



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903  
(401) 274-4400 - TDD (401) 453-0410

*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

March 10, 2016  
PR 16-08

Ms. Tricia K. Jedele  
Conservation Law Foundation  
tjedele@clf.org

**Re: Conservation Law Foundation v. Office of the Governor**

Dear Ms. Jedele:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Office of the Governor (“Governor’s Office” or “GOV”) is complete. By email correspondence dated June 10, 2014, you allege the Governor’s Office violated the APRA with respect to Conservation Law Foundation’s (“CLF”) March 19, 2014 APRA request when it: (1) failed to provide a complete description of CLF’s appeal rights under the statute; (2) failed to provide a reasonable basis for the denial of CLF’s request for a fee waiver; (3) charged CLF a \$60 fee before providing CLF access to documents; (4) withheld public documents or portions of public documents that you allege are not exempt from disclosure under the APRA; and (5) failed to provide an index of documents or portion of documents withheld with sufficient detail such that CLF and/or a reviewing court could determine whether the documents were appropriately withheld.

In response to your complaint, we received a substantive response in affidavit form from the Governor’s legal counsel, Anita Flax, Esquire. Attorney Flax states, in pertinent part:

“CLF alleges that GOV violated the APRA when ‘it failed to provide a complete description of CLF’s appeal rights under the statute’ because GOV’s letter dated April 30, 2014 ‘did not inform CLF that they could also take an appeal directly to the Attorney General or Superior Court.’ The April 30 letter notified CLF of its right to appeal to GOV’s chief administrative officer pursuant to R.I. Gen. Laws § 38-2-8. Although not addressed in CLF’s complaint, the chief administrative officer’s determinations dated June 19 should have notified CLF of the appellate procedure and GOV will include this language in its letter in the future.

CLF alleges that GOV violated the APRA because it failed to provide a reasonable basis for the denial of CLF's request for a fee waiver. First, by letter dated May 9, 2014, GOV did explain its reason for its denial of the fee waiver. Second, CLF cites R.I. Gen. Laws § 38-2-10 as authority for its position that 'the burden of proof is on the government agency denying the request' and argues that GOV has made no effort to satisfy that burden with regard to CLF's fee waiver request. However, R.I. Gen. Laws § 38-2-10 addresses only the burden on the government agency 'to demonstrate that the record in dispute can be properly withheld from public inspection,' and not to demonstrate that a fee waiver request can be properly denied. \* \* \* Finally, 'there is nothing within the APRA that requires a public body, of its own volition, to waive or reduce fees,' *Napolitano v. Albion Fire District*, PR 08-18, nor has any court ordered GOV to waive or reduce its fees.

CLF alleges that GOV violated the APRA because it charged CLF a \$60.00 search and retrieval fee before providing documents for review. 'The APRA does not prohibit a public body from requesting pre-payment of fees. *Smith v. Watch Hill Fire District*, PR 99-15. CLF argues that it should not be charged for 'file review.' Here, there was no paper file. A member of the GOV staff spent five hours searching for, reviewing, and printing emails and electronic documents. The APRA permits a public body to charge \$15.00 for each hour spent on search and retrieval, but does not allow the public body to charge for the first hour. CLF was charged \$15.00 for four hours of search and retrieval for a total of \$60.00. I spent many additional hours reviewing the printed documents and redacting portions of some documents, but did not charge CLF for my time despite the fact that I am permitted to do so under the APRA.

\* \* \*

CLF alleges that GOV failed to provide an index of documents or portions of documents that were withheld under claims of exemption with sufficient detail such that CLF and/or a reviewing court could determine whether those documents were appropriately withheld. The APRA does not require this level of detail. GOV's response to CLF identified documents exempt from public disclosure under §§ 38-2-2(4)(E) and 38-2-2(4)(K)."

We acknowledge your reply.

At the outset, we note that in examining whether an APRA violation 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 Governor's Office violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

We start out by setting forth the documents you sought in your APRA request:

“1. TRANSMISSION BUILD-OUTS. All Documents created and/or dated after June 30, 2012, constituting, memorializing, or otherwise relating to communications between or among Rhode Island Governmental Representatives and representatives of any other New England state, NESCOE, ISO-NE, FERC, natural gas transmission or distribution companies, and/or Electricity Market Participant regarding ‘New Electric Transmission Infrastructure’ as set forth in the NESCOE Letter; this includes, without limitation:<sup>1</sup>

- (a) All Documents relating to proposals for development of transmission infrastructure;
- (b) All Documents relating to the extent of, need for, reliability impacts of, and locations for development of new transmission infrastructure;
- (c) All Documents relating to the cost(s) of and cost allocation(s) for new transmission infrastructure;
- (d) All Documents relating to electrical system planning by ISO-NE for development of new transmission infrastructure;
- (e) All Documents relating to the development of, requests for and/or filing of tariff changes to facilitate development of new transmission infrastructure;
- (f) All Documents relating to analysis of non-transmission alternatives (NTAs) in lieu of new transmission infrastructure;
- (g) All Documents relating to analysis of greenhouse gas emissions impacts associated with the development of new transmission infrastructure.

2. GAS PIPELINE CAPACITY. All Documents created and/or dated after June 30, 2012, constituting, memorializing, or otherwise relating to communications between or among Rhode Island Governmental Representatives and representatives of any other New England state, NESCOE, ISO-NE, FERC, natural gas transmission or distribution companies, and/or Electricity Market Participant regarding ‘Increased Natural Gas Capacity’ as set forth in the NESCOE Letter; this includes, but is not limited to:

- (a) All Documents relating to proposals for increased natural gas pipeline capacity into New England;
- (b) All Documents relating to the extent of, need for, reliability impacts of and locations for development of increased natural gas pipeline capacity into New England;
- (c) All Documents relating to the cost(s) and cost allocation(s) for the procurement of new pipeline capacity into New England;
- (d) All Documents relating to the development of, requests for, and/or filing of tariff changes for recovery of the cost of any such procurement of increased

---

<sup>1</sup> You included a legend of definitions of the various words and phrases.

pipeline capacity through the electricity Regional Network Services rate, or by any other means;

(e) All Documents relating to analysis of alternatives to new or increased pipeline capacity, including, without limitation, energy efficiency;

(f) All Documents relating to analysis of greenhouse gas emission impacts associated with the development of increased pipeline capacity into New England.

3. HYDROPOWER. All Documents created and/or dated after June 30, 2012, constituting, memorializing, or otherwise relating to communications between or among Rhode Island Governmental Representatives and representatives of any other New England state, NESCOE, ISO-NE, FERC, natural gas transmission or distribution companies, and/or Electricity Market Participant regarding hydropower imports from Canada; this includes, but is not limited to:

(a) All Documents relating to any proposed project to import hydropower from Canada including but not limited to the Northern Pass project;

(b) All Documents constituting, memorializing, or otherwise relating to communications relating to hydropower purchases from Canada between Rhode Island Governmental Representatives and any officials, employees, or representatives of the Province of Quebec; Hydro Quebec; Hydro Renewable Energy, Inc.; HQ Energy Services (US), Inc.; Northeast Utilities; Northern Pass Transmission, LLC; and NU Transmission Ventures, Inc.

(c) All Documents relating to the costs to import and/or the financial terms applicable to importation of hydropower from Canada;

(d) All Documents relating to eligibility of hydropower from Canada under the Renewable Portfolio Standard or Renewable Energy Standard of any New England staff.

(e) All Documents relating to the development of requests for, and/or filing of tariff changes for purposes of importing hydroelectricity from Canada.

(f) All Documents relating to analysis of greenhouse gas emissions impacts associated with the importation of hydroelectricity from Canada.”

You allege the Governor’s Office, in its response to your APRA request, failed to provide a complete description of CLF’s appeal rights under the statute. It appears the Governor’s Office response to your APRA request indicated:

“[i]n accordance with R.I. Gen. Laws § 38-2-8, ‘any person . . . denied the right to inspect a record of a public body may appeal to the chief administrative officer of that public body for a review of the determinations made by his or her subordinate.’ Please direct any such administrative appeal to Kenny Alston, Chief of Staff, State House, Room 224, Providence, RI 02903, who will respond within ten (10) business days.”

Under R.I. Gen. Laws § 38-2-8(a), any denial of the right to inspect or copy public records must provide in writing “the procedures for appealing the denial” and “[a]ny person or entity denied

the right to inspect a record of a public body may petition the chief administrative officer of that public body.” (Emphasis added). The plain language of R.I. Gen. Laws § 38-2-8 does not require that a complainant exhaust his or her administrative remedies prior to filing an APRA complaint with this Department or prior to filing a complaint in Superior Court. See Downey v. Carcieri, 996 A.2d 1144, 1150-51 (R.I. 2010) (holding that under the plain language of R.I. Gen. Laws § 38-2-8 a complainant is not required to exhaust all administrative remedies prior to filing a complaint in Superior Court); Fitzgerald v. Warwick Police Department, PR 14-13. To the contrary, and as evidenced by the use of the word “may” in the statute, a complainant has the option to petition the chief administrative officer, but is not required to do so prior to filing a complaint with this Department or a civil lawsuit in Superior Court. As such, the Governor’s Office violated the APRA when it provided you with one avenue for appeal, but omitted the other options for appeal.

You next allege that the Governor’s Office violated the APRA when it failed to provide a reasonable basis for the denial of CLF’s request for a fee waiver. The APRA states that “[a] court may reduce or waive the fees for costs charged for search or retrieval if it determines that the information requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” R.I. Gen. Laws § 38-2-4(e). (Emphasis added). In this case, we cannot conclude the Governor’s Office violated the APRA when it decided not to grant you a fee waiver, as the APRA allows a court to reduce or waive the costs to fulfill an APRA request and does not mandate that a public body do so. See Napolitano v. Albion Fire District, PR 08-18 (“Although the Fire District surely can reduce or waive its fees, there is nothing within the APRA that requires the Fire District, of its own volition, to waive or reduce these fees”). As such, the Governor’s Office did not violate the APRA when it failed to provide you the basis for its waiver denial.

You further allege the Office of the Governor charged a \$60.00 fee before providing you access to documents for review. While you seem to suggest or analogize this process to a “file review,” there is no question that you have sought access under the APRA and the Governor’s Office makes clear that it had to search and retrieve documents responsive to your APRA request. Rhode Island General Laws § 38-2-4(b) provides that “[h]ourly costs for a search and retrieval shall not exceed fifteen dollars (\$15.00) per hour and no costs shall be charged for the first hour of a search or retrieval.” Moreover, DARE v. Gannon, 819 A.2d 651, 661 (R.I. 2003) makes clear that the “costs of redaction should be borne by the requesting party because it is part of the process of retrieving and producing the requested documents.”

Ever since the 2012 APRA amendment, the APRA expressly allows an entity, such as the Governor’s Office, to require prepayment for “costs properly charged” and provides that in such a case “the production of records shall not be deemed untimely if the public body is awaiting receipt of payment.” R.I. Gen. Laws § 38-2-7(b). Here, you make no allegation that the \$60.00 charge was unreasonable. Thus, according to the plain language of the APRA, we find no violation when the Governor’s Office required pre-payment.

You next allege that the Governor's Office violated the APRA when it withheld documents in whole and in part, which you claim are public records. The Governor's Office produced, for this Department's in camera review, approximately three quarters of an inch thick of documents that were withheld in whole. According to the Governor's Office, these documents were withheld "pursuant to R.I. Gen. Laws § 38-2-2(4)(E) because it includes documents that would not be available by law or rule of court to an opposing party in litigation based upon the deliberative process privilege, and because they contain preliminary drafts, notes, impressions, memoranda and working papers of the Governor's staff, the Department of Administration, the Public Utilities Commission, NESCOE staff, and the Governor's appointed NESCOE manager and her communications with other gubernatorial-appointed NESCOE managers deemed non-public pursuant to R.I. Gen. Laws § 38-2-2(4)(K)." In its response, the Governor's Office further indicates pursuant to R.I. Gen. Laws § 38-2-3(b) that no portion of these documents contained reasonably segregable information that was releasable. As discussed, infra, you also challenge the Governor's Office decision to provide other documents in redacted fashion.

Before addressing the merits of this issue, we observe that by letter dated April 30, 2014, the Governor's Office denied your APRA request. Thereafter, by letter dated June 2, 2014, you filed an administrative appeal with the Governor's Office, but before the Office of the Governor rendered a decision on your appeal, you filed the instant complaint, dated June 10, 2014. On June 19, 2014, the Governor's Office rendered its decision and, in large part, provided you access to the redacted documents that it had previously excluded.<sup>2</sup> The Governor's Office affirmed the decision to exempt documents in whole. The result of this timeline is that your complaint raises issues concerning redacted documents, but these documents – in large part – were provided to you as a result of the administrative appeal process.

As the Rhode Island Superior Court has explained "[o]ne purpose of [the deliberative process] privilege is to enhance the quality of agency decision making by encouraging persons within an agency to make comments and recommendations without concern that those deliberations will become public." Heritage Healthcare Services, Inc. v. The Beacon Mutual Insurance Co., 2007 WL 1234481 (R.I. Super. 2007)(Silverstein, J.). Although "Rhode Island law is sparse on the subject," id., Justice Silverstein continued that the deliberative process privilege also "'protect[s] against premature disclosure of proposed policies before they have been finally formulated or adopted' and prevents 'confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.'" Id.

---

<sup>2</sup> Your reply complains that the Governor's Office further violated the APRA when it failed to provide a timely response to your appeal, but this issue was not raised in your complaint and instead was only raised, for the first time, in your rebuttal. Our acknowledgement letter makes clear that a complainant's rebuttal may only address issues that have already been raised and may not be used to raise new issues. For this reason, we do not address the issue of the Governor's Office alleged untimely response to your administrative appeal. See e.g., Mudge v. North Kingstown School Committee, OM 15-20.

“Courts applying this privilege have looked to whether a document was ‘pre-decisional’ and whether it was ‘deliberative’ in order to ascertain whether a particular document should fall within this privilege. A document is pre-decisional if it is ‘prepared in order to assist an agency decisionmaker in arriving at his decision.’” Id. Citing federal authorities, Justice Silverstein added that “[i]t is not enough that a document merely precedes a decision.” Id. Instead, the court indicated that “[i]t must be deliberative such that it ‘makes recommendations or expresses opinions on legal or policy matters.’” Id. Stated differently, in order for the deliberative process privilege to apply, the documents “must be ‘part of the agency give-and-take-of the deliberative process-by which the decision itself is made.’” Id. “In contrast, purely factual materials are not considered deliberative and, therefore, are not privileged.” Id.

After our in camera review of the withheld and redacted documents, with the exception of one-word, we find no violation. With respect to the documents withheld in whole, our review finds this category to contain drafts and other documents (e-mails, memorandum, and other records) reflecting the deliberative process. These communications were principally between and among NESCOE states, including Rhode Island, as well as internal Rhode Island communications regarding then-pending energy matters. Indeed, portions of your APRA request expressly seek documents relating to the “analysis” of certain energy-related matters.

It does not appear that you contest the deliberative nature of these documents, nor does it appear that you contest that the deliberative process privilege may be applied in situations such as those presented herein. For completeness, we note, however, NESCOE is an acronym for New England States Committee on Electricity and is governed by a board of managers appointed by the Governors of the six New England States. NESCOE represents the collective perspective of the six New England states in regional electricity matters and advances the New England states’ common interest in the provision of electricity to consumers at the lowest possible price over the long-term, consistent with maintaining reliable service and environmental quality. See <http://nescoe.com/about-nescoe>. In these types of multi-state organizations, legal privileges have been deemed to exist. See e.g., Tobacoville USA, Inc. v. McMaster, 692 S.E.2d 526, 530 (S.C. 2010)(“While the relationship the AG has with the NAAG is not the traditional attorney-client relationship \* \* \* we nonetheless find that these communications may be covered by the attorney-client privilege.”).

With respect to our review of the redacted documents, we begin by expressing our uncertainty concerning the precise issue before this Department. Specifically, the Governor’s Office initial response provided you documents in a redacted manner and by letter dated June 2, 2014, you filed an administrative appeal with the Governor’s Office. Before the Governor’s Office had the opportunity to respond to your administrative appeal, however, you filed the instant complaint and thereafter – while this matter was pending before this Department – the Governor’s Office provided you much – but not all – the previously redacted portions. In large part your rebuttal does not address the action taken by the Governor’s Office as a result of your administrative appeal. Considering the foregoing, we focus on the redactions that remain following the Governor’s Office response to your administrative appeal. In doing so, we observe that the Governor’s Office has provided no specific guidance to this Department to affirm the remaining

redactions and CLF has provided no specific argument to this Department to find that the remaining redactions violated the APRA.<sup>3</sup>

Notwithstanding the foregoing, our review largely finds no violation in the redacted material following the administrative appeal. Frankly, in some circumstances we question whether the APRA even required the redacted document to be produced. Our review finds that in some situations names were redacted, and in other situations, the documents concerned the deliberative process. Even a September 6, 2013 memorandum, which was redacted in large part, finds that this memorandum contains NESCOE's analysis of the cost of the Gas-Electric hydro solutions and was properly exempted as a memorandum and as part of the deliberative process privilege. See R.I. Gen. Laws §§ 38-2-2(4)(E) & (K). The only issue we find is the second redaction (one word) on what is referenced as Document No. 275. No argument has been presented to justify this redaction and none is apparent to us upon our review. This one word should be disclosed barring "good cause."

Lastly, the APRA states, "[a]ny denial of the right to inspect or copy records, in whole or in part...shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial within ten (10) business days of the request." See R.I. Gen. Laws § 38-2-7(a). You allege that the Governor's Office denial was inadequate since you were not provided an index containing sufficient information to identify the nature and basis of the withheld documents. The Governor's Office denial indicate that it was:

"pursuant to R.I. Gen. Laws § 38-2-2(4)(E) because it includes documents that would not be available by law or rule of court to an opposing party in litigation based upon the deliberative process privilege, and because they contain preliminary drafts, notes, impressions, memoranda and working papers of the Governor's staff, the Department of Administration, the Public Utilities Commission, NESCOE staff, and the Governor's appointed NESCOE manager and her communications with other gubernatorial-appointed NESCOE managers deemed non-public pursuant to R.I. Gen. Laws § 38-2-2(4)(K)."

While the Governor's Office surely provided the statutory basis for its exemption, the Office did not in any manner indicate the number or nature of documents withheld. Moreover, although the Governor's Office provided the statutory exemption, as indicated above, the Governor's Office did not indicate how these statutory exemptions – or the relevant portions of these statutory exemptions – applied to particular documents (or portions of documents).

This Department has previously held that "a statement that the information sought 'is not public information' is not sufficient to comply with the Act's mandate." See Nye v. Town of Westerly, PR 95-21. See also Costantino v. Smithfield School Committee, PR 13-24 ("Pursuant to Rhode

---

<sup>3</sup> We acknowledge the difficulty in providing a specific argument why something should not have been redacted, but in fairness the remaining redactions are sporadic and largely one or two words. In our opinion, the unredacted portions provided ample opportunity to formulate a specific argument why a specific redaction violated the APRA.

Island General Laws, the minutes of a closed session \* \* \* are not public records,” was not sufficient to comply with the Act’s mandate). While the instant denial clearly provides a more detailed basis for the exclusion, it does not, in our opinion, comply with the APRA requirement that a denial be “in writing giving the specific reasons for the denial.” R.I. Gen. Laws § 38-2-7(a).

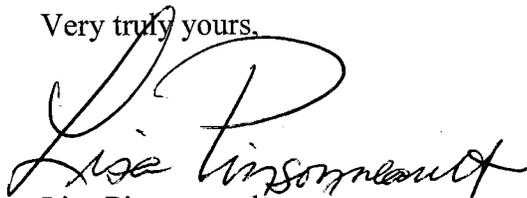
Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public 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).

Here, we find neither remedy appropriate at this time. Specifically, the Governor’s Office has already provided you access to the public records requested and rather than institute injunctive proceedings, we prefer to provide the Governor’s Office the opportunity to disclose the one-word in Document No. 275 for which a basis for non-disclosure is not apparent. We also conclude, based upon the evidence presented, that insufficient evidence exists for a willful and knowing, or reckless, violation. This finding serves as notice to the Office that its actions violated the APRA and may serve as evidence in a future similar situation of a willful and knowing, or reckless, violation. If you do not receive an appropriate response from the Governor’s Office within ten (10) business days of the date of this finding, you should feel free to contact this Department so that we may ensure compliance with the APRA.

While the Attorney General will not file suit in this matter at this time, nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing your file as of the date of this letter, although this Department reserves the right to reopen this matter should it deem appropriate.

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

Very truly yours,



Lisa Pinsonneault  
Special Assistant Attorney General  
Extension 2297

Cc: Claire J. V. Richards Esq.  
claire.richards@governor.ri.gov