



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

December 2, 2016

PR 16-47

Kendra Beaver, Esquire

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

Dear Ms. Beaver:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Department of Environmental Management (“DEM”) is complete. By email correspondence dated April 11, 2016, you allege the DEM violated the APRA when it denied your APRA request dated February 23, 2016. More specifically, your APRA request sought:

“The list referenced in the Office of Compliance 2013 Annual Report, further described in the report as follows. At the beginning of 2013, the RIDEM had a backlog of 152 cases that were pending court action. To further the effort that began in 2009 to address the backlog, the OC&I developed a top 10 list of the most egregious cases. This list is updated each month and provided to the RIDEM’s Office of Legal Services \* \* \* The attorneys filed 12 cases in court and settled or resolved 5 cases. The RIDEM ended 2013 with 152 cases.”

In response to your complaint, we received a substantive response in affidavit form from the DEM’s legal counsel, Mary E. Kay, Esquire. Attorney Kay, states in pertinent part:

“DEM’s denial of STB’s February APRA request is grounded in the fact that the requested document is not a public record pursuant to and as enumerated in the Act.\* \* \*

The specific document requested by STB is a document generated by the Chief of [the Office of Compliance and Inspection (“OC&I”)] in consultation with DEM attorneys, and on occasions attorneys from the Department of Attorney General, for use in determining, which cases may be eligible to proceed to court action and/or resolution. Although commonly referred to as

DEM's OC&I and DEM's Office of Legal Services ('OLS') to evaluate and strategize potential DEM legal action and to track the progress of any settlement discussions. Consequently, DEM's denial of disclosure of the requested document represents a communication between the OC&I and OLS and is protected under the attorney/client relationship pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

\* \* \*

In *Callahan v. Nystedt*, the Rhode Island Supreme Court spelled out the elements that must be satisfied in order for the attorney-client [privilege] to apply:

'(1) the asserted holder of the privilege is or sought to become a client; (2) the person to who the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relate to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.'

All four of the elements are satisfied in the instant matter. The asserted holder of the privilege, OC&I, was and remains a client of OLS. The communication (the requested document) was made to members of the Rhode Island Bar Association who were acting in their capacity as a lawyer in connection with the communication. The requested document was communicated to OLS by OC&I outside the presence of strangers for the purposes of legal services \* \* \* The privilege has been claimed and not waived by OC&I.

STB alleges that the list consists solely of facts, which 'may not be concealed by being revealed to an attorney,' that were compiled by OC&I without the input of OLS. \* \* \* This cannot be further from the truth. As previously stated above, the document was developed by the Chief of OC&I in consultation with DEM attorneys, and in some instances attorneys from the Attorney General.

The attorney-client privilege 'only protects disclosure of communications' and 'does not protect disclosure of the underlying facts by those who communicated with the attorney.' *Upjohn v. United States*, 449 U.S. 383, 395-96 (1981). The document consists of more than just facts, as STB alleges, but contains the mental impressions of DEM personnel regarding the case status. As the ultimate contents and purposes of the document are deeply rooted in the attorney-client relationship, the document is categorized as a 'communication,' [and] is therefore protected under the attorney-client privilege, and thus not public under the Act.

The requested document constitutes a document within the scope of ‘working papers and work product’ pursuant to R.I. Gen. Laws § 38-2-2(4)(K). \* \* \*

The requested document was developed to serve as a working tool, to be used by OC&I and OLS, to strategize, prioritize, and track matters potentially requiring legal action by the agency. Moreover, lending to the support that the document is a working tool and work product is the fact that the document is not static but ever changing. It is a continually evolving document that OC&I and OLS review and utilize regarding matters potentially requiring legal actions.

STB alleges that ‘the mere fact that the list may generate a discussion and action by OC&I and OLS does not change the list into a working paper or work product.’ \* \* \* While factually true, this has no bearing on the present matter. As previously discussed herein the purpose of the document is to identify, track and seek legal counsel regarding enforcement matters that may be eligible for enforcement in superior court. As the document constitutes a draft ‘working paper or work product’ for interoffice communication and consultation, it is not a public document under the Act.

The requested document falls within the definition of an ‘investigatory record’ pursuant to R.I. Gen. Laws § 38-2-2(4)(P). \* \* \*

STB alleges that the document is merely a list of cases that do not require further administrative agency action or investigation and thus do not constitute an ‘investigatory record’ under the Act. DEM contests this analysis. When a matter is added to the document it is deemed a ‘pending court action’ requiring review, and further analysis by a DEM attorney and OC&I staff to determine whether further enforcement is warranted. Thus, by definition a final administrative agency action has not been rendered.”

We acknowledge your rebuttal dated May 6, 2016.

In examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DEM violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA states that 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). The APRA, however, does exempt some documents from public disclosure. Among the exemptions is R.I. Gen. Laws § 38-2-2(4)(A)(I)(a), which exempts “[a]ll records relating to a client/attorney relationship.” Here, we have been provided with a copy of the responsive

document to review. While the parties address numerous APRA exemptions and arguments, we constrain our review to the argument that the instant document is exempt as “relating to a client/attorney relationship.” Id.

In your April 11, 2016 complaint, you addressed the argument that the requested document was exempt as a document relating to the attorney/client relationship. You argued that the document was not privileged and as confirmed by DEM (in its denial of your request), the Office of Compliance and Inspection “created the list” to track cases “potentially requiring legal action by the agency.” You further submit that the “list was not created with input from [the Office of Legal Services] and there are no attorney client communications on the list so it is not exempted from disclosure based on attorney/client exemption.” According to your complaint, DEM also “confirmed that [the Office of Legal Services and the Office of Compliance and Inspection] will later review and discuss the list and make determinations as to whether an action will be commenced in court.” Of note, your complaint makes clear that Save the Bay “does not want to see any ‘consultation’ about the list, just the list itself” and that DEM’s statement that the list represents a working document used by the offices of [Compliance and Inspection and Legal Services] to evaluate and track the progress of settlement of cases [] again, indicates that it may be used later.”

Despite your persistence in arguing that the requested document was created by the Office of Compliance and Inspection and only later shared and discussed with its legal counsel, the evidence is clear – and undisputed – that the document we have reviewed in camera is created by the Office of Compliance and Inspection and the Office of Legal Services. In her affidavit, Ms. Kay affirms that:

“[t]he specific document requested by [Save the Bay] is a document generated by the Chief of [Office of Compliance and Inspection] in consultation with DEM attorneys, and on occasions attorneys from the Department of Attorney General, for use in determining, which cases may be eligible to proceed to court action and/or resolution. Although commonly referred to as a list, it is more appropriately termed a strategy document as it is utilized by DEM’s Office of Compliance and Inspection [] and DEM’s Office of Legal Services [] to evaluate and strategize potential DEM legal action and to track the process of any settlement discussions.” See Kay affidavit, ¶ 12 (emphasis added).

Later, Ms. Kay reiterates that “the document was developed by the Chief of [Compliance and Inspection] in consultation with DEM attorneys, and in some instances attorneys from the Attorney General.” See Kay affidavit, ¶ 16.

The fact that the requested document was developed by the Office of Compliance and Inspection, in consultation with its attorneys, seems to conclusively establish that this document “relat[es] to a client/attorney relationship.” We stress that the evidence demonstrates that this document was created with the assistance and input of DEM’s legal counsel, and this is not a situation where the document was created by non-legal counsel. Indeed, in your April 11, 2016

complaint, you make clear your belief that this document “was not created with input from [the Office of Legal Services]” and that Save the Bay “does not want to see any ‘consultation’ about the list, just the list itself.” Notably, and respectfully, your May 6, 2016 rebuttal hardly addresses the attorney/client argument, and does not address DEM’s position that its Office of Legal Services helped to create the document you seek.

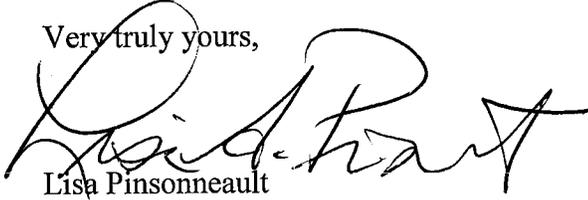
“The general rule is that communications made by a client to his attorney for the purposes of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure.” State v. Von Bulow, 475 A.2d 995, 1004 (R.I. 1984). See also Hickman v. Taylor, 329 U.S. 510-11 (1947)(“In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”). Our observation in a prior case involving the same parties in similar circumstances is equally applicable: “we must conclude that the document you have requested, which was created by DEM’s legal counsel and sent to various DEM employees relative to their legal inquiries is exempt from public disclosure.” Save the Bay v. Department of Environmental Management, PR 15-19. It is also notable that this Department previously found that the exemption for all records relating to the “client/attorney relationship” is broader than the common law attorney-client relationship privilege. See Graziano v. Office of the Auditor General, PR 98-01. We stated that although the exemption includes “all records” relating to the attorney-client privilege, it also encompasses “all records” that relate to the “client/attorney relationship.” In Tetreault v. Lincoln School Committee, PR 99-14B, we concluded that a surveillance report did not constitute a public record. Specifically, because the evidence revealed that the surveillance report, which was ordered by the Lincoln School Department’s attorney for the Lincoln School Department’s use in order to investigate alleged worker’s compensation abuses, related to the client/attorney relationship, we conclude that the surveillance report was not a public record. See also Harris v. City of Providence, PR 16-33.

Based upon the evidence presented, the subject document was generated by the Chief of DEM’s Office of Compliance and Inspection, in consultation with DEM attorneys (and on occasion with attorneys from the Department of Attorney General) to evaluate and strategize potential DEM legal action and to track the progress of any settlement discussions. Moreover, because the document was created, at least in part, by DEM’s legal counsel, no reasonably segregable portion is available for public inspection. See R.I. Gen. Laws § 38-2-3(b). Accordingly, for the reasons discussed, we conclude the requested document is exempt from disclosure as a document “relating to a client/attorney relationship.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

Nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in the Superior Court.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Pinsonneault". The signature is written in a cursive, flowing style with a large initial "L".

Lisa Pinsonneault  
Special Assistant Attorney General

LP/kr

Cc: Mary E. Kay, Esquire