

Department of Attorney General

Peter F. Kilmartin, Attorney General



**Co-sponsored by the Roger Williams
University Law Alumni Association**

The Purpose

The right to access public records and the right to dignity and privacy are both recognized to be of the utmost importance.

R.I.G.L. § 38-2-1

Just because

Subpoena

APRA

What's the Situation?

- An employee?
- A family member?
- A special interest?
- A member of the public?

The Basics

Is this an APRA request?

Presume Public Document

Who is making the
request?

IS IT AN APRA REQUEST?

Provide Source Documents

Not Narrative/Compilation

No Duty Under APRA to
Answer Questions

Block v. Block Island Volunteer Fire Dist., PR 15-45;
Block v. Prudence Island Volunteer Fire Dist., PR 15-46;
Block v. Ashway Fire Dist., PR 15-47

IS IT A PUBLIC BODY?

“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”

R.I.G.L. § 38-2-2(1)

“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”

R.I.G.L. § 38-2-3(a)

Ryan v. Rhode Island Housing, PR 15-43

APRA

A PROACTIVE APPROACH

REQUIREMENTS BEFORE A
REQUEST IS EVEN MADE

“Each public body shall establish written procedures regarding access to public records”

- No written request if available per APA or prepared for/readily available to the public

R.I.G.L. § 38-2-3(d)

Procedures Must Include

- Identification of designated public records officer or unit
- How to make a request
- Where to make a request

No requirement that request be made on public body's form, provided identifiable as request

R.I.G.L. § 38-2-3(d)

Eikeland v. Johnston Police Dept., PR 15-55

Procedures

Copy of procedure shall be posted on public body's website if maintained & be otherwise readily available

Department of Attorney General

“unless you are seeking records available pursuant to the [APA] or other documents prepared for or readily available to the public, we ask that you complete the Public Records Request Form”

Training

Chief Administrative Officers of all public bodies must certify by January 1st of each year that all employees who have authority to grant/deny access to records have received training.

R.I.G.L § 38-2-3.16

MacDougall v. Quonochontaug Central Beach Fire Dist.,

PR 16-05

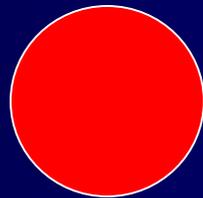
APRA

REQUIREMENTS WHEN A
REQUEST IS MADE

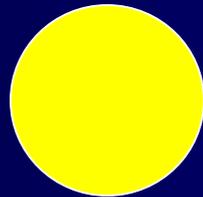
The Exemptions:

R.I.G.L. § 38-2-2(4)

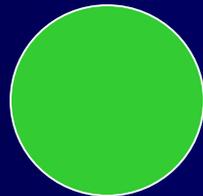
27 Exemptions



Confidential



Exempt



Public

Is It a Public Record?

- Does one of the twenty-seven exceptions apply?
- The Balancing Test: Does the individual's privacy interest outweigh the public's interest in disclosure?

Any reasonably segregable portion of a public record shall be available

If entire document is exempt, must state in writing that no reasonable segregable information exists.

R.I.G.L. § 38-2-3(b)

d'Oliveira v. Department of Public Safety, PR 11-10

Individually – identifiable records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to the FOIA.

R.I.G.L. § 38-2-2(4)(A)(I)(b)

Collette v. Town of Hopkinton, PR 16-02;
Jackson v. Coventry School Dept., PR 16-03

Public Employee Information*

- name
- gross salary
- salary range
- total cost of paid fringe benefits
- gross amount received in overtime
- other remuneration
- job title
- job description
- employment contract
- dates of employment
- positions held with the state, municipality, or public works projects
- work location or project
- business telephone number
- city/town of residence
- date of termination

Trade secrets and commercial
or financial information
obtained from a person, firm, or
corporation which is of a
privileged or confidential
nature

R.I.G.L. § 38-2-2(4)(B)

Law Offices of Richard Humphrey v. Dept. of Health,

PR 16-06

Law Enforcement

Records maintained by law enforcement agencies for criminal law enforcement are exempt, but only if disclosure could:

R.I.G.L. § 38-2-2(4)(D)

- (a) reasonably be expected to interfere with investigations of criminal activity or enforcement proceedings
- (b) deprive a person of the right to a fair trial
- (c) reasonably be expected to constitute an unwarranted invasion of personal privacy

Providence Journal v. Dept. of Public Safety,
136 A.3d 1168 (R.I. 2016)

- (d) reasonably be expected to identify a confidential source
- (e) disclose techniques, procedures, or guidelines for law enforcement investigations or prosecutions
- (f) reasonably be expected to endanger the life or physical safety of any individual

Records relating to the management
and the direction of a law
enforcement agency and records or
reports reflecting the initial arrest
of an adult are public records

R.I.G.L. § 38-2-2(4)(D)

Adult Arrest Logs

- Must be made available within 48 hours of a request (72 hours if made on a weekend or holiday).
- Applies only to arrests made within 5 days of the request.

R.I.G.L. § 38-2-3.2

Adult Arrest Logs

- Full name of arrested adult;
- Home address of arrested adult, unless doing so would identify a crime victim;
- Year of birth of arrested adult;
- Charge or charges;
- Date of the arrest;
- Time of the arrest;
- Gender of the arrested adult;
- Race of the arrested adult;
- Name of the arresting officer unless doing so would identify an undercover officer

R.I.G.L. § 38-2-3.2

Incident Reports

When an arrest has not taken place, there is a presumption that initial incident reports are exempt from public disclosure.

R.I.G.L. § 38-2-2(4)(D)

Niquette v. City of Woonsocket, PR 16-19;

Town of Portsmouth v. DPS, PR 15-51

“Any minutes of a meeting of a public body which are not required to be disclosed pursuant to [the OMA].”

R.I.G.L. § 38-2-2(4)(J)

Preliminary drafts, notes,
impressions, memoranda, working
papers, and work products

Exception:

above documents submitted at a
public meeting shall be public

R.I.G.L. § 38-2-2(4)(K)

Correspondence of/to elected
officials with or relating to
those they represent and
correspondence of/to elected
officials in their official
capacity

R.I.G.L. § 38-2-2(4)(M)

All investigatory records of public bodies pertaining to possible violations of statute, rule, or regulation, other than records of final action taken

R.I.G.L. § 38-2-2(4)(P)

Warwick Post v. Warwick School Department, PR 16-07;
Warwick Beacon v. Warwick School Committee, PR 16-07;
Howell v. City of Warwick, PR 16-07

Records, reports, opinions,
information, and statements
required to be kept confidential
by federal law, regulation, state
law, or rule of court

R.I.G.L. § 38-2-2(4)(S)

Ravetti v. RI BHDDH, PR 16-14

Any individually identifiable evaluations of public school teachers made pursuant to state or federal law or regulation.

R.I.G.L. § 38-2-2(4)(Z)

All documents prepared by school districts intended to be used by school districts in protecting the safety of their students from potential and actual threats.

R.I.G.L. § 38-2-2(4)(AA)

Balancing Test

Does the privacy interest of the individual outweigh the public's interest in disclosure?

DARE v. Gannon, 713 A.2d 218, 225 (R.I. 1998)

Public Interest

“Official information that sheds light on an agency’s performance of its statutory duties.”

Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989)

Privacy Interest

“[W]here the subject of the documents ‘is a private citizen,’ ‘the privacy interest . . . is at its apex.’”

National Archives & Records Admin.v. Favish,
541 U.S. 157 (2003)

Reason or Identity of Person Making Request

Public body cannot require, as condition of fulfilling request, a person/entity provide reason for request or provide personally identifiable information

R.I.G.L § 38-2-3(j)

Timeframe to Respond After Receiving a Request

- provide the records within ten (10) business days, **or**
- extend the time period for an additional twenty (20) business days for “good cause,” **or**
- deny access to records within ten (10) business days

R.I.G.L. § 38-2-7

Procedures for Denying Access to Records

- denial must be in writing, and
- state the specific reason(s) for the denial, and
- indicate the procedure(s) for an appeal in R.I.G.L. § 38-2-8

R.I.G.L. § 38-2-7

Salvatore v. South Kingstown Town & School Dept., PR 16-25

Procedures For “Good Cause”

- Explain in writing need for additional time
- Specific to request made (no boilerplate forms)
- Extend time based upon:
 - voluminous nature of request,
 - number of pending requests, or
 - difficulty in searching/retrieving/copying records

R.I.G.L. § 38-2-3(e)

Plain v. Office of the Governor, PR 16-21;

Ryan v. RI Housing, PR 15-43;

GoLocal Prov v. RI Commerce Corp, PR 16-24

Procedures For “Good Cause”

Unavailability of designated
public records officer shall
not be deemed “good cause”

R.I.G.L. § 38-2-3(d)

Procedures Prior to Providing Records

- upon request, provide estimate of charges, **and**
- upon request, provide detailed itemization of search/retrieval costs, **and**
- perform search/retrieval within reasonable amount of time, **and**
- provide reduction or waiver of search/retrieval costs upon a court order

RESPONDING TO
AN APRA
REQUEST

Cost and Delivery Procedures

- \$.15 per photocopy on common/legal size paper
- \$15.00 per search/retrieval hour, no charge for the first hour
- No more than the actual reasonable cost for providing electronic records

R.I.G.L. § 38-2-4

Public Body May Seek Pre-Payment

“production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under § 38-2-4”

R.I.G.L. § 38-2-7

“the costs of redaction should be borne by the requesting party because it is part of the process of retrieving and producing the requested document”

DARE v. Gannon, 819 A.2d 651, 661 (R.I. 2003)

Cost and Delivery Procedures

- For purposes of calculating search and retrieval time, multiple requests from same person or entity during a 30 day time period shall be considered one request.

R.I.G.L. § 38-2-4(b)

- All fees waived if fail to produce requested records in a timely manner.

R.I.G.L. § 38-2-7(b)

Cost and Delivery Procedures

At the option of the person requesting the records, the public body shall provide copies * * * electronically, by facsimile, or by mail * * * unless complying * * * would be unduly burdensome due to the volume of records requested or the costs incurred.

R.I.G.L. § 38-2-3(k)

Cost and Delivery Procedures

- Persons requesting delivery responsible for any actual cost of delivery.

R.I.G.L. § 38-2-3(k)

- May assess charge for retrieving records from storage where public body is assessed retrieval fee.

R.I.G.L. § 38-2-4(a)

No requirement to reorganize,
consolidate, or compile data not
maintained in the requested
form

Exception: records in an electronic
format and not unduly burdensome

R.I.G.L. § 38-2-3(h)

GoLocal Prov v. City of Providence, PR 16-20

Katz v. Employees Retirement System, PR 16-32

“Any person or entity requesting copies of public records may elect to obtain them in any and all media in which the public agency is capable of providing them”

R.I.G.L. § 38-2-3(g)

Remedies

\$2,000 for a willful and knowing violation

\$1,000 for a reckless violation

Injunctive Relief

Attorney Fees

Department of Attorney General

Peter F. Kilmartin, Attorney General



Open Meetings Act

OPEN MEETINGS ACT

A PROACTIVE APPROACH

REQUIREMENTS BEFORE A
MEETING IS CONVENED

Three Threshold Elements that Trigger OMA

- A “quorum” of a “public body” has a “meeting”
- If one (or more) element is missing, the OMA does not apply

What is a Public Body?

“department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government”

R.I.G.L. § 42-46-2(c)

Pine v. McGreavy, 687 A.2d 1244 (R.I. 1997)

What is a Quorum?

“unless otherwise defined ...
a simple majority of the
membership”

R.I.G.L. § 42-46-2(d)

Mudge v. North Kingstown School Comm, OM 15-20;

Mathews v. Newport City Council, OM 16-04;

Comley v. Little Compton School Comm, OM 16-05;

Grieb v. Aquidneck Island Planning Com'n, OM 16-06

“Rolling” or “Walking” Quorum

A series of meetings each less than a “quorum,” but that collectively represent a “quorum”

Boss v. Woonsocket School Board, OM 15-14

“Rolling” or “Walking” Quorum

Quorums can be created not only by members of a public body, but through a third person

What is a Meeting?

“The convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power”

R.I.G.L. § 42-46-2(a)

“List serves” (email distribution lists through which subscribers receive information on a particular topic) do not violate the OMA

Electronic Communication

Discussions of a public body via electronic communication is permitted **only** to schedule a meeting.

R.I.G.L § 42-46-5(b)(1)

Members must be present to participate in meeting except:

- on active duty
 - has a **disability** and cannot otherwise participate
- Subject to Governor's Commission on Disabilities

R.I.G.L § 42-46-5(b)(2)(3) & (4)

Two Types of Notice

- Annual Notice: at the beginning of each calendar year
- Supplemental Notice: a minimum of 48 hours before every meeting

Posting Requirements

Annual

- Available to public upon request
- Secretary of State

Supplemental

- Principal office; if none, where meeting held
- One other prominent location within governmental unit
- Secretary of State

Notice Requirements

Annual

- Dates, times and location of regularly scheduled meetings

Supplemental

- Date, time and location of all meetings
- Date posted
- Statement specifying business to be discussed

Tanner v. Town of East Greenwich,
880 A.2d 784 (R.I. 2005)

“intended to establish a flexible standard aimed at providing fair notice to the public under the circumstances”

Anolik v. Zoning Bd. of Review of the
City of Newport,
64 A.3d 1171 (R.I. 2013)

“IV. Communications

Request for extension from
Turner Scott received 11/30/08
Re: Petition of Congregation
Jeshuat Israel.”

Executive Session Notice

- If publicly known, provide detailed statement – If not publicly known, may use more general language.
- “Anticipated Litigation”

Graziano v. R.I. Lott’y Comm., OM 99-06

Executive Session Notice

- Public body is required to individually label each item it intends to discuss in executive session.
- Identify the number of items to be discussed.
- No boiler plate language.

Improper Agenda Items

- Old Business/New Business
- Treasurer's Report
- Police Chief's Report
- Good and Welfare

Fagnant v. Woonsocket City Council, OM 15-17;

Tanner v. Bristol 4th of July Committee, OM 16-04

DISCLOSURE OF VOTES

- (All): “available, at the office of the public body, within two (2) weeks of the date of the vote.” R.I. Gen. Laws § 42-46-7(b)(1)
- Note: No extension

DISCLOSURE OF VOTES

Executive session votes must be disclosed upon reconvening into open session except if disclosure would jeopardize a strategy, negotiation, or investigation.

**No sunset provision
for Executive Session minutes**

Minutes

- the date, time, and place of the meeting
- the members who are absent/present
- a record by individual member of any vote(s) taken
- any other relevant information that a member of the public body requests

R.I.G.L. § 42-46-7(a)

Ranaldi v. Town of Narragansett, OM 15-13

DISCLOSURE OF UNOFFICIAL MINUTES

- (All*): “unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier[.]” R.I. Gen. Laws § 42-46-7(b)(1).

DISCLOSURE OF UNOFFICIAL MINUTES

– Exceptions: Sealed executive session
minutes

Extend the time period for
filing minutes and publicly
state the reason

DISCLOSURE OF UNOFFICIAL MINUTES

- (Fire Companies): “within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state’s website.” R.I. Gen. Laws § 42-46-7(b)(2).
 - No extension
 - Post to Secretary of State website

Block v. Ashway Fire District, OM 15-15

DISCLOSURE OF OFFICIAL/APPROVED MINUTES

Public bodies within the executive branch of state government, all state public and quasi-public boards, agencies, and corporations, and all fire companies shall:

DISCLOSURE OF OFFICIAL/APPROVED MINUTES

“shall file a copy of the minutes of all open meetings with the secretary of state * * * within thirty-five (35) days of the meeting[.]” R.I. Gen. Laws § 42-46-7(d).

Exception: Public bodies whose responsibilities are solely advisory in nature

– No extension

DISCLOSURE OF EXECUTIVE SESSION MINUTES

- (All): “available at the next regularly scheduled meeting unless the majority of the body votes to keep the minutes closed pursuant to §§ 42-46-4 and 42-46-5.” R.I. Gen. Laws § 42-46-7(c).
 - No extension

AUDIO/VIDEOTAPING

- Subject to “reasonable restrictions” a public body must allow taping:
 - preserve orderly conduct of meeting
 - safeguard public facility against damage caused by recording equipment
 - require fair payment by the user of the device for electricity used.

Belcher v. Mansi, 569 F.Supp. 379 (D.R.I. 1983)

REQUIREMENTS AT THE MEETING

Convening Into Closed Session

- “Open Call”
 - Majority vote in open session
 - State in open session and in minutes subsection of § 42-46-5
 - State in open session and in minutes a statement of the business to be discussed
 - Not discuss any other matter

R.I.G.L. § 42-46-4(a)

Graziano v. R.I. Lottery Comm., OM 99-06;
Marcello v. Scituate School Committee, OM 15-19

The invitation into executive session lies with the public body, not the individual seeking to attend.

Executive Session

- Every meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5.

R.I.G.L. § 42-46-3

- Ten (10) purposes for which meeting may be closed.

R.I.G.L. § 42-46-5(a)(1)-(10)

R.I.G.L. § 42-46-5(a)(1)

- **Discussions** of job performance, character, or physical or mental health of affected person or persons
 - advanced written notice that discussion may take place in open session
 - state in open call and open minutes that notice provided

R.I.G.L. § 42-46-5(a)(2)

Sessions or work sessions
pertaining to collective
bargaining or litigation

Marcello v. Scituate School Committee, OM 15-19;

Marcello v. Scituate Town Council, OM 16-01

R.I.G.L. § 42-46-5(a)(4)

Investigative proceedings
regarding allegations of civil
or criminal misconduct

R.I.G.L. § 42-46-5(a)(4)

R.I.G.L. § 42-46-5(a)(8)

School Committee sessions to conduct student disciplinary hearings or to review other matters relating to the privacy of students or their records, provided that:

- Advanced written notice that discussion may take place in open session
- State in open call and open minutes that notice provided

Amending the Agenda

“Nothing contained herein shall prevent a public body, other than a school committee, from adding additional items to the agenda by majority vote of the members.”

R.I.G.L § 42-46-6(b)

Amending the Agenda

A vote may NOT be taken, except:

- where necessary to address an unexpected occurrence that requires immediate action to protect the public.
- to refer the matter to an appropriate committee or to another body or official.

Amending Agenda School Committee

1. Posted within 48 hours of meeting at:
 - a. The 2 public locations
 - b. Secretary of State
 - c. Posted on School District's website
2. Process available to provide timely notice to:
 - a. Any person who has requested
 - b. Reasonable steps taken to make public aware

Amending Agenda

School Committee (*Cont.*)

3. Original notice indicate that changes will be:
 - a. Posted on website
 - b. Posted in 2 locations
 - c. Filed with Secretary of State

R.I.G.L. § 42-46-6(e)

Public Comment (Not School Committee)

Public body may respond to
comments initiated by a
member of the public during a
properly noticed open forum

R.I.G.L. § 42-46-6(d)

Public Comment School Committee

Pursuant to a request:

1. Submitted in writing
2. By a member of the public
3. During the public comment session
4. Informational purposes only

R.I.G.L. § 42-46-6(b)

OPEN FORUM SESSION

Nothing requires any public body to hold an open forum session, to entertain or respond to any topic nor does it prohibit any public body from limiting comment on any topic

R.I.G.L. § 42-46-6(d)

Emergency Meeting

Upon a majority vote, an emergency meeting may be convened:

“to address an unexpected occurrence that requires immediate action to protect the public.”

R.I.G.L. § 42-46-6(c)

Any citizen or entity of the state
who is aggrieved as a result of
violations * * * of this chapter
may file a complaint with the
attorney general.

R.I.G.L. § 42-46-8(a)

Grieb v. Aquidneck Island Planning Commission, OM 15-16;
MacDougall v. Quonochontaug Central Beach FD, OM 16-02;
Wilk v. Cumberland Fire District, OM 16-08

Remedies

- File an action with the Superior Court
- File a complaint with the Department of Attorney General

R.I.G.L. § 42-46-8

Penalties

- Injunctive relief and declare actions null and void
- Civil fine up to \$5,000 for a willful and knowing violation
- Attorney fees and costs

R.I.G.L. § 42-46-8(d)

Department of Attorney General

Peter F. Kilmartin, Attorney General



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