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VIA EMAIL ONLY

September 2, 2020
PR 20-62

Kendra L. Beaver, Esquire
Staff Attorney, Save the Bay

Mary Kay, Esquire
Executive Counsel, Dept. of Environmental Management

Re: **Save the Bay v. Rhode Island Department of Environmental Management**

Dear Attorneys Beaver and Kay:

We have completed our investigation into the Access to Public Records Act (“APRA”) complaint filed by Attorney Beaver on behalf of Save the Bay (“Complainant”) against the Department of Environmental Management (“DEM”). For the reasons set forth herein, we find that DEM did not violate the APRA.

Background

On November 19, 2019, the Complainant submitted a 10-part APRA request to DEM seeking multiple categories of records.¹ The relevant portions of the Complainant’s request are reproduced below, with formatting slightly altered:

- (1) “The number of enforcement cases currently pending in the Rhode Island Courts.
- (2) Any lists maintained and/or created by RIDEM of enforcement cases that were filed in, and are currently pending before, Rhode Island Courts with corresponding docket numbers.

¹ Although Complainant’s initial APRA request sought ten (10) categories of records, this Complaint only contains specific allegations regarding DEM’s response to Requests #1, 2, 3, 4 and 7.

- (3) Copies of all Notices of Violations issued by DEM from 2014 to the present concerning water, wetlands and Onsite Wastewater Treatment Systems (OWTS) for which no hearing request was filed.
- (4) Copies of all consent agreements and/or settlement agreements concerning wetlands enforcements, water enforcement and OWTS enforcement executed between 2014 to the present.
- (7) Copies of any notices of informal enforcement actions and Expedited Citation Notices related to water resources violations, freshwater wetlands violations of OWTS violations issued from 2014 to the present.”

On December 4, 2019, DEM extended the time to respond to the request pursuant to R.I. Gen. Laws § 38-2-3(e), based on the “number of requests pending.” On December 10, 2019, DEM provided the Complainant with an “estimate of retrieval time and costs.” DEM received prepayment from the Complainant on December 24, 2019. DEM substantively responded to the request on January 17, 2020 by denying certain parts of the request and providing over 2,500 pages of documents responsive to other parts of the request. Specifically, DEM indicated that it did not maintain a “list” responsive to Request #1, that a list responsive to Request #2 was being withheld pursuant to R.I. Gen. Laws §§ 38-2-2(4)(A)(I)(a), (K) and (P), and directed Save the Bay to DEM’s website for documents responsive to Requests #3 and #4. DEM provided certain documents responsive to Request #7 but stated that it did not construe Request #7 as seeking “warning letters” and thus DEM did not provide “warning letters” in its response.

Dissatisfied with DEM’s response, the Complainant filed a Complaint with this Office.

Legal Arguments

- Complainant

The Complainant alleges that DEM violated the APRA when it: (1) untimely responded to Requests #1 and #2; (2) withheld documents responsive to Requests #1 and #2; (3) provided links to websites in response to Requests #3 and #4 rather than providing copies of documents; (4) failed to include warning letters in response to Request #7; and (5) failed to comply with the APRA by not complying with the Complainant’s request to review the documents prior to copying.

The Complainant argues that DEM untimely responded to Requests #1 and #2 because “DEM ultimately denied this request on January 17, 2020 – nearly sixty (60) days after the filing of the request.” The Complainant also alleges that “[t]he substance of the response is curious” because DEM stated that it did not maintain a list responsive to Request #1 but that it did maintain, and was withholding, a list responsive to Request #2. The Complainant perceives this “inconsistent” response as evidence that a list responsive to Request #1 exists. The Complainant also disputes DEM’s cited grounds for withholding the list responsive to Request #2.

Regarding DEM’s response to Requests #3 and #4, the Complainant maintains that DEM’s referral to the Office of Compliance and Inspection website was “tantamount to a non-disclosure of the records” “[b]ecause such information is not readily available by following the citation provided.”

The Complainant also states that instead of providing a website link, “the copies requested should have been provided” by DEM.

Next, the Complainant maintains that DEM’s failure to include warning letters in response to Request #7 was improper because “DEM includes warning letters when it refers to informal enforcement actions [in its 2018 Annual Compliance Report] and it was a violation of the APRA to interpret the term ‘informal enforcement actions’ narrowly and contrary to its own agency interpretation.” Finally, the Complainant takes issue with the format of DEM’s response in that DEM provided copies of responsive documents when the Complainant stated that it would “most likely [want] scans but we would like to review the files prior to any copying or scanning.”

- DEM

DEM, by and through its Executive Counsel, Mary Kay, Esquire, submitted a substantive response, which included an affidavit from Attorney Kay, as well as the unredacted list withheld in response to Request #2 for this Office’s *in camera* review. DEM maintains that completing the Complainant’s request “required the coordinated efforts of over twenty-six (26) DEM staff, in multiple offices and divisions, constituting in excess of ninety (90) hours of staff time and 2500 pages of documents.” DEM states that it timely extended the time to respond to the Complainant’s request on December 4, 2019 and that the time period to respond to Complainant’s request was “suspended” as of December 10, 2019 when DEM requested prepayment for an estimated 96 hours (inclusive of the first free hour allotted under the APRA) until DEM received prepayment on December 24, 2019. *See* R.I. Gen. Laws § 38-2-7(b). As such, DEM maintains that its January 17, 2020 response to Complainant’s request was timely.

DEM states that Request #1 “did not request a record” and that “[a] single consolidated list which would provide the number of [enforcement cases] does not exist and has never been maintained by DEM.” In responding to this Complaint, DEM provided Complainant a list responsive to Request #2, but redacted certain portions thereof pursuant to Exemptions (A)(I)(a), (K) and (P). Regarding Requests #3 and #4, DEM argues that it referred the Complainant “to discreet sections of the DEM website, where the exact documents requested are readily available for public review.” Additionally, the pertinent section of the DEM website “is organized by month” and “[a] complete copy of each [Notice of Violation (“NOV”)] from 2014 to present can be viewed in pdf format by simply clicking on the appropriate hyperlink” and “[a] complete copy of each consent agreement can be viewed in pdf format by simply clicking the appropriate link.”

Next, DEM states that “[w]hile ‘warning letters’ are included in a description of ‘informal enforcement actions’ in the DEM’s 2018 Annual Compliance Report as referenced in the ... Complaint, the use of such terminology in the Annual Compliance Report is hardly definitive of the term ‘informal enforcement action’ as it is understood within the agency” and “[t]he DEM could not be expected to understand that [Complainant] sought to review its ‘warning letters’ when it requested copies of ‘informal enforcement actions.’”

Finally, DEM argues that “[Complainant] has never specified or clarified for the DEM the format in which [Complainant] wanted the DEM’s response to be provided” because “in the

[Complainant's] Request on the DEM's APRA request form, [Complainant] failed to check off any of the options listed in response to the 'Format Requested' question." Additionally, "[t]he cover letter [Complainant] submitted along with its APRA request form is entitled, 'Re: List of public records requested for inspection or copies of records.' Based on [Complainant's] use of the word 'or' between 'inspection' and 'copies of records,' DEM reasonably concluded that [Complainant] would accept all requested records in either format."

- Complainant's Rebuttal

We acknowledge Complainant's rebuttal. Among other points, the Complainant's rebuttal clarifies that "[t]he issue is not whether the records were compiled in accordance with the time limits dictated by the APRA. The issue is that Request #2 was distinguishable from the other requests. DEM should have denied our request for the list...on December 10, 2019." Additionally, the Complainant argues that "DEM's refusal to provide the [redacted] list [in response to Request #2] until it responded to this Complaint filed with the Attorney General is a violation of the APRA." The Complainant does not dispute the redactions made to the list DEM provided in response to Request #2 when responding to this Complaint.

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.

Each of the Complainant's allegations will be discussed in turn below.

- Timeliness of DEM's response to Requests #1 and #2

Pursuant to the APRA, a public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the period to comply. *See* R.I. Gen. Laws §§ 38-2-3(e), 38-2-7. A public body may extend the time to respond to a request by an additional twenty (20) business days if additional time is necessary due to the "voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records." R.I. Gen. Laws § 38-2-3(e). Moreover, "the production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under 38-2-4." R.I. Gen. Laws § 38-2-7(b).

The Complainant's rebuttal clarified that it is not contesting "whether the records were compiled in accordance with the time limits dictated by the APRA," but instead argues that with respect to Request #2, DEM "should have denied our request for the list *** on December 10, 2019" when DEM sent its prepayment estimate. Our review of the record reveals that although Complainant's request included multiple sub-parts, it was submitted as a single request in a single correspondence. DEM's extension and prepayment estimate pertained to responding to the request in its entirety,

and there is no indication Complainant requested that the estimate be broken down based on sub-parts of the request.

Based on the plain language of the APRA, a public body has ten (10) business days, or thirty (30) business days if it invokes the twenty (20) business day extension, to substantively respond to an APRA request. *See* R.I. Gen. Laws §§ 38-2-3(e), 38-2-7. It is undisputed that within ten (10) business days of the request, DEM timely asserted the twenty business day extension provided in the APRA based on the “number of requests pending,” which is one of the permissible grounds listed in the APRA for asserting an extension. R.I. Gen. Laws § 38-2-3(e). Complainant does not present any evidence or argument disputing that DEM required more time to respond due to the number of requests pending with DEM. The Complainant also does not dispute that DEM substantively responded to its request within thirty (30) business days (not counting the days when the request was tolled, pending receipt of prepayment, R.I. Gen. Laws § 38-2-7(b)). The Complainant has not identified any authority that would require a public body to provide a partial response to a request prior to the deadline for responding to the request, and we find no authority to support this proposition. Notably, we also find no evidence that the DEM sought to delay its response to Request #2, but rather responded to the entire APRA request at once. Accordingly, we find no violation in connection with the timeliness of DEM’s response denying Requests #1 and #2. In the interests of promoting transparency and access to public records, we certainly encourage public bodies to provide responses to APRA requests as promptly as possible.

- DEM’s Denial of Requests #1 and #2

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 copy such records. *See* R.I. Gen. Laws § 38-2-3(a). The APRA does not require “a public body to reorganize, consolidate, or compile data not maintained by the public body.” R.I. Gen. Laws § 38-2-3(h). “A public body that receives a request to inspect or copy records that do not exist or are not within its custody or control shall *** state that it does not have or maintain the requested records.” R.I. Gen. Laws § 38-2-7(c).

Request #1 sought “[t]he number of enforcement cases currently pending in the Rhode Island Courts.” The Complainant argues that “[i]t seems inconceivable that the Office of Legal Services manages its cases without maintaining a list, formal or otherwise, of the cases it is responsible for in court. In addition, there must be a list because DEM denied our second request.” DEM attested that “[s]ome of these enforcement cases are handled by the DEM’s Office of Legal Services (“OLS”) and in other cases DEM is represented by the Attorney General or DLE [Division of Law Enforcement] prosecuting matters with no involvement of OLS or the Attorney General. A single consolidated list which would provide the number of cases pending does not exist and has never been maintained by DEM.”

DEM provided undisputed evidence in the form of an affidavit attesting that it does not maintain a specific document “which would provide the number of cases pending.” However, in response to this Complaint, DEM has now produced a list of cases that DEM contends is responsive to Request #2, which sought “[a]ny lists maintained and/or created by RIDEM of enforcement cases

that were filed in, and are currently pending before, Rhode Island Courts with corresponding docket numbers.”

Given the list that DEM has now provided in connection with Request #2, we question whether DEM’s interpretation of Request #1 was too formalistic. On this point, we note that DEM indicates that it does not handle all enforcement cases itself, and thus “[a] single consolidated list” reflecting the total number of enforcement cases is not maintained. However, it would have been preferable for DEM to provide the list it had, while indicating that it may not be complete or reflect the total number of enforcement cases since some are not handled by DEM. We encourage public bodies to be as forthcoming and transparent as possible when responding to APRA requests.

Nonetheless, this Office has previously determined it unnecessary for us to consider whether a public body violated the APRA when a complainant receives the subject documents after filing an APRA complaint and when there is no evidence of a willful and knowing or reckless violation. *See Lamendola v. East Greenwich School Committee*, PR 20-11; *Farinelli v. City of Pawtucket*, PR 17-22. 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. *See* R.I. Gen. Laws § 38-2-9(d).

Here, DEM has now provided Complainant with a list of cases in response to Request #2 that Complainant indicates may be responsive to Request #1, and there is no evidence that DEM maintains any other record that might be responsive to Request #1. While we do not necessarily adopt Complainant’s contention that the list responsive to Request #2 (seeking any lists maintained and/or created by RIDEM of enforcement cases that were filed in, and are currently pending before, Rhode Island courts) is also responsive to Request #1 (the number of enforcement cases currently pending in the Rhode Island courts), even assuming the correctness of the Complainant’s position, there would be no need for injunctive relief because Complainant is in possession of this document. Additionally, we have not been presented with any evidence that DEM’s conduct was knowing and willful, or reckless. The evidence indicates that DEM did not believe that it maintained any records responsive to Request #1, based on how DEM construed that request. Additionally, DEM informed the requester about the existence of the list in response to Request #2. Given these circumstances, we decline to further review DEM’s response to Request #1.

The Complainant also maintains that “DEM should have provided the redacted list in response to Save The Bay’s Request No. 2. DEM’s refusal to provide the list until it responded to this Complaint filed with the Attorney General is a violation of the APRA.”

This argument encompasses the issue discussed above. The Complainant’s rebuttal does not argue that additional responsive documents exist and does not contest the redactions.² Additionally, we were provided with no evidence that DEM’s initial withholding of the list in its entirety, even assuming it was improper, would have constituted a willful and knowing, or reckless, violation

² As the list was initially withheld in its entirety, the appropriateness of the redactions are outside the scope of the Complaint. If Complainant does take issue with the redactions, it is free to submit a new complaint.

that would warrant civil penalties. *See* R.I. Gen. Laws § 38-2-9(d). DEM asserted that it was providing a redacted version of the list in response to the Complaint “in an effort to be more transparent,” but provided evidence that the list (which it initially withheld in its entirety pursuant to exemptions related to work product and the attorney-client relationship) contains protected or privileged information and was generated and used in connection with legal work. *See Save the Bay v. DEM*, PR 16-47 (finding DEM did not violate the APRA by withholding a list related to its legal cases that was created in part by legal counsel to evaluate and strategize about potential DEM legal action). We also note that when DEM initially responded to the request it withheld the list but provided a website link including a list of all Office of Compliance & Inspection cases initiated since 2000, which evidences DEM attempting to provide relevant information in response to the request. In these circumstances, even if DEM’s initial withholding of the list was improper, based upon the evidence presented, we would not find civil penalties appropriate. As such, this Office declines to further address the merits of this allegation.

Nonetheless, we note that promptly providing access to public records is an important means of ensuring governmental transparency and accountability. Had DEM initially provided this list in response to the request, it would have promoted transparency and potentially avoided this Complaint, at least in part. While we decline to reach the merits of this allegation, we do have reservations regarding whether DEM’s initial withholding of the entire list was proper. Even if part of the list contained protected information, the APRA requires disclosure of any reasonably segregable portion of a record. *See* R.I. Gen. Laws § 38-2-3(b); *see also Lamendola v. East Greenwich School District*, PR 20-20 (discussing how portions of legal billing records containing confidential information may be redacted while non-protected information should be disclosed). Additionally, we have previously recognized that various types of lists maintained by governmental entities are public. *See Davis v. City of Providence*, PR 18-24 (finding list of condemned properties was public); *Morra v. E. Providence Tax Assessors*, PR 99-06 (finding list of properties for which the owners have appealed the City’s property assessments is public). To be sure, we have not examined the merits of this allegation and the determination whether a document constitutes work product and/or attorney-client privilege is not always straightforward, but from our initial review it is difficult for us to understand how a list that merely reflects “enforcement cases that were filed in, and are currently pending before, Rhode Island Courts with corresponding docket numbers” would constitute work product and/or be protected by the attorney-client privilege. Additionally, we have determined that a list that is continually updated is not automatically exempt as a draft or work product. *See Shorey v. City of Pawtucket*, PR 16-53 (“We are unaware of any authority that exempts disclosure of a document simply because it is continuously updated.”). **We add these caveats to ensure that the next time a similar request is made – as it most assuredly will be – a thoughtful, proper, and timely determination is made by DEM.**

Requests #3 and #4

The Complainant next argues that DEM’s reference to a website for documents responsive to Requests #3 and #4 “frustrates the purpose of the Access to Public Records Act and is a constructive denial of the request.” The Complainant maintains that the website does not contain a “list or evident way to search and determine” what records are responsive to these Requests and

Complainant “asked for copies.” Complainant states that “DEM violated the APRA . . . directing us to slog through the enforcement summaries listed on the website.”³ DEM asserts that “the exact documents requested are readily available for public review” by following the links provided to the Complainant.

The purpose of the APRA is to facilitate public access to public records. *See* R.I. Gen. Laws § 38-2-1. Request #3 sought certain Notices of Violations issued by DEM since 2014 for which no hearing request was filed and Request #4 sought certain consent agreements and/or settlement agreements since 2014. This Office conducted an independent search of the website link provided to the Complainant in response to Requests #3 and #4. The link leads to a page entitled “Formal Enforcement Action Summaries,” which are categorized by month dating from April 2000 through June 2020. This Office selected the “January 2014” category and was brought to a page entitled “January 2014 Enforcement Action Summary,” which included subcategories labeled “Formal Enforcement Actions Issued,” “Formal Enforcement Actions Settled or Resolved,” “Superior Court Actions Issued,” and “Superior Court Actions Settled or Resolved.” This Office did a search within this summary page (using CTRL+F) for the terms “notice of violation,” “hearing,” “settlement,” and “consent” and was able to ascertain which actions contained these terms and electronically access additional links to pertinent documents, including Notices of Violation and settlement agreements. This search took this Office approximately ten (10) minutes for the month of January 2014. Additionally, with respect to Request #4, Complainant acknowledges that “it is possible to search through all of the records linked on the website and ultimately locate copies of all Consent Agreements[.]”

Although the APRA provides that a person or entity requesting records “may elect to obtain them in any and all media in which the public agency is capable of providing them,” R.I. Gen. Laws § 38-2-3(g), our review of Complainant’s request does not indicate that Complainant indicated a desire to receive the documents in any specific media. Moreover, the APRA provides that members of the public have the right to “to inspect and/or copy” requested records. R.I. Gen. Laws § 38-2-3(a) (emphasis added). “At the election of the person or entity requesting the public records, the public body shall provide copies of the public records electronically, by facsimile, or by mail in accordance with the requesting person or entity’s choice, unless complying with that preference would be unduly burdensome due to the volume of records requested or the costs that would be incurred. The person requesting delivery shall be responsible for the actual cost of delivery, if any.” R.I. Gen. Laws § 38-2-3(k).

Here, the evidence indicates that DEM provided Complainant with the ability to access and inspect the requested records through a link to a website that contained the relevant records. It also appears

³ Although the Complainant maintains that DEM should have provided the “list of NOV’s for which no hearing was requested for cases that are open,” Request #3 specifically sought “copies of all Notices of Violations,” not a list. *See Cote v. Warwick Fire Department*, PR 18-15 (“it is the requester’s responsibility to frame requests with sufficient particularity to enable the searching agency to determine precisely what records are being requested”). Additionally, DEM notes that its response to Request #5, which is not at issue here, provided Complainant with copies of hearings requests, which could be used to identify documents relevant to Request #3.

that the necessary prepayment required of Complainant would have been substantially higher had DEM endeavored to retrieve and copy each particular responsive document rather than providing a link to where the documents could be located. Based on the record and this Office's independent search, the website links provided by DEM in response to Requests #3 and #4 provided access to the records sought and we do not find that DEM violated the APRA. We nonetheless caution public bodies that providing access to documents via a website link may not always satisfy a public body's burden of providing access to public records under the APRA. Each request must be evaluated on a case-by-case basis and the response must be based on the specific circumstances of the request. Additionally, we encourage public bodies to communicate openly with requesters about requests when doing so may avoid potential issues. Here, it may have been advisable for DEM to communicate with the Complainant about using the website link to access responsive records and to have provided a prepayment option for what would be required for DEM to manually collect the responsive records. Complainant may also opt to submit a new, specific request to DEM seeking hard copies of these records. See R.I. Gen. Laws. § R.I. Gen. Laws§ 38-2-3(k).

Request #7

The Complainant maintains DEM violated the APRA when it failed to provide "warning letters" in response to Request #7, which sought "notices of informal enforcement actions" because DEM's 2018 Annual Compliance Report included "warning letters" in what Complainant characterizes as "it's [sic] own agency interpretation of informal enforcement actions." DEM argues that it "could not be expected to understand that [Complainant] sought to review its 'warning letters' when it requested copies of 'informal enforcement actions,' merely because DEM had included the warning letters in a description of 'informal enforcement actions' in its 2018 Annual Compliance Report. DEM did not withhold the warning letters as non-public; it was not clear from the request and as DEM stated in the DEM response it did not include the warning letters in response to the request."

Our past findings and the caselaw make clear that the requester must indicate what documents are being sought under the APRA. See *Payne, et al. v. Town of Barrington*, PR 20-48; *Albanese v. North Kingstown Harbor Management Commission*, PR 20-19; *Howard v. Department of Environmental Management*, PR 11-35. "[I]t is the requester's responsibility to frame requests with sufficient particularity to *** enable the searching agency to determine precisely what records are being requested." *Assassination Archives and Research v. Central Intelligence Agency*, 720 F. Supp. 217, 219 (D.D.C. 1989) (citations omitted).⁴ We additionally note that "[p]ublic bodies are repositories of records, not libraries; and their administrators are not research assistants who should cull, compile or consolidate the data sought based upon their own idea of what is appropriately extrapolated from the existing records given the discernable objectives behind the request." *Blais v. Revens*, No. C.A. PC-01-1912, 2002 WL 31546103 at *9 (R.I. Super. Nov. 7, 2002).

⁴ The Rhode Island Supreme Court has stated 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).

Based upon the evidence before us, we do not find that DEM's response to Request #7 violated the APRA. Request #7 sought "[c]opies of any notices of informal enforcement actions and Expedited Citation Notices . . ." and Complainant acknowledges that in response to this request, DEM provided "copies of informal enforcement actions and Expedited Citation Notices[.]" Complainant's request did not specify that it was seeking "warning letters." DEM's response to Complainant expressly noted that it did not construe Complainant's request as seeking warning letters. In responding to this Complaint, DEM explained that warning letters have less force and are different in nature than the records it considered to be responsive to this request. In these circumstances, we do not find that it was unreasonable for DEM to interpret the Complainant's request for "notices of informal enforcement actions" to not include warning letters. *See Cote v. City of Warwick*, PR 17-45 (finding that City's interpretation of plain language of request was reasonable); *see also Assassination Archives and Research*, 720 F. Supp. at 219. We also note that upon DEM's advisement that it did not interpret Complainant's request to include "warning letters," nothing prohibited the Complainant from subsequently submitting a specific request for warning letters; there is no indication that Complainant did so. While this Office always stands ready to enforce the APRA, when an APRA request is subject to different reasonable interpretations, we believe the better course is for the requester and the public body to resolve the correct interpretation rather than resorting in the first instance to this Office. This is particularly so when the public body expressly indicates how it has interpreted the request. We find no violation in connection with DEM's response to Request #7. We again, however, stress the importance of open communications when responding to a request. This issue could have been avoided if DEM had preemptively notified Complainant what types of documents were considered "informal enforcement actions," and asked for clarification about whether the request was seeking warning letters.

Format of DEM's Response

Complainant alleges that "DEM failed to comply with the APRA by not complying with our request to review the documents prior to copying." Complainant does not contest that its initial request did not specify a method of delivery, but points to a series of emails it contends "clarifies that we wanted to review the files and most likely would want scans."

The emails provided by Complainant reveal that DEM emailed Complainant on January 16, 2020 indicating that the documents were ready for pick up and that in addition to the prior prepayment, \$330.00 would be due for copying costs. Complainant responded by questioning why copies had been made given that a prior email had indicated that Complainant wished "for an accounting and estimate prior to copying" and would "most likely want scans." DEM responded by advising the Complainant that given the nature of the request, "the most practical and efficient way to compile [documents responsive to the] request was to make copies of the individual documents." DEM explained that it made copies of the documents for its own purposes as part of responding to the request and offered to provide those copies to Complainant at no additional cost (i.e., waiving the \$330.00 copying fee). The record indicates that Complainant responded, "I might as well pick up the copies if they are already done and we will not get charged. Please leave up front and I will pick up or a colleague will this afternoon." DEM maintains that it would have provided scans if requested but based on this last email from Complainant, DEM understood Complainant to be

satisfied with receiving the copies at no additional cost. DEM also states that “[d]ue to the nature and sheer volume of [Complainant’s] request, the DEM was unable to fully compile all the requested documents until the day before a response to [Complainant’s] request was due” and that since the documents were housed in several different DEM offices, “compiling them in one place for review by [Complainant] would have been unduly burdensome and completely impractical.”

Based upon the evidence presented, the Complainant’s request did not indicate the preferred format for providing responsive records. In fact, Complainant’s rebuttal acknowledges that Complainant “fully agrees that it was not clear in its initial request concerning whether we were seeking copies or scans.” Adding to the confusion, Complainant’s Requests #3, #4 and #7 all sought “[c]opies” of documents. Moreover, as discussed above, the Complaint alleges that DEM violated the APRA with respect to Requests #3 and #4 by not providing “copies” of documents.

Based on this record, we find that DEM did not violate the APRA when it provided hard copies of records to the Complainant because the Complainant did not clearly articulate a preferred method of delivery and Complainant seemingly acquiesced to this method of delivery. We also note that this situation underscores the importance of open communication between a requester and a public body; such communication can often help promote clarity and avoid needless expenditure of time and resources.

Conclusion

Although this Office has found no violations, nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of 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.

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