WHAT YOU NEED TO KNOW ABOUT

THE ACCESS TO PUBLIC RECORDS ACT

A HANDBOOK FOR LOCAL OFFICIALS

What You Need to Know about the Access to Public Records Act

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SECTION I:

INTRODUCTION

A. WHAT IS THE ACCESS TO PUBLIC RECORDS ACT?

Do you know why any citizen has the right to access the names of all registered voters in your city or town, or is able to access the salaries of city and town employees in neighboring communities, or to find out what price the property located next to theirs sold for?

In short, because of the Access to Public Records Act (APRA).

The APRA allows individuals or entities to gain access to information (in its various forms) amassed throughout the years by their cities and towns. It is a tool heavily relied on by individuals and entities alike, by newspapers as well as by subscribers of those newspapers, by public officials and by members of the public served by those officials. There is no other statute that provides for the near unfettered access set forth in the APRA.

The best illustration of the Act's importance is the frequency with which it is utilized by individuals and entities that seek ideas and information. The diverse nature of APRA users is a testament to both the Act's universal applicability and utility.

B. BRIEF HISTORY AND PURPOSE

Careful to balance the public's longstanding right to access (first recognized in the United States Constitution) with an individual's indelible right to privacy, the statute is the result of much thought and careful deliberation. Rhode Island was the 49th state to enact this type of law. Its stated purpose is to:

"…facilitate public access to governmental records which pertain to the policy making functions of public bodies and/or are relevant to the public health, safety, and welfare…" [RIGL § 38-2-1.]

The desired effect of the law is to increase not only input from citizens regarding decisions which affect them, but also to enhance the "accountability of their elected and appointed representatives."[1] The Act is therefore an indispensable mechanism for the creation and maintenance of an informed citizenry.

[1] "Attorney General's Guide to Open Government"

SECTION II:

WHY THE ACCESS TO PUBLIC RECORDS ACT IS IMPORTANT TO YOU IN YOUR ROLE AS A MUNICIPAL OFFICIAL

Throughout your tenure in municipal government you have almost certainly come across a significant amount of facts, data, figures, information, and records. It is somewhat obvious that certain records are private. For example, an individual's credit account numbers, tax returns, and medical history are not to be open to public scrutiny. But what about a voter registration card? What about a town employee's salary? What about his/her overtime pay? Town of residence? While there are many records that are undoubtedly private, just as there are those that are obviously public, there is also a wide range of records whose status, private or public is neither obvious nor apparent. What do you do when you encounter this latter set of records?

You must apply the rules enacted by the legislature, which means you must possess a basic understanding of the Access to Public Records Act (APRA). Without knowledge of the Act you will likely violate it.

Because your role as a municipal official inextricably links you to public records and public inquiries in general, the APRA is a necessary tool for carrying out your everyday functions. Hence, the Act's importance to municipal officials cannot be overstated.

SECTION III:

WHEN DOES THE ACCESS TO PUBLIC RECORDS ACT APPLY?

A. WHAT IS A "PUBLIC BODY"?

How do you know if you fall within the realm of agencies, commissions, or departments to which the Act applies? You must meet the statutory definition of the term. The APRA defines a "public body" as:

> "any executive, legislative, judicial, regulatory, or administrative body of the state, or any political subdivision thereof; including but not limited to, any department, division, agency, commission, board, office, bureau, authority, any school, fire or water district, or other agency of Rhode Island state or local government which exercises governmental functions, any authority as defined in RIGL § 42-35-1(b)[2], or any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency." [RIGL § 38-2-2(1).]

As you can see, it is a rather broad definition which mirrors greatly the one provided in the Open Meetings Act. However, certain organizations which are not public bodies under the OMA are under the APRA. For example, a volunteer fire association is not a public body for purposes of the OMA, but it is a public body for purposes of the APRA. [Schmidt v. Ashaway Fire District, et. al. PR 97-09.] Also, judicial bodies are included in the APRA's definition of public bodies, but only in their administrative function.

[2] Non-exclusive list of public bodies: Rhode Island Industrial Building Authority, Rhode Island Recreational Building Authority, Rhode Island Port Authority and Economic Development Corporation, Rhode Island Industrial Facilities Corporation, Rhode Island Public Buildings Authority, Rhode Island Housing and Mortgage Finance Corporation, Rhode Island Resource Recovery Corporation, Rhode Island Transit Authority, Rhode Island Student Loan Authority, Howard Development Corporation, Water Resources Board, Rhode Island Health and Educational Building Corporation, Rhode Island Higher Education Assistance Authority, Rhode Island Turnpike and Bridge Authority, Blackstone Valley District Commission, Narragansett Bay Water Quality Management District Commission, their successors and assigns, and any body corporate and politic with the power to issue bonds and notes, which are direct, guaranteed, contingent, or moral obligations of the state, which is hereinafter created or established in this state. [RIGL § 42-35-1(b).]

In sum, if the agency on which you serve exercises a governmental function, it is a public body.

B. WHAT IS A "PUBLIC RECORD"?

Equally as important as the definition of a "public body" is the meaning of the phrase "public record", for the Act only "ensures the public's right to access 'public records' maintained by public bodies."[3] The question of what constitutes a public record has less to do with form than with function. In broad terms, a public record is "any material, regardless of physical form or characteristic, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." [See RIGL § 38-2-2(4)(i).] Documents, papers, letters, and maps undoubtedly fit within this definition, but so too do less traditional materials, such as tapes, photographs, electronic data processing records, and computer stored data, including e-mails.

1. RECORDS THAT ARE PUBLIC RECORDS UNDER LAW

While § 38-2-2(4)(i) actually defines the term and clarifies which types of materials are considered "public records" (i.e. a letter, document, book, etc.), other statutory sections narrow the term's meaning even further by stating specifically which records are deemed public. For example, under RIGL § 38-2-2(A)(II) the **pension records** of all persons who are either current or retired members of the retirement systems established by the general laws, as well as all members who became members of those retirement systems after June 17, 1991 must be "open for public inspection". Similarly, under RIGL § 38-2-14 **settlement agreements of any legal claim against a governmental entity** are deemed public records. Just as unequivocal as RIGL § 38-2-14, is RIGL § 17-9.1-6 which groups **voter registration cards** among the many records considered to be

[3] "The Attorney General's Guide to Open Government"

public in nature and in turn requires complete disclosure of compiled information. Finally, RIGL § 38-2-2(4)(i)(D) specifies that "records relating to management and direction of a law enforcement agency and records or reports, **reflecting the initial arrest of an adult and the charge or charges brought against an adult**, shall be public" and under subsection (K) "any documents submitted at a public meeting shall be deemed public."

2. RECORDS THAT ARE EXEMPT FROM DISCLOSURE UNDER LAW

In addition to the five categories of documents that are most certainly public records, the General Laws lend guidance with respect to the issue of what records are specifically exempt from disclosure. That is, those records that you and the members of your public body must never open to public view. Although there is an initial presumption of openness, the statutes specifically excludes twenty-three categories of records (which can be broken down into twenty-six separate and distinct classifications) from the access and disclosure requirements with just one stipulation. Under RIGL § 38-2-2(4)(ii) "any reasonably segregable portion of a public record shall be available for public inspections after the deletion of information which is the basis for the exclusion, if disclosure of the segregable portion does not violate the intent of this section."

Therefore, the ban on disclosure of the twenty-three categories of records mentioned in RIGL § 38-2-2(4)(i) is not absolute. Where isolated information can be redacted from the records deemed "not-public" under this section of the statute, without hindering the purpose of this section, it should be.

While many of the records that are exempt under the terms of the statute may be of remote interest to municipal officials, to enable you to get a clear picture of the legislative landscape, all of the exemptions have been included in the graphic on the next page. Those exemptions that do pertain to municipal interests and municipal officials in general however are discussed at length in the section that follows.

RECORDS WHICH ARE EXEMPT FROM ACCESS AND DISCLOSURE

1. All records which are identifiable to an individual applicant for benefits, client, patient, student, or employee.
2. All personal and medical information relating to an individual in any files.
3. Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.
4. Child custody and adoption records, records of illegitimate births, and records of juvenile proceedings before the family court.
5. All records maintained by law enforcement agencies for criminal law enforcement.
6. All records relating to the detection and investigation of a crime (with certain limitation on the extent to which information could be made public).
7. Any records which would not be available by law or rule of court to an opposite party in litigation.
8. Scientific and technological secrets and the security plans of military and law enforcement agencies, the disclosure of which would endanger the public welfare and security.
9. Any records which disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever anonymity has been requested of the public body with respect to the contribution of the contributor.
10. Reports and statements of strategy or negotiation involving labor negotiations and collective bargaining.
11. Reports and statements of strategy or negotiation with respect to the investment or borrowing of public funds, until such time as those transactions are entered into.
12. Any minutes of a meeting of a public body which are not required to be disclosed pursuant to chapter 46 of title 42.
13. Preliminary drafts, notes, impressions, memoranda, working papers, and work products (with the limitation that any documents submitted at a public meeting of a public body shall be deemed public).
14. Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment or promotion, or academic examinations; provided, however, that a person shall have the right to review the results of his or her examination.
15. Correspondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.
16. The contents of real estate appraisals, engineering, or feasibility estimates and evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all proceedings or transactions have been terminated or abandoned; provided the law of eminent domain shall not be affected by this provision.
17. All tax returns.
18. All investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, or regulation other than records of final actions taken provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public.
19. Records of individual test scores on professional certification and licensing examinations; provided, however, that a person shall have the right to review the results of his or her examination.
20. Requests for advisory opinions until such time as the public body issues its opinion.
21. Records, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court.
22. Judicial bodies are included in the definition only in respect to their administrative function provided that records kept pursuant to the provisions of chapter 16 of title 8 are exempt form the operation of this chapter.
23. Library records which by themselves or when examined with other public records, would reveal the identity of the library user requesting, checking out, or using any library materials.
24. Printouts from TELE-TEXT devises used by people who are deaf or hard of hearing or speech impaired.
25. All records received by the insurance division of the department of business regulation from other states, either directly or through the National Association of Insurance Commissioners, if those records are accorded confidential treatment in that state.
26. Credit card account numbers in the possession of state or local government are confidential and shall not be deemed public records.

Of the long list of exemptions to the Act, less than half are likely to be of interest to you, in your capacity as a municipal official. With that in mind, the following section is devoted to those exceptions most commonly encountered by municipal officials of the past. To gain a clear understanding of just how these exemptions take shape in the municipal context, it is helpful to review some Attorney General Advisory Opinions and Findings that relate to RIGL § 38-2-2(4)(i).

a. All Records Which Are Identifiable to an Individual Applicant for Benefits, Client, Patient, Student or Employee

The first exemption listed in RIGL § 38-2-2(4)(i) that is of relevance to municipal officials is perhaps the most difficult to grasp. The expansive reach of this subsection is epitomized by the opening sentence, which reads:

> "All records that are identifiable to an individual applicant for benefits, client, patient, student, or employee, including but not limited to, personnel, medical treatment, welfare, employment security, pupil records, all records relating to client/attorney relationship and to a doctor/patient relationship, and all personal or medical information relating to an individual in any files ..."

(Because the exemption is so encompassing, this section discusses only those records that are "identifiable to an individual," while the next section concerns the records which relate to "all personal and medical information.")

One case that helped give greater specificity to the broad category of records that the legislature intended to exempt under this section of the statute is Henley v. South Kingstown School District, et. al. PR 00-01. The issue there was whether a severance agreement between a town employee and the school district is a record "…identifiable to an individual . . . employee..." The Department of Attorney General answered in the affirmative and determined that an agreement of this sort is not a public record (except for the fourteen categories enumerated). Therefore the contents of such a record must be kept private.

Under the same statutory section a copy of a letter sent by an attorney to the City Manager in Mullowney v. City of Newport PR 04-08 was exempt from public disclosure. It was concluded that because the letter indicated an intention to file a sexual harassment lawsuit against a specifically named individual, it could not be made public.

Another category of records exempt from disclosure under this section of the statute, yet likely encountered by municipal officials, at one time or another, are records related to legal services or legal fees. The threshold inquiry that must be made is whether the document (or letter, audiotape, etc.) is confidential under the attorney/client privilege. By statute, "all records relating to a client/attorney relationship" are exempt from public disclosure," however the total number of hours billed, the total amount of monies paid, and the identity of the attorney/firm to whom fees were paid, must be released. [Re: Providence Journal v. Bristol County Water Authority PR 02-09.]

As you can see from the cases mentioned above, the records which are "identifiable to an individual" are varied in nature, yet all are equally banned from public disclosure.

b. All Personal and Medical Information Relating to An Individual

As municipal officials, who serve on public bodies that amass large files laden with personal information, you must pay particularly close attention to this next exception as well. While the above decisions deal with the issue of what type of records (i.e. a letter, an agreement, etc) must be disclosed under the statute McCormick v. Providence School Department PR 98-09, concerns the question of what type of *information* must be released. Although the case does involve a School Department, the principle for which it stands is equally applicable to municipalities. The primary issue was whether the School Department violated the APRA when it failed to disclose the names and the addresses of teachers. It was determined that the APRA only requires disclosure of, among other information, *an employee's name and town/city of residence*.

While the APRA governs the release of most information related to public employees, the right of an employee to inspect his or her employee file is not affected by the APRA. In Hayden v. City of Warwick PR 03-18, it was determined that the City was not required to provide a public employee with access to complaints maintained in that employee's file. The *only* information about public employees that is a "public record" is specifically enumerated in R.I. Gen. Laws § 38-2-2(4)(i)(A)(I) and is outlined in the chart below:

1. Name	9. Job Title
2. Gross Salary	10. Job Description
3. Salary Range	11. Dates of Employment
4. Total Cost of Paid Fringe Benefits	12. Positions Held with the State or Municipality
5. Gross Amount Received in Overtime	13. Work Location
6. Other Remuneration	14. Business Telephone Number
7. Salary	15. City or Town of Residence
8. Date of Termination	

Mague v. Town of Charlestown PR 96-12 is one opinion that gave more precise meaning to one of the above categories of information (which are *permissible* to disclose). The Department decided that a list of town expenses relating to a Police Chief obtaining a law degree fit within category six, above. As a result, the expenses were classified as "other re-numeration," and were placed within the sphere of records deemed to be public.

c. Preliminary Drafts, Notes, Impressions, Memoranda, Working Papers, And Work Products (with the Limitation that Any Documents Submitted at a Public Meeting of a Public Body Shall be Deemed Public)

There are few municipal officials who operate without preliminary drafts, notes, or memos. For that reason, this next section

explains how these records are classified under the statute and what treatment they are accorded.

Chrabaszcz v. Johnston School Department PR 04-15 is useful to municipal officials because of the Department's interpretation of RIGL § 38-2-2(4)(i)(K). This subsection exempts the following six categories from disclosure:

Preliminary Drafts
Notes
Impressions
Memoranda
Working Papers
Work Products

Although the categories themselves appear straightforward and simple, what complicates matters is that the statute provides an exemption to the exemption, which states that "any documents submitted at a public meeting of a public body shall be deemed public."

Chrabaszcz illustrates that unless the record at issue in any given case, constitutes one of the six types listed above, the second exemption will not come into play. This means that even if a record is submitted at a public meeting, it does not become a "public record" *unless* it is a preliminary draft, work product, etc. Therefore if an individual employee's *contract* is submitted at a public meeting (as was the case in Chrabaszcz) it is not open to public review by operation of the exception. Rather it is exempt from disclosure pursuant to RIGL § 38-2-2(4)(i)(A)(I) because it is a record identifiable to an individual employee.

d. Trade Secrets and Commercial or Financial Information Obtained from a Person, Firm, Or Corporation Which is Of a Privileged or Confidential Nature

As municipal officials you almost certainly deal with bid documents submitted by private contractors. Under the APRA, while bids are being reviewed by the

public body, the bid documents are not subject to public disclosure. [See NEARI v. East Greenwich School Department PR 03-25.] The bids are considered classified because they fall within the scope of the RIGL § 38-2-2(4)(i)(B) as "financial information" that is of "a privileged or confidential nature."

e. Correspondence of or to Elected Officials in their Official Capacities

One of the more easily recognizable types of disclosure-exempt records are the letters and emails exchanged between constituents and their elected officials. Of course the subject matter of the correspondence must in some way be related to the office-holder's functions and duties as a municipal official.

3. RECORDS THAT ARE EXEMPT FROM DISCLOSURE PER JUDICALLY CREATED BALANCING TEST

In addition to the categories delineated in the statute as exempt from public disclosure, other records and information are kept sealed through the operation of a judicially created balancing test. To determine whether the information should be made public, the public's interest in the information is weighed against the privacy interest of the individual. Although most commonly used in the context of investigatory records, municipal officials should be aware of the intricacies of this test for one very important reason: it allows a record to remain closed, even if that record does not fall within any of the statutory exemptions.

This balancing test was employed in Chappell v. Rhode Island State Police PR 04-18 where it was determined that the State Police did not violate the APRA by exempting from public disclosure the home addresses of the Superintendent and one of its inspectors. The Department concluded that the

privacy interests in one's home address outweighs any public interest. The critical component of this inquiry is protection of the individual's right to privacy.

4. RECORDS THAT ARE EXEMPT FROM DISCLOSURE PER ATTORNEY GENERAL OPINIONS & FINDINGS, AND COURT DECISIONS

Finally, certain records are exempt from disclosure not by operation of the statute or application of the balancing test, but rather because of Attorney General Advisory Opinions and Findings, as well as court decisions that give certain records "disclosure exempt" status. For example, it was determined in Douglas v. Town of Westerly PR 98-09 that breakdowns of all leave time taken by a town employee are exempt from disclosure. Likewise, in Fahey v. Providence Water Supply Board PR 04-14 the Department of the Attorney General decided that billing records and invoices of cities and towns are not public records.

It is apparent, from the two opinions mentioned above, that the judiciary plays just as critical a role as the legislature in the determination of records exempt from public disclosure, which is the very reason that it is important for municipal officials to keep abreast of recently decided opinions.

SECTION IV:

PROCEDURES FOR ACCESSING PUBLIC RECORDS

So you have determined the record which you are in possession of constitutes a public record and it does not fall within any of the exemptions from disclosure. How does this record, or a copy of it, get from your office to the hands of the public? The section that follows details the procedures that you can establish under the statute as well the duties of your public body in providing access. This portion of the guide also addresses the proper protocol when a record is not available at the time it is requested.

A. ESTABLISHMENT OF PROCEDURES PERMITTED

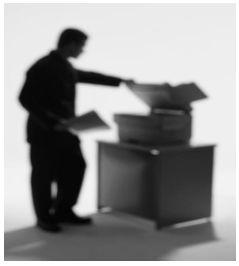
RIGL § 38-2-3 enables each public body to create its own system of accessibility and provides that "each public body shall establish procedures regarding access to public records." An Attorney General Finding issued in 1999 spells out just how much leverage a public body has, to devise and institute its own access policy. The Finding indicates that public bodies may establish procedures that require a person or entity seeking to have public records mailed to go so far as to provide a stamped, self-addressed envelope. [Re: Newport Police Department ADV PR 99-03.] Further, in Zarrilli v. Town of Hopkinton PR 03-08 it was determined that it was not a violation of the APRA to require a citizen to visit the Building and Zoning Office in person to search records himself. The Department concluded that "the APRA does not require members of the public body to search and retrieve documents when the public already has access."

The statute does however limit a public body's autonomy and provides that it may not require written requests for public information. [See RI Gen. Laws § 38-2-3(c).] It is also important to note that while the APRA requires a timely response *regardless of the circumstances*, it does not dictate the method by which the request must be made. [See Mudge v. North Kingstown School Department PR 05-04.]

B. THE PUBLIC'S RIGHT TO INSPECT AND/OR COPY

The procedural regulations of the APRA not only give public bodies the authority to establish their own guidelines, but also delineate the specific rights and obligations of both the public body and the individual or entity that requests access to the records. The main premise, from which all regulations in this arena stem, both statutory and judicial, is that "all records maintained or kept on file by any public body . . . shall be public records and every person or entity shall have the right to inspect and/or copy those records at such reasonable time as may be determined by the custodian thereof." [See RIGL § 38-2-3(a).]

One of the few limitations on the public's right is that the inspection must be at a reasonable time. In the same vein, a city can establish procedures limiting the maximum number of files that an individual can inspect at one time. [See Coulter v. Town of Cumberland PR 95-24A.] However, a city may not establish procedures that limit the public's right to inspect a maximum number of documents in any given day or hour. [See Burns v. City of Providence Assessor's Office PR 98-06.]



If a requested record is unavailable at the time a request is made, either because it is in active use or is in storage, then "the custodian shall so inform the person and make an appointment for the citizen to examine such records as expeditiously as they may be made available." [See RIGL § 38-2-3(d).] In one 1999 Attorney General Finding, the Department determined it proper for the Tiverton Budget Committee to maintain copies of its minutes in a locked filing cabinet within the Town Hall, provided the minutes were made available to the requesting individual within ten (10) business days. [See Carroll v. Tiverton Budget Committee PR 99-11.] The key here is to provide access within ten (10) business days.

The Act also requires that where the public body is capable of providing the copies in more than one media form, it must supply them in any and all forms that the person or entity that requests the copies elects. This becomes significant

because even if it is easier or more convenient for the public body to email a copy of a record to the individual or entity, the public body must supply a paper copy if the individual or entity specifically requested a paper copy. It follows naturally then that the last requirement of this section establishes that if the records are maintained in a computer storage system, they must be provided by the public body "in a printout or other reasonable format, as requested."

While the APRA permits public bodies to establish their own general procedures for inspection and copies with minimal direction, greater guidance is given with the respect to the cost and fees associated with such copies.

The statute does permit public bodies to charge a reasonable fee for the search or retrieval of documents and a separate fee for copies. Moreover the Department of the Attorney General has determined that it is not a violation of the APRA to require pre-payment of search and retrieval fees. [Schwarz v. Public Utilities Commission PR 04-11.] However, the Act specifies that the "hourly costs for a search and retrieval shall not exceed fifteen dollars ($15.00) per hour;" the first hour of a search or retrieval must remain free; and the per page cost of copies cannot exceed fifteen cents (15¢) per page (while only the reasonable actual cost may be charged for electronic records, such as videotapes or audiotapes, or remote/online electronic access to land evidence records), RIGL § 38-2-4. It should also be noted that the APRA does not authorize fees for copying time, only for "copies" and "search and retrieval." [Calci v. Coventry Fire District PR 03-24.]

An additional responsibility of the public body is to "provide an estimate of the costs of a request for documents prior to providing copies." [RIGL § 38-2-4(c).] [See also Morra v. East Providence Tax Assessors PR 99-06.] Besides providing the estimate, if requested, the public body must also submit a detailed itemization of the costs for search and retrieval.

The many duties of the public body in this area, as well as the permissible fees for their services, are itemized below:

A Public Body May Charge:	Prior to Providing Copies of Public Records, A Public Body Must:
1. A maximum of fifteen cents (15¢) per page for a document copyable on common business or legal size paper.	1. Provide an estimate of the charges assessed.
	2. Upon request, provide a detailed itemization of the costs for search and retrieval.
2. A maximum of fifteen dollars ($15.00) per hour for search and retrieval, with the first hour free.	3. Perform the search and retrieval of public documents within a reasonable time.
3. No more than the reasonable actual cost for providing electronic records. [RI Gen. Laws § 38-2-4.]	4. Provide a reduction or waiver of the cost for search and retrieval of public records upon a court order. [R.I. Gen. Laws § 38-2-4.]

C. LIMITING THE DUTIES OF PUBLIC BODIES

Although it may appear that public bodies are heavily burdened with a great number of responsibilities, the legislature was careful to limit the pressure placed on public bodies by RIGL § 38-2-4. Language was therefore included to reflect that the legislature's intention was not to require "…a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested, at the time requested, unless the data were electronic and the public body would not be "unduly burdened" by providing such data."

Attorney General Findings and Opinions issued subsequent to the Act's passage reiterate how critical this language is to municipal officials and the bodies on which they serve. Because cities or towns have been past recipients of complaints in this context, it is helpful to review the many Findings and Opinions that relate to municipalities.

In both Wilson v. City of Central Falls PR 04-09 and Jones v. Town of West Warwick PR 04-10, the Department of Attorney General found that the city/town *did not* violate the APRA since the requested records did not exist. "Since the requested records did not exist, the town/city did not have to compile

or create records." [See also Ethier v. Pawtucket Police Department PR 04-14 and Loebenberg v. Rhode Island Resource Recovery Corporation PR 04-16.]

That said, Orabona v. Town of North Providence PR 03-26 stands for the proposition that if a public body chooses to compile records to respond to a request, which it is not obligated to respond to under the statute, it does so outside the time requirements of the APRA However in Orabona because the Town did not maintain "certified payroll records" of a contractor at the time of complainant's request, the APRA did not require the Town to provide them.

Also, in Siegmund v. Town of Jamestown PR 04-20 the Town was not required to compile the records, which "…fell outside the ambit of the APRA's time provisions." However, the Town produced the documents in accordance with the "good cause" time allowance anyways.

Finally, DeCristofano v. Town of Smithfield PR 00-10 illustrates how the standard for computer-stored data is applied. The Department determined that "since the information maintained within a computer could be retrieved using only a few keystrokes, a public body would not be unduly burdened in compiling date."

D. PROHIBITIONS ON THE USE OF PUBLIC RECORDS

Just as the public's access to certain records is limited, so too is the public's use of these records. The Act places an absolute ban on usage of the information to solicit for commercial purposes or to obtain a commercial advantage over the party furnishing that information to the public body. [RIGL § 38-2-6.] However, it is not within the discretion of the public body to determine which recipients are likely to use the public record for commercial purposes and which are not.

For example, a request made to a public body for a list of all parcels of land improved by swimming pools in a particular city or town, cannot be denied on the basis that the public body suspects the individual who requested the list, to sell it to a swimming pool supply company for a profit. If the custodian of a record questions the true motives of an individual or entity requesting the record,

the proper course of action is for the custodian to file a complaint with the Department of Attorney General. The Department will then conduct an investigation to determine if the individual or entity has in fact violated the Act. Willful and knowing violations of this provision of the statute are punishable by a fine of not more than $500 and/or punishment for no longer than one year, plus any penalties for civil liability.

SECTION V:

DENYING ACCESS

DENIAL OF THE PUBLIC'S RIGHT TO INSPECT AND/OR COPY RECORDS

A. HOW TO ISSUE A DENIAL

What happens if the public body on which you serve chooses not to hand over the record(s)? You better be prepared to issue a statement on why you decided not to supply the requested information. That's right, you can't "just say no" to the individual or entity that made the inquiry. Instead, you must issue a denial. Not just any denial either, but one that meets the numerous requirements of the Act.

The first constraint is that the denial must be in written form. Further, it "must be made to the person or entity requesting the right to inspect or copy." [RIGL § 38-2-7.] The denial must come from the "…public body official who has custody or control of the public record." This means that even if you are the senior official of a public body but you are not in control of a requested record, you have no power to issue a denial. The rejection must come from the custodian of the record.

Perhaps the most critical of all requirements is that the custodian issues

the denial in the timeframe mandated by the APRA: within ten (10) business days of the request or within thirty (30) days, for good cause. One example of how easily a violation can occur in this context is Tel Comm v. City of Warwick PR 04-17 where the City of Warwick was found to have violated the Act by failing to respond to a request within ten (10) business days. The recent case of Shalvey v. Rhode Island College PR 05-06 placed an even greater burden on public bodies and requires a response, "even assuming no responsive documents exist."

In contrast however, the facts of Calci v. Coventry Fire Department PR 04-02 caused the Department of Attorney General to conclude that no violation occurred when the Fire District provided a page missing from a requested document, beyond the ten (10) business days required by statute. (The page was provided shortly after the omission was brought to the attention of the District.)

Just as important as the timing of the denial are its contents. There are two statements in particular that must be included in the denial: (1) a statement that details the specific reasons for the denial; and (2) a statement that indicates the procedures for filing an appeal. [RIGL § 38-2-7(a).] Without more, a statement that the requested record is not a public record is not enough to comply with the requirements of the APRA. [Nye v. Town of Westerly PR 95-21.]

B. WHAT HAPPENS WHEN A REQUEST IS NEITHER GRANTED NOR DENIED?

You may wonder what happens if the public body fails to respond at all within the ten (10) business days. If access is neither granted nor officially denied, the public body's silence is considered a denial and because the statute provides that "…any reason not set forth in the denial shall be deemed waived by the public body (except for good cause shown)," the public body is powerless to defend its "silent denial", in the event a complaint is filed. The significance of this last statement should not go unnoticed, for if you serve on a public body that chooses to do nothing rather than issue a written denial, the public body of which you are a part, is in absolute violation of the Act.

C. LEGAL AVENUES

Once an access request is denied, an individual has three options. First, the individual or entity may file a review petition with the chief administrative officer of the public body (who has ten days to respond), and if the individual is denied access a second time, the individual or entity may file a complaint with the Department of Attorney General. Another available avenue is to simply bypass the second request and file a complaint with the Attorney General's Office.

There are of course certain hurdles which the would-be complainant must overcome. For example, "the Department of Attorney General will not interfere with the judicial process [if] the subject matter of the complaint is already within the jurisdiction of the judicial system." [Blais v. Revens, et. al. PR 01-01.] Therefore if a lawsuit that concerns the same matter has already been filed in the Superior Court, the Department of Attorney General will not involve itself.

In sum, in order for the Department of the Attorney General to have jurisdiction over an APRA complaint, a person or entity must: (1) request a specific record from a public body and (2) be denied access to the requested record. [Schmidt v. Ashaway Fire Association et. al. PR 99-21.]

The third option is for the individual or entity to file a complaint in the Superior Court of the County where the record is maintained. [R.I. Gen. Laws § 38-2-8(b).]

D. REMEDIES

If a lawsuit is filed, either by the individual or entity or by the Attorney General on the individual's behalf, the Act provides many remedies of which the Court can avail itself. If the Court finds that a public body has indeed violated the APRA, it must award reasonable attorneys fees and costs to the prevailing plaintiff. If the Court finds that a public body has (1) violated the APRA and (2) wrongfully denied access to public records, the Court must award not only the fees and costs mentioned above

but also must order the public body to provide the record at no cost to the prevailing party. [RIGL § 38-2-9.] If the public body or official is found to have committed a knowing and willful violation, the Court can award a fine of up to one thousand dollars ($1,000).

In the case of Gorman v. Coventy (Anthony) Fire District PR 02-10 a willful and knowing violation was found since the Fire District had already been warned to comply. A four hundred dollar ($400) fine was assessed against the District and injunctive relief was also awarded.

It is evident from the above that violations of the Act can present serious consequences for both municipal officials and the public bodies on which they serve. Therefore you must particularly close attention to the requirements laid out in the previous sections.

SAMPLE REQUEST LETTER

Dear (Records Custodian):

Pursuant to the Access to Public Records Act, R.I. Gen. laws § 38-2-1 et. seq., I am requesting access to records, which I believe are public documents. Specifically, I am requesting records relating to (be as specific as possible about your request).

In accordance with R.I. Gen. Laws § 38-2-7, (name of public body) has ten (10) business days to provide the requested documents or to notify me in writing of the specific reasons for denying me access to the requested records. If the exemption you are claiming applies only to a portion of the records that I seek, please delete that portion and provide photocopies of the remainder of the records. [See R.I. Gen. Laws § 38-2-2(4)(ii).] I understand that for "good cause" the ten (10) business day time period may be extended for an additional twenty (20) business days, provided that I am notified of the "good cause" in writing within the original ten (10) business days of my request.

I also agree to pay a maximum of 15¢ per page for the cost photocopying and a maximum of $15.00 per hour for search and retrieval, with the first hour being free. It is also my understanding that (name of public body), must provide me an estimate of the costs, prior to providing copies. Please notify me at the following phone number or address when the requested records are available for pickup.

Thank you for your assistance in this matter.

Sincerely,

Name, address, and telephone number (optional)

(Taken from the Attorney General's
Guide to Open Government)

SAMPLE DENIAL LETTER

Dear (name of requester):

Thank you for your letter requesting access to (specify documents requested).

Pursuant to the Access to Public Records Act, the records you have requested (or a portion of the records you have requested) do not constitute public records. Specifically, (specify documents requested) are exempt from public disclosure pursuant to (cite appropriate section of R.I. Gen. Laws § 38-2-2(4)(i)(A)-(W).

In accordance with R.I. Gen. Laws § 38-2-8, you may wish to appeal this decision to (name and address of the chief administrative officer of the public body). You may also wish to file a complaint with the Department of the Attorney General, 150 South Main Street, Providence, Rhode Island, 02903, or the Rhode Island Superior Court of the county where the record(s) are maintained. It is also my understanding that additional information concerning the Access to Public Records Act may be available through the Attorney General's website at www.riag.org.

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

Sincerely,

Name

(Taken from the Attorney General's
Guide to Open Government)

NOTES

NOTES

Rhode Island League of Cities and Towns

The Rhode Island League of Cities and Towns is a private, nonpartisan, nonprofit association of cities and towns formed in 1968 to advocate the interests of cities and towns before the state legislature, federal and state agencies, and to improve the effectiveness of local government in the state of Rhode Island.

Public Policy Advocacy

Lobbying for public policies that benefit and strengthen local government

Membership Programs

Exploration and implementation of services and programs to benefit cities and towns

Intergovernmental Relations

Promoting stable and productive intergovernmental relationships

Public Awareness

Promotion of increased understanding and support for the benefits and value of strong local government with the media, the general public, and other institutions

Membership Education

Publications, information, training and networking opportunities for key elected and appointed local officials

Unity

Fostering a strong sense of unity between all cities and towns resulting in a common agenda to advance local government interests

Federal Representation

Advocacy of local government interests before the United States Congress and federal agencies is provided through affiliation with the National League of Cities in Washington, D.C.