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VIA EMAIL ONLY

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PR 20-65

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Re: **Episcopal Diocese of Rhode Island v. Rhode Island Division of Public Utilities and Carriers**

Dear Attorneys Handy and Spirito:

We have completed our investigation into the Access to Public Records Act ("APRA") complaint filed by Attorney Handy on behalf of the Episcopal Diocese of Rhode Island ("Complainant") against the Rhode Island Division of Public Utilities and Carriers ("Division"). For the reasons set forth herein, we find that the Division violated the APRA.

Background

At the outset, we believe it appropriate to discuss the difference between the Division, which is the respondent in this matter, and the Public Utilities Commission ("Commission"). According to the RI PUC website,[1] the Division and the Commission are each a separate and distinct regulatory body. The three-member Commission serves as a quasi-judicial tribunal with jurisdiction, powers, and duties to implement and enforce the standards of conduct under R.I. Gen. Laws § 39-1-27.6 and to hold investigations and hearings involving a myriad of public utilities pursuant to, *inter alia*, R.I. Gen. Laws § 39-19-4, § 39-1-30, § 39-1-31, and § 39-1-32. *See* 810 RICR 00-00-1.3(A). The Division is led by an Administrator who is not a member of the Commission. The Division "exercises the jurisdiction, supervision, powers and duties not specifically assigned to the Commission." *See* 815 RICR 00-00-1.3(A)(1). The Division, as a rate-payer advocate, is considered an indispensable party in all Commission proceedings and will provide an opinion and/or recommendation on the matters before the Commission. The Division is statutorily charged to enforce all directives of the Commission.

[1] http://www.ripuc.ri.gov/index.html

The Complainant initiated two matters before the Commission. The first sought a dispute resolution concerning National Grid's Standards for Connecting Distributed General Tariff. The second was a petition filed on October 9, 2019 seeking a declaratory judgment "to prohibit National Grid from imposing federally regulated transmission system obligations on projects interconnecting to the distribution system through Rhode Island's distribution system interconnection tariff." As of the date of the parties' submissions in this matter, the first matter was still pending adjudication before the Commission. Regarding the second matter, the Commission denied the Complainant's request for declaratory judgment on April 14, 2020 and the Complainant subsequently appealed that decision to the Rhode Island Supreme Court where the matter remains pending.

On April 21, 2020, the Complainant filed an APRA request with the Division seeking:

> "1. Any record of any communications between staff of the ... Division ... and any employee of National Grid, New England Power Company or Narragansett Electric Company regarding or related to any issues under consideration in Rhode Island Public Utilities Commission Dockets 4973 or 4981, excepting any such communications that have already been copied or produced to representatives of the Episcopal Diocese of Rhode Island or its counsel Seth Handy of Handy Law, LLC.
>
> 2. Any record of any communications between staff of the Rhode Island Division of Pub1ic Utilities and Carriers and any agent of National Grid, New England Power Company or Narragansett Electric Company, including but not limited to any employee or staff of its legal counsel Keegan Werlin LLP including but not limited to Jack Habib, Esq. or Stephen Frias, Esq. regarding or related to any issues under consideration in Rhode Island Public Utilities Commission Dockets 4973 or 4981, excepting any such communications that have already been copied or produced to representatives of the Episcopal Diocese of Rhode Island or its counsel Seth Handy of Handy Law, LLC.
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> In addition, pursuant to the Access to Public Records Act, R.I. Gen. Laws §38-2-1 et seq. and the Open Meetings Law, R.I. Gen. Laws §42-46-1 et seq., the Episcopal Diocese of Rhode Island requests a copy of any memorandums generated by Rhode Island Division of Public Utilities and Carriers for the Interim Director's consideration regarding or related to any or all issues under consideration in Rhode Island Public Utilities Commission Dockets 4973 or 4981."

The Division responded on April 22, 2020 by denying the request and stating that the records were exempt from disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(E), which exempts "[a]ny records which would not be available by law or rule of court to an opposing party in litigation."

The Complainant appealed the Division's response to Acting Administrator Linda George, Esquire. Attorney George upheld the denial, stating that "the records represent 'work product' of the Division's legal staff and are properly excluded from disclosure under APRA." Attorney

George's response also stated that she "never received a legal memorandum on the subject matter contained in your APRA request."

Dissatisfied with the Division's response, the Complainant filed a Complaint with this Office.

Legal Arguments

- Complainant

Complainant maintains that the Division's initial invocation of R.I. Gen. Laws § 38-2-2(4)(E) was improper because the Division failed to provide "any explanation for why the requested records would not be available to an opposing party in litigation." The Complainant further challenges the Division's response to the administrative appeal, which asserted that the withheld records constitute attorney work product. The Complainant argues that Rule 26(b) of the Rhode Island Superior Court Rules of Civil Procedure distinguishes "core" and "factual" work product and affords "factual work product less protection than opinion work product" and "does allow some factual materials prepared in anticipation of litigation to be discovered, so long as the party seeking discovery demonstrate a substantial need for the materials and that it cannot obtain the substantial equivalent without undue hardship." The Complainant indicates that it "requested these records out of concern that National Grid and its affiliates (collectively, National Grid) exercised undue influence over the Division in its adjudicatory proceeding at the [Commission]."[2] The Complainant maintains that "[t]hese records are a means to evaluate National Grid's influence on the adjudicatory process in Docket 4981. The Diocese has no other means to obtain the requested records." The Complainant also asserts that the requested records must not constitute "core" work product because it would have been inappropriate for a regulatory agency to have its mental impressions shaped by a party before it.

- Division

The Division submitted a substantive response through its Chief Legal Counsel, John Spirito, Jr., Esquire, as well as a copy of all withheld documents for this Office's *in camera* review. The Division states that "the records in issue were properly withheld from disclosure under APRA due to the 'work product' nature of the records." The Division argues that "[t]here is absolutely no prohibition that precludes parties from discussing issues and related matters in docket proceedings before the Commission" and that it would not be an ethical breach for the Division to discuss a Docket matter with National Grid.

The Division also states that "under the 'common interest doctrine,' it is not surprising that National Grid and the Division would share discussions on the merits of the Complainant's petition

[2] To the extent the Complainant raises concerns about the adjudicatory proceedings before the Commission and/or raises allegations of undue influence, those allegations are outside the scope of this Office's authority which is limited to investigating alleged violations of the APRA. *See* R.I. Gen. Laws § 38-2-8(b). It is our understanding that the Complainant appealed the Commission's adjudication to the Rhode Island Supreme Court where the matter remains pending.

for a declaratory ruling. *** [A]s an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work product doctrine."[3]

Regarding the withheld documents, the Division asserts that "the materials being protected from disclosure are several connected email communications between a Division staff attorney and attorneys for National Grid. While most of these emails benignly address scheduling matters, the core message in these email communications contain the mental impressions, conclusions, opinions and legal theories of the Division's attorney assigned to the [declaratory judgment matter]." The Division asserts that "[s]uch opinion work product qualifies for absolute immunity from discovery and under no circumstances may another party obtain, through discovery [or APRA request], an attorney's recorded thoughts and theories."[4] (Inserted text in original).

We acknowledge Complainant's rebuttal, which, among other arguments, takes issue with the Division's position that it shares a common interest with National Grid, which is a utility the Division regulates.

Relevant Law

When we examine an APRA complaint, our authority is to determine whether a violation of the APRA has occurred. *See* R.I. Gen. Laws § 38-2-8. In doing so, we must begin with the plain language of the APRA and relevant caselaw interpreting this statute.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. *See* R.I. Gen. Laws § 38-2-3(a). Rhode Island General Law § 38-2-2(4)(E) exempts from public disclosure "any records which would not be available by law or rule of court to an opposing party in litigation."

Exemption (E) encompasses common law legal privileges, including the attorney-client privilege, deliberative process privilege, and work product privilege. *See Hydron Labs., Inc. v. Dep't of Atty. Gen. for State*, 492 A.2d 135, 139 (R.I. 1985) ("It was never the Legislature's intent to give litigants a greater right of access to documents through APRA than those very same litigants would have under the rules of civil procedure. Therefore, exemption [E] of APRA was enacted to limit production under APRA to the scope of production allowed in pending litigation."). This Office recently discussed how Exemption (E) resembles Exemption 5 of the Freedom of Information Act ("FOIA")[5] and "encompasses documents not available to an opposing party in litigation by 'rule

[3] Citing *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129,* 902, F.2d 244, 249 (4th Cir. 1990).
[4] Citing *Henderson v. Newport County Regional Young Men's Christian Ass'n*., 966 A.2d 1242, 1247 (R.I. 2009).
[5] We reference FOIA because the Rhode Island Supreme Court has made clear that "[b]ecause APRA generally mirrors the Freedom of Information Act * * * we find federal case law helpful in interpreting our open record law." *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556, 558 n.3

of court,' meaning judicially recognized litigation privileges." *Providence Journal v. Executive Office of Health and Human Services*, PR 20-01.

Both federal courts and Rhode Island state courts have broadly recognized that documents revealing attorney work product and mental processes are entitled to protection. *See Upjohn Co. v. United States,* 449 U.S. 383, 398 (1981) ("Rule 26 accords special protection to work product revealing the attorney's mental processes."); *Crowe Countryside Realty Associates Co. LLC v. Novare Engineers, Inc*., 891 A.2d 838, 842 (R.I. 2006) (noting that attorney opinions and mental processes are generally afforded "near absolute protection against disclosure"). The Rhode Island Supreme Court has held that a document constitutes work product entitled to a high degree of protection when it "reveals the opinions, judgments, and thought processes of counsel." *State v. von Bulow*, 475 A.2d 995, 1009 (R.I. 1984) (quoting *In Re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir.1982)).

"To determine whether an item is work product, one must look, as a preliminary matter, at 'whether, in light of the nature of the document or tangible material and facts of the case, the document can be said to have been prepared or obtained because of the prospect of litigation." *State v. Lead Indus. Ass'n, Inc.*, 64 A.3d 1183, 1192-93 (R.I. 2013); *see also* R.I. Super. Ct. R. 26(b)(3) (limiting discovery of documents prepared in anticipation of litigation). "The attorney work-product [prong of FOIA Exemption 5] extends to 'documents and tangible things that are prepared in anticipation of litigation or for trial' by an attorney." *Corley v. Sessions*, 280 F. Supp. 3d 164, 168 (D.D.C. 2017); *see also Lead Indus. Ass'n, Inc.*, 64 A.3d at 1193 ("work product applies to documents prepared principally or exclusively to assist in anticipated or ongoing litigation"); *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015) ("The work product protection is broader than the attorney-client privilege in that it is not restricted solely to confidential communications between an attorney and client. ... It is narrower, however, insofar as the doctrine protects only work performed in anticipation of litigation or for trial.") (citation omitted).

The "'[c]ommon interest doctrine' permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims." *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272 (4th Cir. 2010). "The doctrine allows attorneys representing different clients with identical legal interests to share otherwise privileged information without a resultant waiver." *McCullough v. Fraternal Order of Police, Chicago Lodge 7*, 304 F.R.D. 232, 239 (N.D. III. 2014) (citing *United States v. BDO Seidman, LLP,* 492 F.3d 806, 815 (7th Cir. 2007)). "The common interest doctrine is not, itself, a species of privilege; it is an exception to the general and familiar rule of waiver, which obtains when a client communicates with his attorney in the presence of a third person or shares privileged communications with a third party." *Id.* The burden is on the party asserting the privilege to establish its existence by showing that "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not

(R.I. 1989). We note, however, that unlike FOIA Exemption 5, APRA Exemption (E) is not expressly limited to "inter-agency or intra-agency" records.

been waived." *HFGL Ltd. v. Alex Lyon & Son Sales Managers and Auctioneers, Inc.*, 264 F.R.D. 146 (D.N.J. 2009).

Findings

The Division withheld twenty-four (24) pages of documents responsive to the Complainant's request. These documents consist of email exchanges between an attorney for the Division and attorneys for National Grid between the period of October 30, 2019 and November 14, 2019. Based on our review, approximately 19 pages consist of a back-and-forth exchange between the Division and National Grid attorneys attempting to schedule a meeting; no substantive discussion about the then-pending Commission matters initiated by Complainant are contained in the emails. We are hard-pressed to find that these scheduling discussions reveal the "opinions, judgments, and thought processes of counsel" or constitute material gathered in anticipation of litigation within the ambit of the work-product privilege. *von Bulow*, 475 A.2d at 1009; *see also Lead Indus. Ass'n, Inc.*, 64 A.3d at 1193. Nor has the Division provided any substantive argument to support withholding these scheduling discussions pursuant to the work-product privilege encompassed in R.I. Gen. Laws § 38-2-2(4)(E).[6] Rather, the Division acknowledges that "most of these emails benignly address scheduling matters." Accordingly, we find the Division violated the APRA by withholding these emails.

Based on our *in camera* review, the remaining withheld emails pertain to a substantive discussion between the Division's attorney and National Grid's attorneys regarding the Complainant's declaratory judgment petition. The emails at issue consist of National Grid's attorney sharing his observations and opinions with the Division and, in turn, the Division's attorney providing his own observations and opinions. These emails reflect the type of attorney mental impressions and opinions that may be subject to work product protection. However, we find two problems with the Division's assertion of the work product privilege with regard to these emails.

First, the Division has failed to provide argument or evidence that the emails were exchanged "'in anticipation of litigation or for trial' by an attorney." *Corley*, 280 F. Supp. 3d at 168; *see also Lead Indus. Ass'n, Inc.*, 64 A.3d at 1193 ("work product applies to documents prepared principally or exclusively to assist in anticipated or ongoing litigation"). We have not been presented with evidence that any relevant "litigation" was ongoing in November 2019 when the emails were exchanged. Although the parties are currently engaged in an appeal before the Supreme Court regarding the Commission's denial of Complainant's petition, that appeal did not commence until after the Commission rendered its decision on April 14, 2020, and the Division argues that the pending Supreme Court case is not "litigation" but only an "administrative appeal." The Division also makes a point of arguing that the declaratory judgment petition filed by the Complainant was

[6] Complainant argues that the Division failed to explain the basis for withholding the records. The APRA provides that any denial of the right to inspect records shall give "the specific reasons for the denial[.]" R.I. Gen. Laws § 38-2-7. Here, the Division's initial response to the request cited Exemption (E) as the basis for withholding the records and its response to the administrative appeal further specified that the records constituted "work product." In these circumstances, we do not find that the Division failed to specify the reasons for denial.

not a "contested case" that required a hearing. The Division asserts that in the case of such a declaratory judgment petition, "the legal rights, duties and privileges of a 'specific party' are not in issue" and instead the agency is "narrowly charged with the obligation of issuing a legal opinion 'as to the applicability of any statutory provision or of any rule or order of the agency." The Division further argues that the decision on the declaratory judgment petition was merely "offered as a generic determination of whether an agency statute, rule or order would apply in a given set of facts."[7]

These arguments by the Division suggest that the emails in question, which pertained to the declaratory judgment petition, did not pertain to any ongoing or anticipated litigation.[8] Based on the arguments of the Division, the emails instead pertained to a non-adversarial proceeding in which the Commission was simply issuing "a generic determination of whether an agency statute, rule or order would apply in a given set of facts."

Although the Division argues that the emails reflect attorney mental impressions, opinions, and legal conclusions, that alone is insufficient to invoke the work product privilege. Rather, the document must also be prepared "in anticipation of litigation or for trial.'" *Corley*, 280 F. Supp. 3d at 168; *see also Lead Indus. Ass'n, Inc.*, 64 A.3d at 1193 ("work product applies to documents prepared principally or exclusively to assist in anticipated or ongoing litigation"). The Division wholly fails to offer any evidence or argument that would demonstrate that the emails were exchanged "in anticipation of litigation or for trial." Instead, as noted above, the Division's description of the nature of the declaratory judgment petition that the emails pertained to evidences that the emails were not related to litigation or an adversarial proceeding. As such, we conclude that the Division has failed to demonstrate that the emails are entitled to the protection of the work product privilege.

There is also a second basis to doubt that the work product privilege applies. The emails in question were exchanged between the Division and National Grid. The work product privilege, assuming it applied, is subject to waiver. Courts have recognized that the work product privilege is designed

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[7] The Division seems to offer these arguments in an effort to show that it was not improper for the Division to communicate with National Grid regarding the declaratory judgment petition and to demonstrate that the Complainant does not have a need for the requested records in connection with any ongoing litigation. However, the Complainant sought the records through an APRA request, not a discovery request. Whereas the issue of the Complainant's purported need for the records may be relevant if the records were protected by the work product privilege and if the Complainant sought access to privileged documents through a discovery request in litigation, here we do not find those considerations to be relevant. Moreover, as noted above, any allegations related to undue influence are not before us.

[8] Our finding in this case is based on the particular arguments and evidence presented by the parties and as such, it is unnecessary for us to examine whether work pertaining to an administrative proceeding, such as the declaratory judgment petition, could be considered in anticipation of litigation. The particular arguments presented by the parties and the record in this case evidences that the Division did not consider its communications with National Grid about the declaratory judgment petition to be in anticipation of or related to litigation.

to protect work product from adversaries in litigation and that "disclosing material in a way inconsistent with keeping it from an adversary waives work product protection." *United States v. Massachusetts Inst. of Tech*., 129 F.3d 681, 687 (1st Cir. 1997). The United States Court of Appeals for the First Circuit has held that "disclosure to a potential adversary" that did "not take place in the context of a joint litigation where the parties shared a common legal interest" forfeited the privilege. *Id.* The Complainant in this case takes issue with the Division's assertion that it, as a regulatory body, shares a common interest with National Grid. Based on the record before us, the Division as rate-payer advocate, has not presented any evidence or argument supporting why National Grid and the Division shared a "common interest," nor has the Division articulated any evidence or argument concerning why sharing their legal opinions and mental impressions about the petition did not waive any claim to work product privilege.

The Division argues that these emails are protected from disclosure pursuant to the "common interest doctrine" because the Division and National Grid shared a "common interest" in the Complainant's declaratory judgment petition. As noted above, the common interest doctrine is not an independent privilege, but rather is an exception to waiver. *McCullough*, 304 F.R.D. at 239. The "common interest doctrine" applies to communications that were made "in the course of a joint defense effort." *HFGL Ltd.*, 264 F.R.D. at 146. The Division has not provided any evidence that it was engaged in such a joint defense effort with National Grid at the time when these emails were exchanged. The Division asserts that "[t]here is absolutely no prohibition that precludes parties from discussing issues and related matters in docket proceedings before the Commission." We take no position on the merits of that statement, but even assuming it is true, it does not mean that any such communications receive work product and common interest protection. We were not provided with any evidence or argument indicating that the communications at issue were made pursuant to a common defense, nor is there any evidence that the Division and National Grid memorialized the purported joint defense in writing. Nor is there any evidence that National Grid was acting as an agent or consultant of the Division. Rather, the record indicates that National Grid "was an advocate for its own interests and not a provider of independent advice." *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d at 27.

Under the APRA, "the burden shall be on the public body to demonstrate that the record in dispute can be properly withheld from public inspection[.]" R.I. Gen. Laws § 38-2-10. Here, we do not find sufficient evidence to support the Division's assertion that the Division and National Grid's communications are protected under the work product privilege and Exemption (E). As such, we find the Division also violated the APRA by withholding these remaining emails (pages 20-24 of with the withheld records).

Conclusion

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).

Although injunctive relief may be appropriate, we believe it appropriate to first allow the Division an opportunity to comply with this finding. Thus, within ten (10) business days, the Division must produce the requested records to the Complainant.

We were not presented with evidence that the violations found herein were willful and knowing, or reckless. We observe that there are no recent similar violations found against the Division.

Although this Office will not file suit in this matter at this time, 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). This file remains open pending completion of the steps described above.

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*
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