheld under R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) because they were part of an email chain that was forwarded to legal counsel. We requested EOHHS provide supplemental information concerning the basis for exempting those emails (which appeared to be independently responsive to the request, apart from being included in an email chain involving legal counsel).

Supplemental Submissions

EOHHS filed its supplemental submission, through counsel, which included an affidavit from Administrative and Legal Support Services Administrator Lisa M. Martinelli, Esquire. In accordance with our prior finding, EOHHS disclosed the cover transmittal email in document (e) previously withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(K), with limited redactions, and also disclosed portions of certain records (Section 2, documents (b), (c), (d), (e), (t), (ee), and (ff)) previously withheld in their entirety under R.I. Gen. Laws § 38-2-2(4)(E). EOHHS also provided additional information regarding the two documents withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(K) about which we had questions, as well as a chart outlining the documents withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(E) for this Office's *in camera* review. The chart applied the deliberative process test set forth in *Providence Journal Co.*, 981 F.2d 552 to each document, setting forth why EOHHS contends the document is both deliberative and pre-decisional. Finally,

[1] Our discussion refers to various withheld documents based on how they are listed on the Exemption Log that is attached as Exhibit A to PR 20-01. The Log lists the documents in three Sections based upon the exemption to which they were withheld.

EOHHS contends that "EOHHS followed the holdings of Courts in other jurisdictions who determined that attorney client communication includes the *entire* e-mail string *and attachments* if the client is circulating the document to solicit legal advice from legal counsel" to support its withholding of email chains in their entirety pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) when certain portions thereof were not sent, received, or copied to legal counsel. (Emphasis in original).

Upon request for clarification from this Office, EOHHS represented that with regard to Section 3, documents (e), (f) and (q), the emails in the chain on which legal counsel is not copied "originated from different state agencies that were not subject to this APRA" and are "not maintained independently by EOHHS and only came into the care, custody and control of EOHHS in the context of requesting legal advice." (Emphasis in original). Although the Complainant did not submit a substantive supplemental rebuttal, the Complainant did submit a brief response in connection with this request for clarification, questioning "why the privileged portions of those e-mails [withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a)] cannot be redacted, with the non-privileged portions produced? The mere fact that they were not maintained independently should not matter if they can be produced as part of a partially redacted email chain."

Supplemental Findings

Section 1: R.I. Gen. Laws § 38-2-2(4)(K)

In its supplemental submission, EOHHS attested that documents (c) and (g), which were withheld pursuant to R.I. Gen. Laws § 38-2-2(4)(K), were created by the State's UHIP Executive Consultant and the Chief Information Officer at the Division of Information Technology ("DoIT"), respectively, and were only shared with the "UHIP Executive Committee, comprised of senior level state employees representing EOHHS, the Department of Human Services (DHS), the Division of Information Technology (DoIT), and HealthSource R.I. (HSRI)." EOHHS states that document (c) "outlines potential terms of an extension/settlement with Deloitte and a projected timeline." Document (g), which was entitled "Vendor Settlement Planning DoIT Recommendations" "provided technical recommendations to the UHIP Executive Committee regarding implications of extending the Deloitte contract." EOHHS maintains that, although it does "not have a replica" of either document in an updated form, both documents were modified "when the terms of the extension/settlement were further developed." Indeed, document c notes that it contains figures that are "still projected and under review." There is also no evidence that either document was publicized or shared outside of the State agencies involved in this cross-agency project.

The Complainant did not refute these representations. Based on the undisputed evidence and this Office's review of documents (c) and (g) *in camera* with the benefit of this additional context, we find that documents (c) and (g) permissibly constitute work product, working papers, and/or preliminary drafts encompassed within Exemption (K) and that EOHHS did not violate the APRA by withholding these records.[2]

[2] The APRA requires a public body denying a record request to "provide the specific reasons for the denial" and 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." R.I. Gen. Laws § 38-2-7(a).

Section 2: R.I. Gen. Laws § 38-2-2(4)(E), the "Deliberative Process Privilege"

This Office engaged in a comprehensive analysis of the "deliberative process privilege" in our prior finding, PR 20-01. We do not repeat that analysis here but note that "[a] document qualifies for nondisclosure under the deliberative process privilege if it is both 'predecisional' and 'deliberative.'" *Providence Journal*, 20-01 (citing *Providence Journal Co.*, 981 F.2d at 557). This Office further discussed the nature of the deliberative process privilege in *Providence Journal v. Office of the Governor*, PR 20-08. In that finding we discussed how 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 also 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)).

We first note that EOHHS has now disclosed what it believes are reasonably segregable portions of documents (b), (c), (d), (e), (t), (ee), and (ff). *See* R.I. Gen. Laws § 38-2-3(b) (requiring disclosure of reasonably segregable portions of exempt documents). Complainant has raised no objection to any redactions made by EOHHS. As such, Complainant is now in possession of portions of these documents. We also do not find any evidence that EOHHS's withholding of these portions, assuming it was initially improper, was willful and knowing or reckless given the acknowledgment in our prior finding regarding the time and attention EOHHS put into responding to the APRA request. *See* R.I. Gen. Laws § 38-2-9(d). Accordingly, we find it unnecessary to consider whether EOHHS violated the APRA by initially withholding the portions of these documents that it has now produced. *See Payne v. Town of Barrington*, PR 20-48.[3]

In light of the additional information provided by EOHHS in its supplemental *in camera* chart, this Office again conducted a lengthy review of all the remaining documents withheld pursuant to

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Accordingly, for each document withheld by EOHHS, we reviewed EOHHS's withholding of the document based on the specific exemption cited by EOHHS in the Exemption Log, notwithstanding whether EOHHS could have asserted an additional exemption for withholding any particular document.

[3] This Office has previously determined it unnecessary to consider whether a public body violated the APRA where a complainant receives the subject documents after filing an APRA complaint and where there is no evidence of a willful and knowing or reckless violation. *See Lamendola v. East Greenwich School Committee*, PR 20-10. The reason for this conclusion is because, even assuming a violation occurred, the APRA only provides for two types of remedies (injunctive relief and civil fines for a willful and knowing or reckless violation) and neither remedy would be appropriate in these circumstances. *See* R.I. Gen. Laws § 38-2-9(d). Injunctive relief is unnecessary because EOHHS has already produced the portions of documents in question. Civil fines are not appropriate as we have not found evidence of willful and knowing or reckless conduct.

R.I. Gen. Laws § 38-2-2(4)(E). While the *in camera* nature of our review makes extended discussion inappropriate, the remaining documents withheld on the basis of Exemption (E) generally reflect a back-and-forth discussion among state agency personnel regarding gathering information and reviewing considerations related to the Deloitte contract extension. 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 various facets of the Deloitte negotiations and related issues. As such, these documents are pre-decisional in that they were created to assist the decision-makers in reaching decisions regarding how to proceed with regard to the Deloitte negotiations and related issues. The documents are also deliberative in that they reveal the thought processes and considerations considered by the staff and are "part of the agency give-and-take-of the deliberative process-by which the decision itself is made." *Heritage Healthcare Services, Inc. v. The Beacon Mutual Insurance Co.,* 2007 WL 1234481 (R.I. Super. 2007) (Silverstein, J.). . Accordingly, as the two requirements for non-disclosure have been met, *see Providence Journal v. Office of the Governor*, PR 20-08 we conclude that EOHHS did not violate the APRA by withholding the internal and interagency records it withheld under Exemption (E).

Section 3: R.I. Gen. Laws § 38-2-2(4)(A)(I)(a)

In PR 20-01, we determined that all documents listed under Section 3 of the Exemption Log were either sent to or generated by EOHHS legal counsel and/or outside legal counsel and relate to an attorney/client relationship and, thus, EOHHS did not violate the APRA by withholding these documents. *See* R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). However, based on our review, documents (c), (e), (f), (g), (h), (i), (k), and (q) within Section 3 contain emails in a chain that do not include legal counsel and that appear to be independently responsive to the APRA request.

EOHHS asserts that, "even though one email is not privileged, a subsequent and privileged email which forwards that prior non-privileged email, will allow the privilege to attach to the entire email chain, including the non-privileged prior email message." *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 238, 240 (2008).

EOHHS is correct that otherwise non-privileged information communicated to an attorney in connection with obtaining or rendering legal advice may be privileged and fall within the ambit of R.I. Gen. Laws § 38-2-2(4)(A)(I)(a). However, "to the extent a non-privileged attachment to a privileged communication exists independent of the privileged communication, [a public body] would be obligated to produce it." *Engage Healthcare Communications, LLC v. Intellisphere, LLC*, 2017 WL 10259770, n. 5 (D.N.J. 2017). "[A]s *Upjohn Co. v. United States* makes clear, the fact that non-privileged information was communicated to an attorney may be privileged, *even if the underlying information remains unprotected*." *Muro v. Target Corp.*, 250 F.R.D. 350, 363 (N.D. Ill. 2007), aff'd, 580 F.3d 485 (7th Cir. 2009) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)) (emphasis added). As such, "[a] party can therefore legitimately withhold an entire e-mail *forwarding* prior materials to counsel, while also disclosing those prior materials themselves." *Id.* (emphasis in original).

With regard to documents (e), (f) and (q), EOHHS asserts that it does not maintain the non-privileged portions of these emails independent of the privileged email chain where those emails were forwarded to legal counsel. For each of these documents, the particular emails within the chains that do not involve legal counsel (and standing alone would not be privileged) do not include EOHHS personnel. As such, there is no indication that EOHHS would have maintained that initial communication until it was subsequently forwarded as part of a chain email to EOHHS personnel and legal counsel. Put differently, the record indicates that EOHHS does not actually maintain the specific emails involving staff of other state agencies (but not EOHHS staff), except to the extent such emails were subsequently forwarded to EOHHS and legal counsel as part of a protected communication among different state agencies working together in pursuit of the State's common interest. *Cf. In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) ("The joint defense privilege protects communications between an individual and an attorney for another when the communications are part of an ongoing and joint effort to set up a common defense strategy").

Here, the privileged communication consists of the email that was sent to legal counsel, including the entire chain that was forwarded to legal counsel as part of the communication. To require EOHHS to redact the email that included counsel but produce other parts of that chain as Complainant suggests would impermissibly require EOHHS to reveal part of what was communicated to legal counsel as part of a protected communication. Accordingly, EOHHS is only required to produce the email earlier in the chain that does not include counsel if that prior email is in itself responsive to the APRA request and if EOHHS independently maintains that email by itself. *See Muro*, 250 F.R.D. at 363 ("[a] party can therefore legitimately withhold an entire e-mail *forwarding* prior materials to counsel, while also disclosing those prior materials themselves.").

We have previously held that the APRA does not require a public body to produce records it does not maintain. *See Lopez v. City of Providence*, PR 20-03 ("Because the APRA does not require a public body to disclose records that do not exist or that are not within its custody or control, we find no violation[.]"); *see also* R.I. Gen. Laws § 38-2-7(c). On the record before us and based on EOHHS's uncontested representations, we conclude that EOHHS does not maintain the non-privileged portions of documents (e), (f) and (q), "independent of the privileged communication." *Intellisphere, LLC*, 2017 WL 10259770, n. 5. As noted previously, EOHHS personnel were not included on the emails earlier in the chain that did not include counsel. Although EOHHS has certain management responsibilities for other state agencies that were included in those emails, such as the Department of Human Services ("DHS"), the two agencies remain separate entities. *See* R.I. Gen. Laws § 42-7.2-2. This is further evidenced by the fact that EOHHS and DHS each have their own websites and their own, separate procedures for submitting APRA requests. *See* R.I. Gen. Laws § 38-2-3(d) (requiring each public body to post on its website written procedures for submitting APRA requests). As such, EOHHS did not violate the APRA by withholding the portions of the email chain that did not originally involve legal counsel and did not involve EOHHS personnel, but that were maintained by EOHHS only as part of a chain forwarded to legal counsel. However, Complainant is free to submit an APRA request to other state agencies seeking documents that would include these original emails prior to them becoming part of a chain email involving legal counsel.

We next similarly consider the portions of documents (c), (g), (h), (i) and (k), where EOHHS withheld email chains that included particular emails on which legal counsel was not included. Based on our review of each of those withheld documents, the only portion of each of those email chains that does not include legal counsel is an email from DHS Director Courtney Hawkins to herself attaching a "scanned" transmission.[4] For the reasons noted above, there is no evidence that EOHHS independently maintains this particular email, which did not include any EOHHS personnel, independent of the overall chain email communication that involved legal counsel. For these reasons, we do not find that EOHHS violated the APRA by withholding these documents in their entirety.

Conclusion

Although this Office will not file suit in this matter, 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). Please be advised that we are closing our file as of the date of this letter.

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

[4] This appears to be a communication where Director Hawkins (or someone acting on her behalf) scanned a document and sent it to herself.