

Department of Attorney General
Peter F. Kilmartin, Attorney General



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Just because

Subpoena

APRA

What's the Situation?

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



Is this an APRA request?

“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)

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)
East Bay Newspaper v. Mt. Hope Trust, PR 10-39

IS IT A “PUBLIC RECORD”?

- Provide documents, not answers
- Provide source documents

Gagnon v. East Prov. School Committee, PR 12-12;
Campbell v. Town of Tiverton, PR 12-13;
Smith v. Warwick Public Schools, PR 12-20

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

Substantive Provisions

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)

Waltonen v. West Greenwich Town Council, PR 12-19;

Murphy v. Town of North Smithfield, PR 12-11;

Reilly v. Providence EDP, PR 13-01

All records relating to a client/attorney relationship, doctor/patient relationship, and all medical information relating to any person.

R.I.G.L. § 38-2-2(4)(A)(I)(a)

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)
In Re: Rhode Island Airport Corporation, ADV PR 12-02;
Shoemaker v. DOH, PR 13-15

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

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

Waltonen v. West Greenwich Town Council, PR 12-19

- (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);
WPRI v. Woonsocket Police Department, PR 12-17

INCIDENT REPORTS

- Incident reports that do not lead to an arrest are presumptively exempt
- Requestor's heightened interest in report is irrelevant to analysis (i.e. requestor is the subject of the report)
- Public to all under the APRA

McQuade v. Dept. of Public Safety, PR 13-03

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

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)

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)

2013 Amendment

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.

2013 Amendment

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

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 and Records
Administration v. Favish*, 541 U.S. 157 (2003)

Fuka et al. v. R.I. DEM,
(Indeglia, J., April 2007)

home addresses of all
licensed commercial
fishermen and dealers

See also Shoemaker v. DOH, PR 13-15

***Procedural
Provisions***

**“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)
Desmarais v. Manville Fire Dept. Bd. of Wardens, PR 12-05;
Auclair v. Manville Fire District, PR 12-06;
Catanzaro v. East Greenwich Police Department, PR 13-08

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 form established by public body,
provided identifiable as request

R.I.G.L. § 38-2-3(d)

Procedures

Copy of procedure shall be
posted on the public body’s
website if maintained and be
made otherwise readily
available



Review Procedures

Catanzaro v. East Greenwich Police Dept.

“For any person who does not
desire to make an oral request,
wishes to make a formal written
request or the request needs
clarification, please complete the
written form.”

Desmarais v. Manville Fire Dept.

“A request for inspection or copying of public records shall be presented in writing, via facsimile or in person to the Chief/Clerk of the Manville Fire District.”

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”

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
Law Off. of Michael Kelly v. City of Woonsocket, PR 13-13

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
DiDomenico v. Cumberland Police Dept., PR 13-12;
Manfredi v. Providence Housing Auth., PR 12-34

“A public body that receives a request to inspect or copy records that do not exist or are not within its custody or control shall * * * state it does not have or maintain the requested records”

R.I.G.L. § 38-2-7(c)

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

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)

Boston Herald v. Economic Development Corp., PR 12-24;
Felise v. East Bay Energy Consortium, PR 13-02

Procedures For “Good Cause”

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

R.I.G.L. § 38-2-3(d)

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)

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

Duxbury v. Town of Coventry, PR 13-16;
Chariho Regional School v. Kingston Hill Acad., PR 13-05

“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

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)

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)

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)

O'Rourke v. Bradford Fire District, PR 13-11

“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)

Kent v. RI Office of Energy Resources, PR 10-16
Livingston v. Rhode Island Family Court, PR 12-01

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



Make sure program qualifies

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

Purpose

“It is essential...that public business be performed in an open and public manner and that citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of Public Policy.”

R.I.G.L. § 42-46-1

OMA Misconceptions

- By-laws or Town Charters
- Robert’s Rules of Order
- Disclosure of closed session discussion

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)

Kurland v. PROCAP, OM 12-29;
Boss v. Woonsocket Sick Leave Pool Bd. of Govs, OM 12-36;
In Re: The RI Interlocal Risk Mgt Trust, Inc., ADV OM 13-02

What is a Quorum?

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

R.I.G.L. § 42-46-2(d)

Laccinole v. Town of Narragansett, OM 12-37;
Warfel v. New Shoreham Shellfish Comm’n, OM 13-05

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)

Tomlins v. City of Cranston, OM 12-34;
In Re: Bd. of Regents for Elementary & Secondary Ed. Appeals Comm., ADV OM 13-01

“Rolling” or “Walking”

Quorum

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

Mudge v. North Kingstown School Committee, OM 13-11

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)

Warfel v. New Shoreham Shellfish Comm., OM 13-05

Electronic Communication

- A member of a public body may participate by use of electronic communication or telephone if:
 - 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)

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;
Langseth v. Warwick City Council Airport Lit. Comm., OM 12-27;
Beagan v. Albion Fire Dist., OM 12-08

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

Cardoza v. Portsmouth Open Space Committee, OM 13-03;
McFadden v. Exeter West Greenwich School Committee, OM 13-17

R.I.G.L. § 42-46-5(a)(2)

Sessions or work sessions pertaining to collective bargaining or litigation

Novak v. Western Coventry Fire District, OM 12-11;
Kerwin v. RI Higher Education Assist. Authority, OM 13-10

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

R.I.G.L. § 42-46-5(a)(9)

Any hearings on, or discussions of, a grievance filed pursuant to a collective bargaining agreement

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.

Knight v. Pawtucket School Committee, OM 12-03;
Cosper v. Mental Health Advocate Search Committee, OM 13-01

Votes

Within two (2) weeks of any vote a record listing how each member voted on each issue must be made available at the office of the public body.

Novak v. Western Coventry Fire District, OM 12-22;
Carney v. Charlestown Town Council, OM 13-19

Two Types of Notice

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

Kerwin v. RI Student Loan Authority, OM 12-32;
Hevey v. Coventry Town Council, OM 13-15

Notice Requirements

- | <u>Annual</u> | <u>Supplemental</u> |
|---|--|
| • Dates, times and location of regularly scheduled meetings | • Date, time and location of all meetings |
| • Available to public upon request | • Date posted |
| | • <u>Statement specifying business to be discussed</u> |

Novak v. Western Coventry Fire District SAP Committee, OM 12-38

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)

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

Improper Agenda Items

- “Discuss Non-binding referendum public meeting forum”
- “Discussion and possible vote in regards to election legislation in the R.I. General Assembly”
- “Minutes, Tax sale properties, Executive Session”

Newton v. East Greenwich Fire District, OM 13-13;
Block v. RI Board of Elections, OM 13-14;
Cardoza v. Portsmouth Open Space Committee, OM 13-03

Improper Agenda Items

- Old Business/New Business
- Treasurer's Report
- Police Chief's Report
- Any other matter brought before the Board

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;
Novak v. Western Coventry Fire District, OM 12-11

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.

Novak v. Western Coventry Fire District, OM 12-11

Proper Executive Session Notice

1. R.I.G.L. § 42-46-5(a)(1)
(Town Manager performance review)
2. R.I.G.L. § 42-46-5(a)(2)
(Police Union Negotiation concerning ___)
3. R.I.G.L. § 42-46-5(a)(1),(2)
(Personnel Matter)
4. R.I.G.L. § 42-46-5(a)(2)
(potential litigation – land dispute)



Practical Tip

A public body should indicate that it “may” seek to go into executive session for a stated purpose.

Balbat/Holden-Shea v. Westerly Housing Auth. Bd. of Comm., OM 13-18

Amending Agenda (Not School Committee)

- By majority vote
- Informational purposes only and may not be voted on except:
 1. Emergency
 2. Refer matter to another committee/person

R.I.G.L. § 42-46-6(b)
Taylor v. Providence Housing Authority, OM 12-33;
Gilkenson v. Cranston City Council, OM 13-16

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. *Amended items unexpected and could not have been added for newspaper publication*
3. *State for record and minutes why agenda items could not have been added in newspaper and need to be addressed at this meeting*

Amending Agenda School Committee (Cont.)

4. Process available to provide timely notice to:
 - a. Any person who has requested
 - b. Reasonable steps taken to make public aware
5. 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)

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.”

- If matter can wait forty-eight (48) hours: it is not an emergency

R.I.G.L. § 42-46-6(c)

Satchell v. West Warwick Town Council, OM 12-30B

All open meetings must
be accessible to
persons with
disabilities

R.I.G.L. § 42-46-13

Desmarais v. Manville Fire District, OM 12-13

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)

Minutes: availability

- Unofficial minutes within 35 days of the meeting, or
- At next regularly scheduled meeting, whichever is earlier

Exception:

- sealed executive session minutes
- extend time period and publicly state reason

R.I.G.L. § 42-46-7(b)

ACLU v. Woonsocket School Department, OM 12-28;

Silva v. Little Compton Budget Commission, OM 13-12

Filing/Posting Minutes on SOS website

Only state and quasi-boards shall keep official and/or approved minutes and file a copy of the minutes with the Secretary of State within 35 days of a meeting

Exception: Advisory Public Bodies

R.I.G.L. § 42-46-7(d)

Felise v. East Bay Energy Consortium, OM 13-02;

Macomber v. Warren Town Council, OM 13-21

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)

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)

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)