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

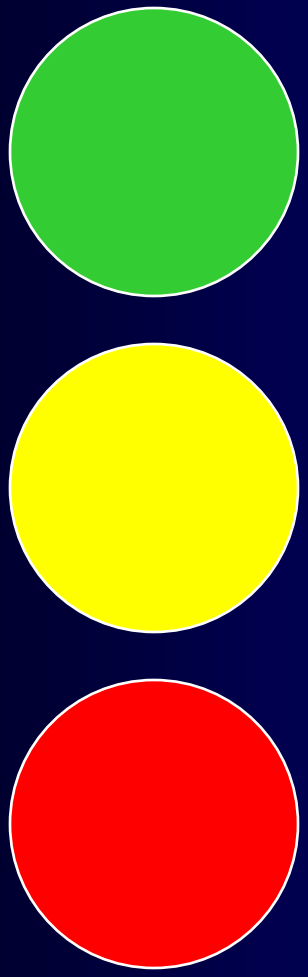
The Basics

Presume Public Document

Is this an APRA request?

Who is making the request?

The Basics



- Must Disclose
- May Disclose
- Must Not Disclose

"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)

Collette v. Town of Charlestown, PR 13-20

IS IT AN APRA REQUEST?

Provide Documents

Farley v. Cranston School Dept., PR 13-26;
Gagnon v. East Prov. School Committee, PR 12-12;
Schmidt v. Ashaway Volunteer Fire Assoc., PR 97-23

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);

Farley v. Cranston School Dept., PR 13-26;

Rosenfield v. No. Kingstown School Dept., PR 14-02

"Each public body shall establish <u>written</u> 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

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

Buckley, et. al v. RI Turnpike & Bridge Auth., PR 13-23;
Fitzgerald v. East Providence Police Dept., PR 14-12;
Novak v. Western Coventry Fire Dist., PR 14-06

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."

City of East Providence

"A request to inspect and/or copy public records of the City of East Providence may be presented by telephone or in writing to the City Clerk"

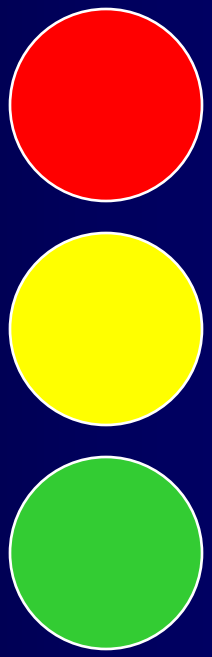
Department of Attorney General

"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"

The Exemptions:

R.I.G.L. § 38-2-2(4)

27 Exemptions



Confidential

Exempt

Public

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)

Reilly v. Providence EDP, PR 13-01;
Waltonen v. West Greenwich Town Council, PR 12-19;
Murphy v. Town of North Smithfield, PR 12-11

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?

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)

WPRI v. Community College of RI, PR 14-01;

DeAscentis v. Town of Jamestown, PR 14-04

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

Providence Journal v. Dept. of Public Safety, No. PC12-5458 / Decision on April 1, 2014

(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 <u>are public records</u>

R.I.G.L. § 38-2-2(4)(D)

<u>*WPRI v. Woonsocket Police Department*</u>, PR 12-17

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

"Any records which would not be available by law or rule of court to an opposing party in litigation."

R.I.G.L § 38-2-2(4)(E)

Hydron Laboratories, Inc. v. Attorney General, 492 A.2d 135 (R.I. 1985)

"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)

Valley Breeze v. Pawtucket School Committee, OM 14-27

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

<u>Exception</u>:

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)

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)

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)

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)

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

home addresses of all licensed commercial fishermen and dealers

Shoemaker v. DOH, PR 13-15;
DeAscentis v. Town of Jamestown, PR 14-4

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

Boss v. Woonsocket Superintendent's Office, PR 13-19;
Scripps News v. RI Dept. of Business Reg., PR 14-07

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; *Costantino v. Smithfield School Committee*, PR 13-24

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 Develop. 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

Fitzgerald v. East Providence Police Dept., PR 14-12;

Fitzgerald v. Warwick Police Dept., PR 14-13;

Duxbury v. Town of Coventry, PR 13-16

"the costs of redaction should be bourne 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)

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

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)

Fitzgerald v. East Providence Police Dept., PR 14-12

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)

Azar v. Town of Lincoln, PR 13-21;

DiBenedetto v. Town of Foster, PR 14-08

"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

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

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)

Daly-LaBelle v. So. Kingstown School Committee, OM 13-23;

Santos v. Exeter Town Council, OM 14-05;

Boss v. Woonsocket School Board of Review, OM 14-19

What is a Quorum?

"unless otherwise defined … a simple majority of the membership"

R.I.G.L. § 42-46-2(d)

Angelo v. Dunn's Corners Fire District, OM 13-33;

Vadenais v. North Smithfield Town Council, 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)

In Re: Bd. of Regents for Elementary & Secondary Ed. Appeals Comm., ADV OM 13-01;

Vadenais v. North Smithfield Town Council, OM 14-03

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

Payne v. Motor Vehicle for Hire Commission, OM 13-28; *Common Cause v. 195 Redevelopment Dist. Comm.*, OM 14-21

“Rolling” or “Walking” Quorum

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

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

“Rolling” or “Walking” Quorum

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

Mudge v. North Kingstown School Committee, OM 13-11; *Vadenais v. North Smithfield Town Council*, OM 13-34

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

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)

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;
Fay/Gorman v. Central Coventry Fire Dist., OM 14-09

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

McFadden v. Exeter West Greenwich School Comm., OM 13-17

Friend v. East Greenwich Town Council, OM 13-31

R.I.G.L. § 42-46-5(a)(2)

Sessions or work sessions pertaining to collective bargaining or litigation

Valley Breeze v. Pawtucket School Comm., OM 14-27

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

Zhang v. East Greenwich School Comm., OM 14-17

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 Adv. Search Comm.*, 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.

Carney v. Charlestown Town Council, OM 13-19

Pierson v. Coventry School Committee, OM 14-18

Two Types of Notice

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

Hevey v. Coventry Town Council, OM 13-15;

Common Cause v. I-195 Redevelop Dist Comm., OM 13-27

Posting Requirements

- Principal office of public body
- One other prominent location within the governmental unit
- Secretary of State (electronic)

R.I.G.L. § 42-46-6(c);

Stewart et al. v. West Greenwich Town Council, OM 11-13

Notice Requirements

Annual

- Dates, times and location of regularly scheduled meetings
- Available to public upon request

Supplemental

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

Staven v. Portsmouth Town Council, OM 14-04; *Novak v. Western Coventry Fire Dist.*, OM 14-06; *Vitkevich v. Portsmouth Town Council*, OM 14-12

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."

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"

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

Improper Agenda Items

- "Prudence Island Ferry update"
- "Request for additional funding for the mothballing of the former Elmhurst School Chapel"

Staven v. Portsmouth Town Council, OM 14-04;

Vitkevich v. Portsmouth Town Council, OM 14-12

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

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.

Recess into executive session under R.I.G.L. § 42-46-5 (a)(2) (legal advice & litigation) for the purpose of discussing and/or acting upon:

1. Legal Advice on Contract
2. Discussion of Employee
3. Seal Executive Session Minutes

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)

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)

All open meetings must be accessible to persons with disabilities

R.I.G.L. § 42-46-13

Bourbonniere v. Newport City Coun, OM 14-22;

Valley Breeze v. Pawt. School Comm., OM 13-29

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

Sheldon v. Warwick Min. Hous. Review Brd., OM 14-14; *Belcher v. Mansi*, 569 F.Supp. 379 (D.R.I. 1983)

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

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)

Block v. State Properties Committee, OM 14-26

Filing/Posting Minutes on SOS website

All fire organizations:

- shall post unofficial minutes of their meetings within 21 days of the meeting, but not later than 7 days prior to the next regularly scheduled meeting, whichever is earlier

In re: R.I. Gen. Laws § 42-46-7(b)(2), ADV OM 14-01

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)